

## OUR INTERNATIONAL CONSTITUTION

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*Abstract*

*Recent judicial and academic debate over the role of international law in constitutional interpretation has misguidedly focused narrowly on cases involving substantive due process and the Eighth Amendment, such as *Lawrence v. Texas*, *Roper v. Simmons* and *Atkins v. Virginia*. This article analyzes the Supreme Court's historical use of international law in constitutional interpretation and argues that the Court has understood the Constitution to invite consideration of international law in six fundamental contexts: (1) in construing Congress' power to redress offenses against the law of nations; (2) in interpreting constitutional terms that embody concepts of international law; (3) in allocating powers within our federal system; (4) where international rules create a compelling governmental interest; (5) in recognizing "inherent" unenumerated governmental powers that are enjoyed by other sovereigns, and (6) to lend meaning to constitutional provisions implicating "community standards" regarding the basic rights of persons. Although the Court's resort to international opinion in the latter, "community standards," cases has sparked the greatest controversy, the article argues that the contemporary use of international law in cases such as *Roper* is fully consistent with the Court's historical traditions. International law has played the most robust role in the inherent powers cases, although its use has also been the least legitimate. The cases establish that consideration of international law to lend substantive meaning to constitutional analysis has a lengthy historical pedigree, but they also demonstrate that the Court at times has used international law opportunistically and that resort to international law is not invariably rights-protective. The caselaw also does not address deeper questions regarding the legitimacy of resort to international law in a democratic system. The second part of this article seeks to bridge this legitimacy deficit by offering four principles for identifying an appropriate role for international law in constitutional interpretation. The article then applies those principles to the recent plurality opinion in *Hamdi v. Rumsfeld* and concludes that *Hamdi* generally represents a principled approach to the application of international law in constitutional analysis.*

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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.<sup>1</sup> *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 1980’s, and that has found expression recently in cases such as *Lawrence v. Texas*,<sup>2</sup> invalidating the Texas homosexual sodomy statute, *Grutter v. Bollinger*,<sup>3</sup> upholding affirmative action in higher education, and *Atkins v. Virginia*,<sup>4</sup> invalidating the death penalty for the intellectually disabled.<sup>5</sup> In extrajudicial speeches and writings, Chief Justice Rehnquist and Justices Ginsburg, Breyer, O’Connor all have indicated that consideration of international and foreign law is important to the jurisprudence of the modern Supreme Court.<sup>6</sup>

Reference to international and foreign sources in constitutional analysis 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,<sup>7</sup> and invoked Justice Thomas for the proposition that “this Court . . . should not impose foreign moods, fads, or fashions on Americans.”<sup>8</sup> Dissenting in *Atkins*, Chief Justice Rehnquist criticized the majority’s invocation of “the views of other countries,” emphasizing that under the Eighth

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<sup>1</sup> *Roper v. Simmons*, 544 U.S. \_\_, \_\_ (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 6 (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.”).

<sup>2</sup> 539 U.S. 558, 123 S.Ct. at 2481 (2003). (invoking the European Court of Human Rights’ opinion in *Dudgeon v. United Kingdom* 45 Eur. Ct. H.R. (1981) ¶ 52). The reference was the first time the European Court’s jurisprudence had been cited in a Supreme Court majority opinion. Justice Kennedy underscored the cite’s significance by mentioning it when he announced the opinion from the bench.

<sup>3</sup> 539 U.S. 306, 334 (2003) (Ginsburg, and Breyer, JJ., concurring), *citing* the International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 1904, November 20, 1963, and the Convention on the Elimination of All Forms of Discrimination Against Women, 19 I.L.M. 33 (1980). The concurrence invoked the treaties for the proposition that affirmative action must end, as a constitutional matter, when its goals are achieved.

<sup>4</sup> 536 U.S. 304, 316 n. 21 (2002) (noting that the practice was “overwhelmingly disapproved” within the world community, and citing Brief for the European Union as *Amicus Curiae* in *McCarver v. North Carolina*, O.T. 2001, No. 00-8727, at 4).

<sup>5</sup> *Id.* at 316 n. 21.

<sup>6</sup> William H. Rehnquist, “Constitutional Courts – Comparative Remarks” (1989), reprinted in *GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE – A GERMAN-AMERICAN SYMPOSIUM* 411, 412 (Paul Kirchof & Donald P. Kommers eds., 1993); Ruth Bader Ginsburg, [add 2005 ASIL talk]; “Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication,” Remarks for the American Constitution Society (Aug. 2, 2003); Stephen Breyer, Keynote Address: “The Supreme Court and the New International Law,” 97 *Am. Soc’y Int’l L. Proc.* 265 (2003); Sandra Day O’Connor, “Remarks to the Southern Center for International Studies,” (Oct. 28, 2003) 3 (“[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”); Keynote Address, 96 *Am. Soc’y Int’l L. Proc.* 348, 350 (2002).

<sup>7</sup> *Lawrence v. Texas*, 539 U.S. at 558, 123 S.Ct. at 2495 (Scalia, J., dissenting).

<sup>8</sup> *Id.* at 2495, quoting *Foster v. Florida*, 537 U.S. 990 n. \* (2002) (Thomas, J., concurring in denial of certiorari).

Amendment, “*American* conceptions of decency ... are dispositive.”<sup>9</sup> 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.”<sup>10</sup> 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.”<sup>11</sup>

Academic,<sup>12</sup> press,<sup>13</sup> and congressional<sup>14</sup> criticisms have been equally sharp. Congressman Tom Feeney of Florida, who co-sponsored a proposed House resolution opposing the practice, 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.”<sup>15</sup> At congressional hearings on the issue, witnesses have referred to the judiciary’s use of international and foreign sources as impeachable and “subversive.”<sup>16</sup>

Most proponents and opponents of the Court’s use of international and foreign sources share one common assumption: that the invocation of such sources is new.<sup>17</sup> The Justices’

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<sup>9</sup> *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’”).

<sup>10</sup> *Roper*, 543 U.S. at \_\_\_ (Scalia, J., dissenting).

<sup>11</sup> Antonin Scalia, *Foreign Legal Authority in the Federal Courts*, Keynote Address to the American Society of International Law, April 2004, at 3 (on file with the author) (emphasis in original). See also Ann Gearan, *Foreign Rulings Not Relevant to High Court, Scalia Says*, Washington Post, April 3, 2004, at 7.

<sup>12</sup> E. Young, *Foreign Law and the Denominator Problem*, \_\_ Har. L. Rev. \_\_ (forthcoming 2005); Peter Rubin, *American Constitution Society Supreme Court Roundup* (July 1, 2003), at <http://www.acslaw.org/pdf/SCOTUstrans.pdf> (describing the *Lawrence* citations to the European Court of Human Rights as “remarkable” and “extraordinary”). 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* \_\_ Ohio State L. Rev. 1 (2004) (discussing *Lawrence* as “potentially revolutionary.”). [Add Yoo, Ramsey, Alfred]

<sup>13</sup> 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, A-1 (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.”).

<sup>14</sup> Various House resolutions have been introduced objecting to the use of foreign legal sources in constitutional analysis. See, e.g., H. Res. 97, 109<sup>th</sup> Cong., 1<sup>st</sup> Sess., (2005) (expressing the sense of the House that “judicial determinations regarding the meaning of the Constitution . . . should not be based on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments . . . inform an understanding of the original meaning of the laws of the United States.”); Constitutional Preservation Resolution,” H. Res. 446, 108<sup>th</sup> Cong., 1<sup>st</sup> Sess. (Nov. 18, 2003) (The 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”); H. Res. 568, 108<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (Mar. 17, 2004). H. Res. 446 had 23 co-sponsors, and H. Res. 568 had 59 co-sponsors, including Judiciary Committee Chair James Sensenbrenner and House Majority Leader Tom Delay.

<sup>15</sup> Tom Curry, *House Members Protest Use of Non-U.S. Rulings in Big Cases*, MSNBC News, March 11, 2004, available at <<http://msnbc.msn.com/id/4506232/>>.

<sup>16</sup> “Appropriate Role of Foreign Judgments in the Interpretation of American Law, Hearing before the Subcommittee on the Constitution of the Committee on the Judiciary, on H.Res. 568, 108<sup>th</sup> Cong., 2<sup>nd</sup> Sess., Ser. No. 67 (March 25, 2004). See also Hearing on H. Res. 97 and the Appropriate Role of Foreign Judgments in the Interpretation of American Law, 109<sup>th</sup> Cong., 1<sup>st</sup> Sess., (July 19, 2005).

<sup>17</sup> See e.g., O’Connor, *Remarks to Southern Center for International Studies*, *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*); Rehnquist, *supra* note 6 at 412 (“For nearly a century and a half, courts in the United States exercising the power of judicial review

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,<sup>18</sup> globalization,<sup>19</sup> and the universality of basic human rights.<sup>20</sup> 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 Court for recently expanding the practice "beyond the area of the Eighth Amendment."<sup>21</sup> 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,<sup>22</sup> like Justice Scalia, she attributes judicial invocation of foreign sources to the "pathbreaking" *Trop* plurality opinion.<sup>23</sup>

The present controversy over resort to international and foreign sources also has focused on the Court's recent due process and death penalty jurisprudence.<sup>24</sup> A 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*.<sup>25</sup> Justice O'Connor's plurality opinion in *Hamdi* looked to the international law of war both to uphold the President's constitutional authority to detain citizens as enemy combatants<sup>26</sup> and to suggest limits on the scope of that power.<sup>27</sup> Furthermore, although O'Connor found that constitutional due process limited the president's power to detain, even here the plurality gave a nod toward international

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[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.").

<sup>18</sup> Rehnquist, *supra* note 6, at 412; Ginsburg, *supra* note 6, at 2

<sup>19</sup> O'Connor, *Remarks to Southern Center for International Studies*, *supra* note 6, at 2 ("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."); Breyer, *supra* note 6, at 2 (referring to "commercial, technological, and political . . . globalization").

<sup>20</sup> Breyer, *supra* note 6, at 2; Ginsburg, *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.").

<sup>21</sup> Scalia, *supra* note 11, at 3 (discussing *Trop v. Dulles*, 356 U.S. 86 (1958) (plurality opinion)). See *Foreign Rulings Not Relevant to High Court, Scalia Says*, WASHINGTON POST, *supra* note 11, at 7 (remarks by Justice Scalia dating the resort to foreign material at least to 1958 and describing the trend as "inconsistent").

<sup>22</sup> Ginsburg, *supra* note 6, at 5-7. Harold Koh and Gerald Neuman have argued that resort to international law has original or historical roots. Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43-45 (2004) (noting support for resort to foreign authority from the founding era); Gerald Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT'L L. 82, 83-84 (2004) (noting the Court's historical reliance on foreign and international sources in a variety of contexts).

<sup>23</sup> Ginsburg, *supra* note 6, at 14.

<sup>24</sup> 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' plurality opinion invalidating the death penalty for persons age 15 at the time of the 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); *Enmund v. Florida*, 458 U.S. 782, 796-797, n. 22 (1982).

<sup>25</sup> 124 S.Ct. 2633 (2004). For further discussion, see Part V, *infra*.

<sup>26</sup> *Id.* at 2641.

<sup>27</sup> *Id.* .

law in 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.<sup>28</sup> 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.<sup>29</sup>

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.<sup>30</sup> 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 international sources has not been limited to the Constitution's foreign relations clauses.

This article seeks to challenge and redirect contemporary academic debate regarding the role of international law in constitutional interpretation based on an examination of historical Supreme Court practice. Part II demonstrates that the Supreme Court traditionally has understood our constitutional design as inviting consideration of international law in a variety of ways. In its strongest form, the Constitution expressly commands consideration of international rules, as in the authorization for Congress to define and punish offenses against the law of nations.<sup>31</sup> In most contexts, however, international law informs, rather than controls, constitutional interpretation. Thus, the Court has read provisions of the Constitution ranging from war to commerce and freedom of contract as incorporating concepts of international law. In other contexts, the Court has analogized from international rules regarding relations among sovereign independent states to resolve structural disputes regarding state and national authority within our federal system. The Court has suggested that international law may establish compelling governmental interests implicating individual rights. In the “inherent powers” cases, the Court has assumed that the national government enjoys the powers of international sovereigns, without locating that power in any particular constitutional provision. Finally, the Court has read constitutional provisions such as “cruel and unusual punishments” “liberty” and “due process” as incorporating broad “community standards”<sup>32</sup> regarding the basic rights of the

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<sup>28</sup> *Id.* at 2651. Geneva Convention (III) Relative to the Treatment of Prisoners of War, adopted Aug. 12, 1949, entered into force Oct. 21, 1950, art. 5.

<sup>29</sup> Chief Justice Rehnquist joined O'Connor's opinion without comment. Justices Scalia and Stevens would have held that the Constitution barred treating U.S. citizens on U.S. soil according to the traditional laws of war, but did not object to its usage beyond that context. *Id.* at 2667 (Scalia, J., dissenting), *citing* *Ex Parte Milligan*, 71 U.S. 2 (1866). Indeed, Scalia suggested that individuals outside U.S. territory could be subject to such detentions. *Id.* at 2673. Justices Souter and Ginsburg criticized the Government's invocation of war powers by questioning whether the United States had even been obeying the laws of war it invoked. *Id.* at 2658 (Souter, J., concurring part, dissenting in part, 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 2685 & n.6.

<sup>30</sup> Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 58, n. 10 (2004). See also Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 AM. J. INT'L L. 69, 71 & n. 14 (2004) (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”).

<sup>31</sup> U.S. CONST., Art. I, § 8, cl. 10.

<sup>32</sup> Harold Koh has utilized the term “community standard” to refer to constitutional provisions that by their own terms “implicitly refer[] to a *community standard*, e.g., “cruel and *unusual*,” “*due process of law*,” “*unreasonable*

person, including international standards. *Atkins*, *Lawrence*, and *Roper* fall into this final category of cases. Although the Court's invocation of international opinion in the community standard cases has sparked the greatest controversy, Part II argues that international law has played the strongest substantive role in the inherent powers cases, though its application there also has been the least legitimate.

Part III examines the insights that the six categories of cases offer for current debates on the role of international law in constitutional analysis. As a threshold matter, the cases flatly refute two assumptions from the current debate: 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.<sup>33</sup> The Court's frequent and longstanding resort to international law clearly belies the suggestion that the Constitution per se is an affirmative barrier to 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 academics who concede international law's relevance to constitutional analysis regarding certain subjects,<sup>34</sup> the cases suggest that using subject matter to identify the contexts in which international law is relevant is an elusive, if not impossible, task.

The cases further demonstrate that the Court consistently has applied international law as an evolving concept and has applied contemporary rules of international law rather than norms prevailing at the nation's founding. The Court's approach to international law has not depended on any particular mode of constitutional analysis, but has arisen across the range of traditional interpretive mechanisms – original understanding, text, structure, history, doctrine, and prudential concerns.<sup>35</sup>

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 the practice 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, and illegitimate, 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.

The second half of the article seeks to answer these difficult normative questions. Part IV considers the legitimacy of the Court's various approaches to international law and rebuts

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searches and seizures,” Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 46 (2004).

<sup>33</sup> See Ramsey, *supra* note 30, 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”).

<sup>34</sup> See Alford and Ramsey, *supra* note 30

<sup>35</sup> 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* (1991) (identifying six modes of constitutional interpretation: history, text, structure, doctrine, prudentialism, and ethos).

the democracy deficit critique. Part V then offers four principles for determining the appropriate relationship between international law and constitutional analysis. Assuming the existence of a potentially applicable international rule, the premise is that international law is neither presumptively relevant or irrelevant to constitutional analysis, and that the propriety of resort to international law must be resolved on a question-by-question basis, with due consideration to the nature of both the constitutional provision and the international rule being invoked. Accordingly, a Court first must consider the receptiveness of the constitutional provision to the international rule. This requires consideration in turn of both whether the particular constitutional provision at issue poses some barrier to receipt 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 operation of the international rule. The Court then must consider the nature of the international rule -- how uniformly accepted and well defined the international norm is, the extent to which the norm has been accepted or rejected by the United States, and any limitations imposed by international law on the rule's operation.

The article concludes in Part VI by applying these principles to the plurality decision in *Hamdi v. Rumsfeld*. It argues that although the *Hamdi* plurality erred in assuming that international law authorized the detention of citizens, *Hamdi* otherwise complied with these principles and generally represents an appropriate use of international law in constitutional analysis.

The scope of this article is limited to contexts in which the Court has invoked international law to provide substantive meaning to constitutional provisions. In other words, the focus is on resort to *international law*, in the form of either treaties or customary international law.<sup>36</sup> It does not consider cases invoking the comparative practices of individual foreign states (except as necessary to explain the Court's jurisprudence in the recent community standard cases, such as *Lawrence*).<sup>37</sup> Resort to international law raises many of the same questions implicated by use of comparative foreign law in constitutional analysis, and to that extent, the arguments herein can be analogized to the comparative context. But resort to the comparative practices of individual states to provide substantive guidance in constitutional analysis also raises additional difficulties that are not considered here, such as legitimacy concerns arising from selective and anecdotal use, questions regarding what subset of international practices it is appropriate to draw upon, and the hazards of judicial misinterpretation of a culturally contingent foreign practice.<sup>38</sup> It also does not include cases invoking British common law traditions, which have a distinct authoritative pedigree in American constitutional analysis. Likewise, the focus is on situations where international law or uniform practice helps provide the *substantive* constitutional rule. The analysis thus does not

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<sup>36</sup> Customary law is evidenced by widespread and consistent state practice, taken under a sense of legal obligation (*opinio juris*). See Bruno Simma, EUR. J. INT'L L. Because it occasionally is difficult to determine whether the Court is relying on international law or merely uniform foreign practice which may not give rise to customary international law, I identify cases in which the Court invokes the universal conduct of nations as relying on international "practice."

<sup>37</sup> For excellent consideration of the role of comparative examples in constitutional analysis, see Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L. J. 223 (2001-2002); Christopher McCrudden, *A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights*, 20 OXFORD J. LEGAL STUDIES, 499 (2000); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L. J. 1225 (1998-1999).

<sup>38</sup> See discussion in Alford, Ramsey; Lawrence \_\_ VA. J. INT'L L. \_\_ (2005).

address situations in which the Court explains a domestic rule by distinguishing it from foreign practice,<sup>39</sup> or purely “empirical” or “evidentiary” approaches,<sup>40</sup> in which the Court looks to foreign usage to test a constitutional hypothesis. The article instead considers contexts in which international law and uniform state practice are affirmatively invoked to inform the substantive rule of decision in constitutional construction. International law establishes the least common denominator of behavior accepted in the international community and, when applied in a principled manner, can inform and enrich our constitutional analysis.

## II. SIX APPROACHES TO INTERNATIONAL LAW IN CONSTITUTIONAL ANALYSIS

This section argues that the Supreme Court has understood our constitutional design and traditions as inviting consideration of international authorities in at least six ways: (1) cases where the constitution expressly requires consideration of international law; (2) cases where constitutional text refers to a concept of international law; (3) cases where international law is used as an analogy for delineating structural relationships among sovereigns within the U.S. federal system; (4) cases where a treaty or other international law rule creates a governmental interest implicating a constitutional question; (4) inherent powers cases, where international law has substituted for enumerated governmental authority; and (6) community standards cases, where international law serves as an element in the search for fundamental human values.

### A. Express Invitation: Offenses Against the Law of Nations

In its strongest form, the Constitution textually commands consideration of international rules through Article I, § 8’s grant to Congress of the power to define and punish offenses against the law of nations.<sup>41</sup> The question whether Congress has properly exercised its authority under the Offences Clause necessarily requires consideration of what constitutes an offense against the law of nations, and the Court has construed congressional power under the clause in light of international law to uphold military tribunals<sup>42</sup> and laws regarding piracy,<sup>43</sup>

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<sup>39</sup> See Larsen, *supra* note \_\_, at 9.

<sup>40</sup> See discussion in Koh, *International Law as Part of Our Law*, *supra* note 22, 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 \_\_, at 10-13 (discussing “evidentiary” use of comparative sources).

<sup>41</sup> U.S. CONST., Art. I, § 8, cl. 10.

<sup>42</sup> *Application of Yamashita*, 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) (same), discussed *infra* at Part II.B. 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).

<sup>43</sup> In *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 157 (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.” 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.

counterfeiting,<sup>44</sup> and protecting embassies,<sup>45</sup> among others.<sup>46</sup> International law plays a robust role in this context, supplying the substantive rule against which Congress' 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 appears to be unproblematic, given the Constitution's explicit textual invitation.

## B. Textual Reference to Concepts of International Law

Other constitutional provisions, while not expressly commanding resort to international law, textually invite consideration of international rules by appearing to refer to concepts of international law. The most obvious and frequent candidates for this approach would be cases addressing such terms as "war," "treaty," "ambassador," "admiralty" or "piracy" – all concepts which on their face implicate relations with foreign nations. Even if the clauses themselves do not expressly require resort to international law, the Court has viewed consideration of international rules in such contexts as appropriate and legitimate, and has justified its approach by the need to promote comity with foreign nations and harmony in the international system.

The Court also has viewed constitutional provisions as referencing concepts of international law, however, in a number of contexts that we would now consider "domestic," such as the commerce power, the power to borrow money, the right to just compensation under the Fifth Amendment, and the prohibition on involuntary servitude. In these latter cases, the Court has looked to international law, not to promote international comity, but because the Court understood the constitutional system as having received, and domestically distributed, exiting rights and powers under international law.

### 1. War Powers

Resort to international law to provide meaning to the constitutional war powers<sup>47</sup> has a long historic pedigree. In *Brown v. United States*,<sup>48</sup> for example, 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"<sup>49</sup> did not automatically confiscate enemy property in wartime.

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<sup>44</sup> *U.S. v. Arjona*, 120 U.S. 479, 487 (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.")

<sup>45</sup> *Boos v. Barry*, 485 U.S. 312, 316, 323 (1988) (identifying the Offences clause as a basis for congressional legislation regarding crimes against diplomats).

<sup>46</sup> 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).

<sup>47</sup> A number of enumerated provisions in Articles I and II of the Constitution address the authority to commence, regulate, and pursue military action. *E.g.*, 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.* cl. 12 (raise and support armies); *id.* cl. 13 (provide and maintain a navy); *id.* cl. 14 (make rules for the government and regulation of land and naval forces); *id.* cl. 15 (call forth the militia); *id.* cl. 16 (govern the militia when in service of the United States); and *id.* Art. II, § 2, cl. 1 (President's commander in chief power).

<sup>48</sup> 12 U.S. (8 Cranch) 110 (1814).

<sup>49</sup> *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 124-125 (invoking the "mitigated" law of nations).

Marshall urged that the Declare War clause should be construed to comport with this international rule:

The constitution of the United States was framed at a time when this rule [opposing automatic confiscation of property] . . . was received throughout the civilized world. 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.<sup>50</sup>

Marshall thus argued that prudential considerations deriving from 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. His approach was also notable for applying limits imposed by international law and state practice to deny power to the president.

In dissent, Justice Story also concluded that the Constitution gave the United States all war powers “which, by the modern law of nations, are permitted and approved.”<sup>51</sup> Story disagreed with the majority on two points: he believed that international law unqualifiedly recognized the right to seize enemy property, and that Congress, by declaring war, had already authorized the President to exercise those powers.<sup>52</sup> The dispute, in other words, turned on the meaning of international law and whether Congress had authorized the action, not the propriety of considering international law in constitutional analysis.

In upholding President Lincoln’s blockade of confederate shipping traffic during the Civil War in *The Prize Cases*,<sup>53</sup> the Court again looked to international law.<sup>54</sup> All members of the Court agreed that, once a legal state of war was established, the scope of presidential power was governed by the international laws of war.<sup>55</sup> The Court’s approach to international law

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<sup>50</sup> *Id.* at 124.

<sup>51</sup> *Id.* at 145 (Story, J., dissenting).

<sup>52</sup> *Id.* at 133-34 (Story, J., dissenting) (citing Vattel, Pufendorf, Grotius, and Bynkershoek); *id.* at 140-44. *Id.* at 147 (Story, J., dissenting) (“the 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,” *id.* at 144, 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).

<sup>53</sup> 67 U.S. (2 Black) 635 (1863).

<sup>54</sup> *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”); *id.* at 670-74 (inhabitants of rebellious states may be considered “enemies” under the laws of war).

<sup>55</sup> The four dissenting justices agreed that the national government’s war powers included the powers recognized by the law of nations, that these applied in civil war, *id.* at 688 (Nelson, J., dissenting), and that a de facto war existed. *Id.* at 689-90. The dissenters simply would have held that the international law powers of belligerency could only be activated by Congress.

here was clearly evolutionary. The majority looked to writings by Emer de Vattel<sup>56</sup> and later publicists<sup>57</sup> for the substance of the laws of war.

In short, all members of 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.<sup>58</sup>

Supreme Court decisions examining the power to establish military commissions indicate a court struggling to reconcile the relationship between constitutional war powers informed by international law and the protections of the Bill of Rights. *Ex Parte Milligan*<sup>59</sup> 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 because the Constitution prohibited the prosecution:

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.<sup>60</sup>

The Court concluded that the Constitution barred the prosecution of a citizen by military tribunal when the regular courts were open. Thus, constitutional protections were construed to bar resort to international norms.

The World War II case of *Ex Parte Quirin*,<sup>61</sup> however, upheld 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."<sup>62</sup> Despite *Milligan's* conclusion that a civilian could not be tried by military

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<sup>56</sup> Vattel was an eighteenth-century writer whose views were influential on the Framers. Neuman, *supra* note 22, at 83. 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).

<sup>57</sup> 67 U.S. at 668 (invoking "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 also cited historical and contemporary international law authorities. *Id.* at 651 (discussing Wheaton, Phillimore, and Halleck); *id.* at 654 (discussing Wheaton and Grotius).

<sup>58</sup> See also *Miller v. United States*, 78 U.S. 268 (1870) (relying on international law to uphold a federal statute authorizing confiscation of rebel property against Fifth and Sixth Amendment challenge).

<sup>59</sup> 71 U.S. 2, 121 (1866).

<sup>60</sup> *Id.*

<sup>61</sup> 317 U.S. 1 (1942). The case arose under Congress' powers to make rules for the armed forces, Art. I, § 8, cl. 14, and to define and punish offenses against the law of nations, Art. I, § 8 cl. 10; and the Commander in Chief power, Art. II, § 2, cl. 1. *Id.* at 28.

<sup>62</sup> *Id.* at 27-28. *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, and international publicists regarding what constitutes a violation of the laws of war). The Court also looked to treaties and customary international law rules to define the substantive charges triable by military tribunal. *Id.* at 30-31 & n. 8, *id.* at 34-35 & n. 12; *id.* at 36 (citing laws of Great Britain and treatises on international law and the laws of war).

process when the ordinary courts were open, *Quirin* held that these Amendments “did not restrict whatever authority was conferred by the Constitution to try offenses against the law of war by military commission.”<sup>63</sup> Thus, *Quirin* and its progeny<sup>64</sup> upheld the constitutionality of military trials pursuant to the laws of war, at least to the extent that such trials had been authorized by Congress.

Resort to international law in interpreting the war powers has continued to the present day. The current Bush administration has looked to the customary international laws of war to claim that the President has constitutional authority to establish military tribunals and detain enemy combatants, including U.S. civilians,<sup>65</sup> and the Supreme Court partially upheld that argument in *Hamdi v. Rumsfeld*, as discussed in Part VI, below.

## 2. The Treaty Power

As with the war powers, resort to international law and practice in construing the scope of the treaty power<sup>66</sup> has a lengthy history. The Supreme Court has looked to international law and state practice to determine both the appropriate subjects for treaty-making and the relationship between the treaty power to the domestic legal system.

In construing the appropriate subjects for treaty-making, 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. Thus, in the 1840 case of *Holmes v. Jennison*,<sup>67</sup> Chief Justice Taney asserted in a plurality opinion<sup>68</sup> that “[t]he power to make treaties . . . 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.”<sup>69</sup> Taney accordingly acknowledged both that constitutional provisions could be informed by international rules, and that the Constitution could limit the operation of international rules in the treaty clause in a manner consistent with domestic constitutional rules.

Taney then looked to international law to address both of these issues. He concluded that because “the recognition and enforcement of the principles of public law” was an ordinary subject of treaties, the treaty clause necessarily bestowed power to enforce such rules on the government.<sup>70</sup> Taney also looked to the constitutional text and to Vattel’s views on

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<sup>63</sup> *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.

<sup>64</sup> E.g., *Application of Yamashita*, 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).

<sup>65</sup> *Cf.*, *Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2659 (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”).

<sup>66</sup> U.S. CONST., Art. II, § 2, cl. 2 (“[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur”).

<sup>67</sup> 39 U.S. 540 (1840).

<sup>68</sup> Although there was no majority opinion for the Court, Justices Story, McLean and Wayne concurred in Chief Justice Taney’s opinion.

<sup>69</sup> *Id.* at 569.

<sup>70</sup> *Id.* Taney concluded that rendering of fugitives was a right governed by the law of nations, and thus fell within the treaty power.

international law to conclude that the Compact Clause denied the power to make international agreements, including extradition agreements, to the states.<sup>71</sup> Thus, international law supported construing the treaty clause to allow the national government to enter extradition agreements, and nothing in the Constitution's federal structure barred the government's exercise of that power.

In *De Geoffrey v. Riggs*, the Court again viewed the treaty power as defined and limited by international standards, holding that a treaty must address questions "properly the subject of negotiation with a foreign country."<sup>72</sup> In *Missouri v. Holland*,<sup>73</sup> the Court suggested that the treaty power *expanded* the substantive lawmaking powers otherwise available to the national government. In either case, tying the treaty power to what the international community considers an appropriate subject for treaty-making means that the national government's authority under the treaty power substantively expands (within the bounds allowable by the Constitution)<sup>74</sup> as the international community recognizes new subjects as appropriate for treaty-making.<sup>75</sup>

The 1891 case of *In re Ross*<sup>76</sup> elaborated on this approach. *Ross* upheld a murder conviction that had been imposed by a U.S. consular court in Japan without a grand or petit jury. Justice Field looked to international law and foreign state practice to construe both the scope of the treaty power and Ross' claim that the Fifth and Sixth Amendments limited that power. Field reasoned that the treaty power "extends to all proper subjects of negotiation with foreign governments" and authorized the establishment of consular courts, based on "the uniform practice of civilized governments for centuries to provide consular tribunals in . . . [non-]Christian countries."<sup>77</sup> Field noted that the European practice of establishing consular tribunals for seamen abroad predated the Middle Ages, and concluded that the United States' power to establish consular tribunals by treaty must be commensurate with that of other nations.<sup>78</sup> Thus, international practice established that the creation of consular courts was a proper exercise of the treaty power.

Justice Field also invoked international practice to hold that Fifth and Sixth Amendment jury protections did not apply to consular proceedings. Field's argument relied in part on original understanding. He reasoned that the drafters of the Constitution must have intended to incorporate existing international practice regarding consular tribunals, of which

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<sup>71</sup> Taney looked to Vattel's Law of Nations to construe the Compact Clause's prohibition against states entering into international agreements, U.S. CONST., Art. I, § 10, and reasoned from international principles of comity that extradition of an individual to another country was an exercise of comity under the law of nations, and thus was a foreign affairs power not possessed by the states. He concluded from text, structure, and U.S. practice that the treaty power had been denied to the states. *Id.* at 572.

<sup>72</sup> 133 U.S. 258, 267 (1890).

<sup>73</sup> 252 U.S. 416 (1920). See also *United States v. Lara*, 541 U.S. 193, 124 S.Ct. 1628, 1634 (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 L. HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 72 (2d ed.1996).

<sup>74</sup> *Reid v. Covert*, 354 U.S. 1, 16-17 (1953) (treaty power limited by the Constitution).

<sup>75</sup> Curtis Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 402-09 (1998). See also Curtis Bradley, *The Treaty Power and American Federalism, Part II*, 99 MICH. L. REV. 98 (2000).

<sup>76</sup> 140 U.S. 453, 464 (1891).

<sup>77</sup> *Ross*, 140 U.S. at 462.

<sup>78</sup> *Id.* at 463 ("[The United States] can, equally with any of the former or present governments of Europe, make treaties providing for the exercise of judicial authority in other countries by its officers appointed to reside therein.")

they were aware,<sup>79</sup> that European consular tribunals historically did not include juries, and that Fifth and Sixth Amendment protections accordingly must not have been intended to apply to them.<sup>80</sup> He also offered a territorial argument: that constitutional protections did not apply to extraterritorial proceedings.<sup>81</sup> Field viewed his approach as rights-enhancing, because consular courts protected Americans from barbaric foreign legal proceedings.<sup>82</sup> The net effect of his reliance on international practice, however, was to deny constitutional individual rights protections.

In addition to looking to international law and practice to construe the substantive scope of the treaty power, the Court has looked to international law to help determine the appropriate relationship of treaties to the domestic constitutional system. As noted above, Chief Justice Taney construed the Compact Clause in light of international law to hold that principles of federalism lodged the treaty power in the national government and denied it to the states. The Court also looked to principles of comity and international practice to adopt the last-in-time rule, which establishes the hierarchical relationship between treaties and federal statutes. In *Taylor v. Morton*, Justice Curtis sitting as circuit justice concluded that “the power to [reject a treaty]. . . , is prerogative, of which no nation can be deprived, without deeply affecting its independence.”<sup>83</sup> Curtis concluded that the people of the United States could not have denied this power to their government (a potentially originalist argument) and assumed the power belonged to Congress. The Supreme Court later ratified Curtis’ reasoning in upholding Congress’ power to legislate contrary to an existing treaty.<sup>84</sup>

The Court, however, has not assumed the U.S. treaty power doggedly follows international practice and has recognized that the constitutional structure modified traditional treaty practice to some extent. In *Foster v. Nielson*, for example, the Court read the Supremacy Clause as establishing a presumption that treaties are domestically self-executing. International practice in the founding era generally did not recognize treaties as establishing privately enforceable rights.<sup>85</sup> The Court noted however that under the Supremacy Clause, “a *different principle* is established,”<sup>86</sup> which altered the international presumption.

In sum, the treaty cases have looked to both international law and uniform practice to inform the scope of the treaty power, to help determine the structural position of treaties and treaty-making in the domestic constitutional system, and arguably, in *In re Ross*, to deny

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<sup>79</sup> *Id.* at 464-465.

<sup>80</sup> *Cite.*

<sup>81</sup> *Id.* at 464. This holding was abandoned in *Reid v. Covert*, 354 U.S. 1 (1953), which held that Fifth and Sixth Amendment protections applied extraterritorially to the capital trial of a U.S. citizen. *Reid*, in short, held that constitutional protections could not be overridden by the treaty power. For further discussion of the relationship between international law and concepts of territoriality, see *infra* at Part II.B.

<sup>82</sup> *Cite.*

<sup>83</sup> 23 F.Cas. 784, 786 (C.C.Mass. 1855) (Curtis, J.).

<sup>84</sup> *Chae Chan Ping v. United States*, 130 U.S. 581, 602 (1889) (citing *Taylor* for the proposition that “the power to [override a treaty] was prerogative, of which no nation could be deprived without deeply affecting its independence”).

<sup>85</sup> *Foster v. Nielson*, 27 U.S. 253, 259 (1829) (Marshall, C.J.) (“A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect of itself the object to be accomplished, especially so far as its operation is infra-territorial, but is carried into execution by the sovereign power of the respective parties to the instrument.”)

<sup>86</sup> *Id. Cf. Taylor v. Morton*, 23 F.Cas. at 787 (Curtis, J.) (“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.”).

constitutional protections to exercises of the treaty power. The cases have recognized a fairly powerful role for international principles in interpreting the treaty power, but have also recognized that the constitutional structure imposes limits on the receipt of international norms in this context.

### 3. Territory

The concept of territorial jurisdiction has been heavily informed by international rules throughout the Court’s constitutional jurisprudence, and principles of comity appear to at least partially motivate the Court’s use of international rules, even though the concern may not be explicit. In *Cunard S.S. v. Mellon*,<sup>87</sup> for example, the Court looked to international law to determine the territorial reach of the Eighteenth Amendment’s prohibition on the transportation or importation of liquor. The Court concluded that international law principles of jurisdiction and federal cases supported the Amendment’s application to foreign vessels that were temporarily docked in U.S. ports,<sup>88</sup> but barred its application to U.S. vessels on the high seas.<sup>89</sup> Justice Sutherland’s dissent disagreed with the majority’s interpretation of the international rule, not on the relevance of that rule to the Eighteenth Amendment.<sup>90</sup>

### 4. Habeas Corpus

In *Johnson v. Eisentrager*,<sup>91</sup> the Court relied in part on international law to conclude that constitutional habeas corpus<sup>92</sup> did not extend to enemy aliens with no territorial connection to the United States. In addition to noting that common law practice denied habeas to such aliens,<sup>93</sup> Justice Jackson reasoned that preserved “inherent distinctions recognized throughout the civilized world” regarding enemy aliens, and cited international treatises for the proposition that enemy aliens universally were denied access to a nation’s courts.<sup>94</sup> Jackson also contended

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<sup>87</sup> 262 U.S. 100, 122-24 (1923).

<sup>88</sup> “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, \*123 International Law Digest, § 145; 1 Hyde, International Law, §§ 141, 142, 154; Wilson, International Law (8th Ed.) § 54; Westlake, International Law (2d Ed.) p. 187, et seq; Wheaton, International Law (5th Eng. Ed. [Phillipson]) p. 282; 1 Oppenheim International Law (3d Ed.) §§ 185-189, 252. 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 (domestic citations omitted).

<sup>89</sup> *Id.* at 123.

<sup>90</sup> 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.

<sup>91</sup> 339 U.S. 763 (1950).

<sup>92</sup> U.S. CONST., art. I, § 9, cl. 2.

<sup>93</sup> *Id.* at 768 (citing “no instance where a court” has issued such a writ “in this or any other country”); *id.* at 775 n. 6 (“At common law ‘alien enemies have no rights, no privileges, unless by the king’s special favour during the time of war.’”) (citing Blackstone); *cf. id.* at 776 (discussing “[t]he ancient rule against suits by resident alien enemies”).

<sup>94</sup> 339 U.S. at 769 & n.2.

that the U.S. practice was consistent with the practices of “Western Civilization”<sup>95</sup> and “the most enlightened of nations”<sup>96</sup> Jackson invoked principles of comity in support of his interpretation, reasoning that enemy foreign states were unlikely to grant habeas to detained U.S. soldiers.<sup>97</sup> He argued from both originalism and contemporary practice that extraterritorial application of the U.S. Constitution to active enemy aliens was unsupported. It could not have been contemplated by the framers, and “[t]he practice of every modern government is opposed to it.”<sup>98</sup>

## 5. Clauses Where Comity is Not Implicated

While comity plays a role in justifying the use of international law in constitutional analysis in certain contexts, in many other cases, the Court has understood the constitutional as incorporating international law in contexts with not foreign relations implications. The Court’s rationale in this context appears based on the assumption that the constitutional system received and distributed certain pre-existing powers of government and rights of individuals under international law. As discussed below, the approach was employed in construing the commerce power, the power to borrow money, the right to just compensation under the Fifth Amendment, and the prohibition on involuntary servitude. Several early justices adopted a similar approach with respect to the Article I, § 10 prohibition on the impairment of contract.<sup>99</sup>

### A. Commerce

With respect to the commerce power, in *Gibbons v. Ogden*, Chief Justice Marshall contended that international rules regarding commerce between sovereign states had been received and delegated to the national government 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 [through the commerce clause].<sup>100</sup>

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<sup>95</sup> *Id.* at 773 & n. 5.

<sup>96</sup> *Id.* at 773-74 (noting that U.S. practice had “resulted in treatment of alien enemies more considerate than that which has prevailed among any of our enemies and some of our allies”).

<sup>97</sup> *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).

<sup>98</sup> 339 U.S. 763, 785 (1950).

<sup>99</sup> *Ogden v. Saunders*, 25 U.S. 123, 158-59 (1827) (opinion of Washington, J.) (right to contract derives from the law of nations but may be regulated by municipal law); *id.* at 282 (opinion of Johnson, J.) (obligation to perform a contract arises from a combination of moral law, universal law, and the laws of society).

<sup>100</sup> 22 U.S. (9 Wheat.) 1, 211 (1824).

Marshall argues that commerce among nations necessarily includes power over navigation, and that the commerce power would have been so understood at the Constitution's adoption.<sup>101</sup>

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. . . . The law of nations . . . pronounces all commerce legitimate in a state of peace, until prohibited by positive law.”<sup>102</sup> Johnson reasoned that the international power over commerce originally had been possessed by the states, which had possessed the supreme powers of international sovereigns, and had been transferred to the national government by the Constitution.<sup>103</sup>

## B. The Power to Borrow Money

The late nineteenth-century Court likewise looked to uniform international practice to uphold Congress' power to borrow money through legal tender. Noting in *Julliard v. Greenman*,<sup>104</sup> that nothing in the Constitution expressly authorized the practice, Justice Gray looked to the general international powers of sovereign states to inform the Constitution's provisions.<sup>105</sup> Gray offered an originalist basis for considering foreign 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 and adopting of the constitution of the United States.”<sup>106</sup> But Gray also contended that this practice remained the contemporary norm.<sup>107</sup> 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

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<sup>101</sup> *Id.* at 190. See also *The Vessel “Abby Dodge” v. United States*, 223 U.S. 166 (1912) (using the law of nations to inform construction of the foreign commerce clause); *The Passenger Cases*, 48 U.S. (7 How.) 283, 415-18 (1849) (Wayne, J., concurring) (relying on international law publicists to define “commerce” from an originalist perspective and to conclude that the commerce power must be exclusive); *Groves & Graham v. Slaughter*, 40 U.S. 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).

<sup>102</sup> *Id.* at 227 (Johnson, J.).

<sup>103</sup> 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.

<sup>104</sup> 110 U.S. 421 (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' 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 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 relied upon by the majority 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 discussion of the inherent powers cases in Category 2, below.

<sup>105</sup> 110 U.S. at 447.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

Constitution,” it was reasonably incident to Congress’ powers over commerce, debts, and money.<sup>108</sup>

Gray’s methodology in identifying international practice was not particularly rigorous. He limited his consideration of “universal[]” practice to the U.S. and Europe, and even then cited only an English case enforcing the right of the Austrian government. In dissent, Justice Field rejected the majority’s construction of the 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.<sup>109</sup>

### C. Just Compensation

The Court also has looked to international law in construing the right to just compensation under the Fifth Amendment. In *United States v. Pacific R.R.*,<sup>110</sup> Justice Field looked to international law to conclude for the Court that the government was not obligated to pay compensation for takings of private property committed under extreme urgency during the Civil War. Field observed that the international rules of war recognized that no compensation could be claimed against the government for injuries and destruction that were the result of military operation,<sup>111</sup> and quoted Vattel at length as distinguishing between wartime damages committed deliberately by the state and those “caused by inevitable necessity” for which no compensation is owed.<sup>112</sup> The Court noted that it had been the practice of the government to compensate some such injuries on the principle that private property should not be taken for public use without just compensation, but that such practices “may not be within the terms of the constitutional clause.”

### D. Involuntary Servitude

*Robertson v. Baldwin*<sup>113</sup> invoked historical and contemporary foreign 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 to eliminate chattel slavery and related forms of peonage, and should not be read to bar forms of service that had been treated as exceptional “from time

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<sup>108</sup> *Id.* at 449-50.

<sup>109</sup> *Id.* at 459. *See also id.* at 467.

<sup>110</sup> 120 U.S. 227 (1887).

<sup>111</sup> *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.”).

<sup>112</sup> *Id.* at 234–35. Congress and the President had also drawn this distinction in reliance on international law. In vetoing a bill to compensate a loyal citizen whose house had been destroyed by the army, the President observed that “[i]t is a general principle of both international and municipal law that all property is . . . subject to be[ing] used or destroyed “in times of great public danger, . . . 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, for injuries to or destruction of private property in necessary military operations during the civil war, the government is not responsible, is thus considered established.” *Id.* at 239.

<sup>113</sup> 165 U.S. 275, 283-86 (1897).

immemorial.”<sup>114</sup> 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.<sup>115</sup> Brown thus looked to foreign practice to deny Thirteenth Amendment protection.

In dissent, Justice Harlan argued that the plain language of the Thirteenth Amendment barred coerced employment of seamen, and objected to the Court’s resort to foreign and historical “usages” to dilute this clear constitutional meaning.<sup>116</sup> Harlan did not contend that use of international sources was inappropriate *per se* in constitutional analysis; he instead challenged the majority’s choice of sources, and their application to alter plain constitutional text. In particular, Harlan criticized the majority’s invocation of ancient practices, such as the laws of the Rhodians, as reflecting the conduct of despotic governments with no concept of modern individual rights.<sup>117</sup> 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.<sup>118</sup> Harlan further objected to the Court’s reliance on modern countries whose laws did not prohibit involuntary servitude.<sup>119</sup> 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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This category of cases raises several interesting questions regarding the legitimacy of resort to international law. Prudential reasons could readily justify the use of international law to interpret constitutional clauses that involve relations with foreign governments, since playing by international rules in our interactions with other countries will both avoid international conflict, and will ensure that the United States is not disadvantaged in its international relations. The practice is not patently appropriate from a constitutional perspective, however, since much about the even the war and treaty powers under the Constitution differentiates the U.S. from international practice. Exercise of the U.S. war and treaty powers is limited structurally through the division of power between the president and legislature. Congress declares war; 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 is also substantively limited by the Constitution’s individual rights provisions such as habeas corpus and the Bill of Rights.<sup>120</sup> 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 U.S. Constitution. The practice of reading constitutional provisions as incorporating international rules in this context, however,

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<sup>114</sup> *Id.* at 282.

<sup>115</sup> *Id.* at 282-86.

<sup>116</sup> *Id.* at 296 (Harlan, J., dissenting) (If the Thirteenth Amendment forbid the practice, the laws of other countries were “of no consequence whatever.”) *See also id.* at 301.

<sup>117</sup> *Id.* at 293, 302.

<sup>118</sup> 165 U.S. at 294. Harlan also noted that the Massachusetts colonial law and the 1790 federal statute cited by the Court had been in place at a time when slavery was lawful.

<sup>119</sup> *Id.* at 296-97 (Harlan, J., dissenting).

<sup>120</sup> *E.g.*, *Hamdi v. Rumsfeld* (due process limits President’s war power to detain enemy combatants).

on occasion has led the Court to refuse to recognize the possibility of constitutional limits on the exercise of the international rule.<sup>121</sup>

Constitutional provisions that do not facially address foreign relations but nevertheless have been construed as addressing concepts of international law also raise provocative questions regarding legitimacy. Comity and parity in U.S. relations with other nations cannot be the justification for looking to international law to construe the just compensation clause or the Thirteenth Amendment. As international law evolves over time, how is the decision to be made whether a particular constitutional clause addresses a concept of international law, or not? One answer could be to resort to original understanding, and the Court at times has given a nod in this direction. But more often the Court has not attempted to justify this practice in terms of original understanding. Instead, the Court appears to have operated against a general background understanding that international norms inform constitutional meaning unless some aspect of the constitutional design (text, longstanding interpretation, etc.) clearly differentiates the United States from international standards.

### C. International Rules as a Structural Analogy for the Federal System

The Supreme Court also has looked to international and foreign sources to address structural questions in relations among the states and between the state and national government. In construing relations among the several states in contexts ranging from Fourteenth Amendment due process to the Full Faith and Credit clause, as well as delineating powers between the states and the federal government, the Court has analogized to international rules governing relations among independent sovereigns to determine the scope of state authority within our federal system.<sup>122</sup> Here again, relations with other nations are not implicated, and international law is not invoked for reasons of comity with foreign governments. Instead, international rules are applied either because the states and national government are viewed as independent sovereigns whose relations are governed by the international rules regulating relations among nations, or simply as a rule from an analogous context that the Court finds persuasive. In the latter case, international law is seen as offering established and workable rules for governing relations among sovereigns which have been tested by time, and thus seem an appropriate model to import into the domestic context.

Notable among these cases is the first year civil procedure classic *Pennoyer v. Neff*,<sup>123</sup> in which the Court invoked international law to interpret state personal jurisdiction under the Fourteenth Amendment due process clause. In *The Schooner Exchange v. McFaddon*,<sup>124</sup> Chief Justice Marshall had invoked the law of nations both to establish that a nation has

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<sup>121</sup> See, e.g., *Miller v. United States* (Fifth and Sixth Amendment protections do not apply to wartime seizures); *Ex parte Quirin* (Fifth and Sixth Amendments do not apply to trial by military commission), *Korematsu v. United States* (differential treatment based on race in wartime emergency does not violate due process); *In re Ross* (Fifth and Sixth Amendments do not limit extraterritorial actions under the treaty power).

<sup>122</sup> See *Pennoyer v. Neff*, 95 U.S. \_\_\_, 722 (\_\_\_) (relying on international law limitations on territorial jurisdiction to hold that the Fourteenth Amendment due process clause prohibits states from exercising jurisdiction over out of state defendants); *Haddock v. Haddock*, 201 U.S. 562 (1906) (construing state power under the Full Faith and Credit Clause in light of international law); *Pullmans Palace Car Co. v. Pennsylvania*, 141 U.S. 18 (1891) (construing state taxation power in light of international law); *Manchester v. Massachusetts*, 139 U.S. 240 (1891) (construing scope of state jurisdiction in light of international law); *Grover & Baker S.M. Co. v. Radcliffe*, 137 U.S. 287 (1890) (Full Faith and Credit Clause).

<sup>123</sup> *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877).

<sup>124</sup> 11 U.S. 116 (1812).

absolute jurisdiction over all things within its territory.<sup>125</sup> In *Pennoyer*, Justice Field applied this rule to the authority of the states. Analogizing the several states to sovereigns in the international realm,<sup>126</sup> Field based the decision 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.”<sup>127</sup> These principles, the Court concluded, operated through the Fifth Amendment due process clause to preclude the exercise of jurisdiction over an out-of-state defendant absent appearance or personal service of process. *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, *Pennoyer* addressed the same due process text for which the Court’s resort to international sources proved so controversial in *Lawrence*.

Justice Field wrote in the immediate aftermath of the Civil War, when the modern implications of that conflict for the powers of the several states were not fully understood, and so the propriety of the analogy to international rules may have been more obvious at that time. Nevertheless, while the rule in *Pennoyer* was later modified by the minimum contacts doctrine,<sup>128</sup> the concept of territorial sovereignty laid down in that case continues to permeate modern personal jurisdiction jurisprudence.<sup>129</sup>

The Court has employed a similar approach in other cases involving state jurisdiction,<sup>130</sup> the Full Faith and Credit Clause,<sup>131</sup> state powers of taxation<sup>132</sup> and under the compact clause,<sup>133</sup> and sovereign immunity under the Eleventh Amendment.<sup>134</sup>

The Court’s use of international rules to delineate structural relationships within the federal system again is not based on any desire to uphold U.S. international obligations or to preserve harmony in the international system. The early Court to some extent was operating

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<sup>125</sup> *Id.* at 136. Marshall also relied on the law of nations to conclude that U.S. courts nevertheless had no jurisdiction over friendly foreign public vessels in their territory.

<sup>126</sup> 95 U.S. at 722 (noting that although state sovereignty was limited to some degree by the Constitution, in all other respects they “possess and exercise the authority of independent States, and the principles of public law . . . are applicable to them”).

<sup>127</sup> *Id.* at 722, *citing* Story, conflict of laws, and Wheat. Int’l L, pt. 2 cl. 2. *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...”).

<sup>128</sup> E.g., *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

<sup>129</sup> Friedrich K. Juenger, *A Shoe Unfit for Globetrotting*, 28 U.C. DAVIS L. REV. 1027, 1031-1036 (noting that Chief Justice Stone’s opinion in *International Shoe* “did not eschew the notion of territorial sovereignty” and that subsequent decisions have remained “preoccupied with sovereignty,” together with fairness).

<sup>130</sup> E.g., *Manchester v. Massachusetts*, 139 U.S. 240 (1891).

<sup>131</sup> E.g., *Haddock v. Haddock*, 201 U.S. 562 (1906); *Grover & Baker S.M. Co. v. Radcliffe*, 137 U.S. 287 (1890).

<sup>132</sup> E.g., *Pullmans Palace Car Co. v. Pennsylvania*, 141 U.S. 18 (1891).

<sup>133</sup> *Poole v. Fleeger*, 36 U.S. 185, 209 (1837) (Story, J.) (“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 by the law and practice of nations. It is a right equally belonging to the states of this Union” which the Court found preserved by the compact clause.).

<sup>134</sup> E.g., *New Hampshire v. Louisiana*, 108 U.S. 76 (1883). *See* Thomas Lee, *Making Sense of the Eleventh Amendment: International Law and State Sovereignty*, 96 NORTHWESTERN L. REV. 1027 (2002).

from the position that the several states were in fact, or recently had been, independent sovereigns, and that relations among the states accordingly should be governed by international rules unless the Constitution provided to the contrary. By the latter 19<sup>th</sup> Century, however, the Civil War convincingly had established the supremacy of the nation,<sup>135</sup> and the illusion that states were analogous to international sovereigns no longer was sustainable.<sup>136</sup> The Court nevertheless continued to apply international rules to govern relations among the states and between the national government. This could have been simply the result of precedent, or path dependence, once the doctrinal approach had been established. But the Court's consciousness of the changing nature of state sovereignty in other constitutional areas suggests that the Court was capable of breaking out of its prior doctrinal mold when it wanted to. Instead, the Court appears to have continued looking to international rules to govern the federal relationship because the rules were convenient, well-defined, had been proven workable over time, and addressed a problem that appeared roughly analogous to the one confronting the Court. They therefore offered a ready positive model for addressing a set of problems which the Court otherwise would have had to attempt to craft itself from whole cloth.

#### D. International Law as Creating Governmental Interests

In construing individual rights provisions of the Constitution, international law on occasion has been asserted as creating governmental interests warranting infringement of civil liberties. Thus, in *Boos v. Barry*,<sup>137</sup> 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."<sup>138</sup> The D.C. Circuit had previously upheld the statute, based on its conclusion that the United States' international diplomatic obligations created a compelling governmental interest.<sup>139</sup> The Supreme Court declined to determine whether this interest was compelling, finding the law was not narrowly tailored.<sup>140</sup> 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.<sup>141</sup> The opinion appeared to assume that international obligations could establish governmental interests under the First Amendment,<sup>142</sup> and raised, but did not answer, the question whether such an

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<sup>135</sup> GEORGE FLETCHER, *OUR SECRET CONSTITUTION: HOW LINCOLN REDEFINED AMERICAN DEMOCRACY*, \_\_\_ (2001).

<sup>136</sup> *Pennoy v. Neff*.

<sup>137</sup> 485 U.S. 312 (1988).

<sup>138</sup> § 22-1115.

<sup>139</sup> *Finzer v. Barry*, 798 F.2d 1450 (D.C. Cir., 1986).

<sup>140</sup> 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 Congress, as "the body primarily responsible for implementing our [treaty] obligations," that the narrower provision fulfilled the United States' international obligations toward diplomats. *Id.* at 324-26, *citing* 18 U.S.C. § 112(b)(2).

<sup>141</sup> 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." *See* 485 U.S. at 322-23 (discussing treaty and customary international law obligations toward diplomats and citing Vattel).

<sup>142</sup> *Id.* at 324 (recognition of an interest under international law does not automatically make the interest "compelling" under the First Amendment).

international interest could warrant “adjust[ing]” First Amendment analysis.<sup>143</sup> 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 First Amendment analysis without considering international law.<sup>144</sup>

The role of international law in this constitutional context is the least developed of the six categories considered here. The suggestion in *Boos v. Barry* that certain international rules might create a compelling governmental interest justifying a narrowly tailored restriction on a constitutional right indicates that despite the well-established rule that treaties cannot override constitutional provisions, they may inform the analysis of a particular constitutional provision. Even this approach, however, appears unproblematic. Treaties and customary international law 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 states.

#### E. Deriving Inherent Governmental Powers from International Law

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 law rules as a source of governmental authority to act, not in the process of interpreting an enumerated power, but in the absence of, or *in lieu of*, textual constitutional authority. The Court has accordingly derived government power from powers it identifies as inherent in all sovereign states, based on principles of international law.

The most notorious application of the inherent powers approach was articulated in *United States v. Curtiss-Wright Export Corp.*,<sup>145</sup> in which the Court held that a joint resolution delegating authority to the President to criminalize foreign arms sales did not violate the non-delegation doctrine.<sup>146</sup> Justice Sutherland famously 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.”<sup>147</sup> *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.”<sup>148</sup>

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<sup>143</sup> *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.”)

<sup>144</sup> See also Brief of the United States, *Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal*, 125 S.Ct. 1846 (U.S. Apr 18, 2005) (NO. 04-1084) at 41-44 (arguing that international drug convention creates a compelling governmental interest in prohibiting drug use that justifies infringement on religious freedom). Cf. *Gibson v. Babbitt*, 223 F.3d 1256, 1258 (11th Cir. 2000) (government has a compelling interest in fulfilling its treaty commitments to Indian tribes).

<sup>145</sup> 299 U.S. 304, 318 (1936).

<sup>146</sup> *Id.* at 329.

<sup>147</sup> *Id.* at 318.

<sup>148</sup> *Id.*

Much of the reasoning in *Curtiss-Wright* is dicta,<sup>149</sup> and the opinion has been appropriately condemned for resorting to international law in lieu of constitutional analysis, rather than as a part of it. But the Court has also relied on inherent sovereign powers derived from international law to establish national quasi- or extra-constitutional authority in a variety of areas, including immigration, the governance of Indian tribes and territorial inhabitants, (discussed in more detail below), as well as the powers to denationalize citizens<sup>150</sup> and subpoena citizens overseas,<sup>151</sup> and the power of eminent domain.<sup>152</sup> In all of these contexts, the Court has looked to international law, not to inform constitutional text, but to supplant it.

Although the inherent powers cases reflect the Court's most robust resort to international law in constitutional analysis, their application of international law is also the most problematic. The Court has enforced powers derived from international law without recognizing the limits inhering in the same international rules and has embraced international norms with little or no consideration of how they were received into the constitutional design or whether the Constitution imposed some limits on the international rule. The inherent powers cases thus also reflect the Court's most robust application of international law in disregard of protections under international law and the Constitution.

## 1. Immigration

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<sup>149</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–36 n.2 (1952) (Jackson, J., concurring). See Sarah H. Cleveland, *Powers Inherent in Sovereignty*, 81 TEX. L. REV. 1 (2000).

<sup>150</sup> *Mackenzie v. Hare*, 239 U.S. 299 (1915), upheld Congress' power to strip a U.S. national of citizenship on the grounds that the power to expatriate citizens 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.”) The case involved a federal statute withdrawing citizenship from U.S. citizen women who married a foreign national., and the decision relied in part on the subordinate legal status of women. *Id.* at 311-12. The decision was overturned by a series of cases, including *Trop v. Dulles*, 356 U.S. 86, 102 (1958), and *Afroyim v. Rusk*, 387 U.S. 253 (1967).

<sup>151</sup> *Blackmer v. United States*, 284 U.S. 421, 437-38 (1932), upheld judicial power to subpoena a U.S. citizen from abroad as a “power inherent in sovereignty,” citing both international law and English cases. *Id.* at 437 & n. 4 (“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...”). The Court noted that both international law and English practice allowed for the governance of a nation's citizens abroad. *Id.* at 437 & n. 2.

<sup>152</sup> *Kohl v. United States*, 91 U.S. 367 (1875), derived the government's power of eminent domain from the inherent sovereignty of nations. *Id.* at 371 (citing Vattel for the proposition that “[t]he right is the offspring of political necessity; and it is inseparable from sovereignty, unless denied to it by its fundamental law”). The Court also read the Fifth Amendment just compensation clause as an implicit recognition of the power. *Id.* at 372-73. See also *United States v. Jones*, 109 U.S. 513, 518 (1883), quoting *Mississippi & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878) (“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.”); *Gettysburg Elec. Ry. Co. v. United States*, 160 U.S. 668, 679 (1896) (upholding eminent domain power and citing *Kohl*). See discussion of the origins of the concept of eminent domain in D. Dana & T. Merrill, PROPERTY: TAKINGS 8-25 (2002)

In *Chae Chan Ping v. United States*,<sup>153</sup> the Court upheld the constitutional authority of Congress to bar aliens from entering the United States.<sup>154</sup> Although the Court previously had held that Congress' power to regulate immigration derived from the foreign commerce clause,<sup>155</sup> 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."<sup>156</sup> Rather than attempting to locate this authority in the enumerated powers of the national government, Field offered a structural argument that the Constitution had bestowed on the national government all the foreign relations powers possessed by independent nations.<sup>157</sup> In short, "the power of exclusion of foreigners [was] an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution."<sup>158</sup> Field implicitly construed the authority as sufficiently powerful to override the alien's claim that exclusion of a returning resident alien violated constitutional due process.<sup>159</sup>

Two later decisions, *Nishimura Ekiu v. United States*<sup>160</sup> and *Fong Yue Ting v. United States*,<sup>161</sup> again asserted that Congress' immigration authority derived from international law, with only the barest nod toward the Constitution. *Nishimura* 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 . . . .<sup>162</sup>

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<sup>153</sup> 130 U.S. 581 (1889).

<sup>154</sup> *Id.* at 589.

<sup>155</sup> *The Head Money Cases*, 112 U.S. 580, 600 (1884) ("Congress [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. 276, 280 (1875); *Henderson v. New York*, 92 U.S. 259, 270-71 (1875).

<sup>156</sup> *Id.* at 603-04. *See also id.* at 606 (describing the right to exclude as "the highest duty of every nation").

<sup>157</sup> *Id.* at 604, 606 ("[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, suppress insurrection, repel invasion, [and] regulate foreign commerce . . . are all sovereign powers").

<sup>158</sup> *Id.* at 609.

<sup>159</sup> *Id.* (sovereignty cannot be bartered away). *See* discussion in Cleveland, *Powers Inherent in Sovereignty*, *supra* note 149, at 130.

<sup>160</sup> 142 U.S. 651, 659-60 (1892).

<sup>161</sup> 149 U.S. 698 (1893).

<sup>162</sup> *Id.* at 569.

Like Field, Gray employed a structural justification for the Constitution's receipt of inherent power. Because international law recognized the authority of states to exclude aliens, and because the Constitution gave the national government powers over foreign relations,<sup>163</sup> he reasoned, the international authority to exclude aliens must also be possessed by the national government.

*Fong Yue Ting* extended the government's power to exclude aliens to include 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 *Nishimura* and *Chae Chan Ping*, and then devoted four full pages to international law sources, including the works of Vattel, Ortolan, Phillimore, and Bar.<sup>164</sup> 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."<sup>165</sup>

The Court's interpretation and application of international law in the inherent powers immigration cases was problematic for several reasons. It is not clear that international law actually recognized as broad sovereign authority over aliens the Court asserted. In particular, the Court's decision in *Fong Yue Ting* ignored the limits that international law imposed on a sovereign power over denizens and other long term residents.<sup>166</sup> The Court's assumption that international powers were possessed by the national government in their entirety ignored questions regarding the *constitutional* source of that authority and any constraints the Constitution might impose on it. The Court made no attempt to lodge the power in constitutional text, and defined the power as sufficiently broad and plenary to override the alien's claims of individual rights.<sup>167</sup>

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<sup>163</sup> *Id.* at 659.

<sup>164</sup> *Id.* at 706-711. The Court later invoked international treaties and foreign decisions again 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. *Id.* at 724.

<sup>165</sup> *Id.* at 711.

<sup>166</sup> For further discussion, see 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 19th century, there was little, in principle, to support the absolute exclusion of aliens"); Cleveland, *Powers Inherent in Sovereignty*, at 83-87 (discussing 19<sup>th</sup> century international rules regarding regulation of aliens).

<sup>167</sup> All of these defects were pointed out by the three dissenting Justices. The dissenters' objection was threefold: First, they rejected the contention that international law allowed the arbitrary expulsion of resident aliens. *Id.* at 734-737 (Brewer, J., dissenting). Second, they argued that even if the majority were correct in its interpretation of international law, there was no reason for concluding that the government's limited, delegated powers under the constitution were intended to incorporate the practices of despotic nations recognized by international law. *Id.* at 757 (Field, J., dissenting) ("[E]ven if that power were exercised by every government of Europe, it would have no bearing on these cases. It may be admitted that the power has been exercised by the various governments of Europe . . . [But] no power to perpetrate such barbarity is to be implied from the nature of our government, and certainly is not found in any delegated powers under the Constitution."); *accord id.* at 757 ("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."). Finally, they argued that any international law power implicitly incorporated into the Constitution must be limited by due process and other express individual rights protections. *Id.* at 737 (Brewer, J., dissenting) ("whatever 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

## 2. Indians

International law doctrines regarding the status of aboriginal peoples, discovery and conquest have played an important role in the recognition of a plenary federal power over Indian tribes. Although not itself a constitutional case, the 1823 case of *Johnson v. M'Intosh*<sup>168</sup> rooted the foundations of this doctrine squarely in international law principles of discovery. The case involved a title dispute which turned on the question whether Indian tribes were capable of transferring land to private parties. Chief Justice Marshall concluded that the United States 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.”<sup>169</sup> Marshall devoted approximately half of his 33-page opinion to establishing Europe’s “universal recognition”<sup>170</sup> of this principle<sup>171</sup> and further invoked the “principle of universal law” that treated Indian lands as “vacant”<sup>172</sup> to justify a sovereign federal power over them.

The legitimacy of the discovery doctrine under international law by the time of *M'Intosh* had been severely questioned,<sup>173</sup> and in *Worcester v. Georgia*,<sup>174</sup> Marshall himself ridiculed the “extravagant and absurd idea” that discovery gave European states power over Native American tribes.<sup>175</sup> Marshall instead relied on a different proposition from international law – Vattel’s discussion of the relationships between powerful and weak states<sup>176</sup> – to conclude that Indian sovereignty barred any intervention by the State of Georgia.<sup>177</sup> *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*,<sup>178</sup> Chief Justice Taney asserted that the discovery doctrine and the tribes’ aboriginal status gave Congress plenary authority to extend criminal jurisdiction over Indian tribes.<sup>179</sup> His discussion ultimately received judicial sanction in *United*

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declared in the original amendments”); *id.* at 738 (Brewer, J., dissenting); *id.* at 755–56 (Field, J., dissenting); *id.* at 762 (Fuller, C.J., dissenting).

<sup>168</sup> *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

<sup>169</sup> *Id.* at 584.

<sup>170</sup> *Id.* at 574.

<sup>171</sup> *Id.* at 572–84.

<sup>172</sup> *Id.* at 595–96.

<sup>173</sup> See, e.g., 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).

<sup>174</sup> 31 U.S. (6 Pet.) 515 (1832).

<sup>175</sup> *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.*

<sup>176</sup> *Id.* at 561.

<sup>177</sup> *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 . . .”).

<sup>178</sup> 45 U.S. (4 How.) 567, 570–71 (1846).

<sup>179</sup> *Rogers*, 45 U.S. at 571–72 (“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

*States v. Kagama*,<sup>180</sup> which upheld plenary congressional authority to legislate a criminal code for Indian tribes. Writing for the Court in *Kagama*, Justice Miller expressly rejected reliance on any enumerated constitutional clause.<sup>181</sup> Instead, Justice Miller reasoned that federal authority over the Indians derived from discovery,<sup>182</sup> and that as a result, “Congress may by law punish any offence committed there.”<sup>183</sup>

After *Kagama*, the Court upheld, over Fifth Amendment due process and takings objections, Congress’ plenary authority to determine tribal citizenship, to dissolve tribal jurisdiction and to allot or lease tribal lands without tribal consent.<sup>184</sup> In 1955, the Court invoked the doctrines of discovery, conquest, and “aboriginal” title<sup>185</sup> 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 not a property right. Instead it was “a right of occupancy which . . . may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.”<sup>186</sup> The Court traced its analysis directly to the 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 . . . “that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest.”<sup>187</sup>

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.”<sup>188</sup>

In sum, in the Indian context, as in the classical immigration cases, the Court looked to international law doctrines to establish an inherent federal authority that was not only sweeping in scope, but was largely unchecked by individual rights protections. The decisions were characterized both by reliance on international law doctrines of questionable validity, as well as

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may by law punish any offence committed there, no matter whether the offender be a white man or an Indian.” *Id.* at 572.

<sup>180</sup> 118 U.S. 375 (1886).

<sup>181</sup> *Id.* at 378–79 (rejecting reliance on constitutional references to “Indians not taxed” and the Indian commerce clause).

<sup>182</sup> *Id.* at 380–82, *citing* Rogers, *Johnson v. McIntosh*.

<sup>183</sup> *Id.*

<sup>184</sup> *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (rejecting Fifth Amendment challenge to Congress’ power to allot property without tribal consent); *Cherokee Nation v. Hitchcock*, 187 U.S. 294 (1902) (rejecting Fifth Amendment challenge to Congress’ authority to lease property without tribal consent); *Stephens v. Cherokee Nation*, 174 U.S. 445 (1899) (upholding Congress’ authority to determine tribal citizenship, subject tribes to federal jurisdiction, and dissolve tribes).

<sup>185</sup> *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955).

<sup>186</sup> *Cite.*

<sup>187</sup> *Id.* at 279–80 (citation omitted).

<sup>188</sup> *Id.* at 280; *see also* *United States v. Santa Fe Pac. R.R.*, 314 U.S. 339, 347 (1941) (discussing Congress’ “supreme” power to extinguish original Indian title).

by little regard either for how the Constitution received the power or any individual rights protections the Constitution imposed.

### 3. Territories

The final significant grouping of inherent powers cases involves U.S. authority to govern later-acquired territories. The Court employs the inherent powers approach less consistently in the territory cases, however. Although all the territory cases invoke international law, some apply international law through a theory of inherent power, while others do so in construing the enumerated Territory Clause.<sup>189</sup>

*Jones v. United States*<sup>190</sup> upheld the power of Congress to adopt criminal legislation for overseas possessions. The Court invoked international rules regarding discovery, and international publicists such as Vattel, Wheaton, Halleck, Phillimore, and Calvo,<sup>191</sup> to hold that the United States could acquire and govern 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 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.<sup>192</sup>

The Court concluded that this international law principle “affords ample warrant for the legislation of congress,”<sup>193</sup> without relying on the Territory Clause or any other enumerated provision.

*Downes v. Bidwell*,<sup>194</sup> the most famous of the *Insular Cases*, addressed whether Puerto Rico was part of the “United States” for purposes of the Uniformity Clause.<sup>195</sup> 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 asserted that the United States should be presumed to 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

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<sup>189</sup> U.S. CONST., art. IV, § 3, cl. 2.

<sup>190</sup> 137 U.S. 202, 212–13 (1890). The Court’s opinion had methodological roots in ambiguous language in *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 542 (1828) (upholding Congress’ 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 *The Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 42 (1890) (upholding Congress’ power to dissolve the Mormon Church, over due process objections, as a power of “national sovereignty, [which] belong[s] to all independent governments.”).

<sup>191</sup> *Jones*, 137 U.S. at 212.

<sup>192</sup> *Id.* at 212. The Court also cited English and U.S. cases for the proposition that the legal or de facto sovereign over a territory was a political question. *Id.* at 212, 215–16.

<sup>193</sup> *Id.* at 212.

<sup>194</sup> 182 U.S. 244 (1901).

<sup>195</sup> U.S. CONST. art. I, § 8, cl. 1 (“all duties, imposts, and excises shall be uniform throughout the United States”).

presumption arises that our power with respect to such territories is the same power which other nations have been accustomed to exercise.”<sup>196</sup> Brown accordingly concluded that Puerto Rico was not “part of the United States”<sup>197</sup> and thus was not subject to the Uniformity Clause. Having denied constitutional protection for the territories, Brown suggested that “certain natural rights” might nevertheless restrain government action. They would do so, however, only through principles “inherent in the Anglo-Saxon character,” not legal obligation.<sup>198</sup>

Justice White’s plurality opinion differed from Brown’s by assuming that federal power to govern territories derived from the Constitution.<sup>199</sup> His approach thus at least theoretically relied on international law to inform enumerated provisions (like the Category I cases), 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 gave a sovereign authority to govern conquered territories as it saw fit<sup>200</sup> and then assumed that equivalent powers must be possessed by the United States.<sup>201</sup> U.S. authority over the territories was accordingly largely unlimited.

Unlike Brown, 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.<sup>202</sup> White did not, however, specify which provisions of the Constitution he considered sufficiently fundamental to be operable.<sup>203</sup> In sum, Justices Brown and White and his fellow concurring Justices all 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<sup>204</sup> 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 which the Constitution controlled:

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<sup>196</sup> *Id.* at 285–86.

<sup>197</sup> *Downes*, 182 U.S. at 287.

<sup>198</sup> *Id.* at 282–83.

<sup>199</sup> *Id.* at 290 (White, J., concurring) (power derives from either the power to acquire territory or the Territory Clause).

<sup>200</sup> *Id.* at 300, 301–02 (White, J., concurring), *citing* *American Insurance Co. v. Canter*, 26 U.S. 511 (1828).

<sup>201</sup> *Id.* 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).

<sup>202</sup> *Id.* at 290–91.

<sup>203</sup> Fundamental constitutional rights did not include the right to grand or petit juries. *Balzac v. Porto 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. *Kepner v. United States*, 195 U.S. 100, 134 (1904) (Holmes, J., dissenting) (joining Justice Holmes in arguing that the prohibition against double jeopardy should not apply to the Philippines, despite its statutory application by Congress).

<sup>204</sup> Justices Fuller, Harlan, Brewer, and Peckham dissented.

[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.<sup>205</sup>

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

Justice White's incorporation theory was finally embraced by a majority of the Court in *Dorr v. United States*,<sup>206</sup> 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,<sup>207</sup> which the Court read as granting powers largely equivalent to those of other sovereigns.<sup>208</sup> The *Dorr* Court offered a dubious originalist rationale for its construction of the Territory Clause, reasoning that the Framers, in adopting this clause, had recognized a power to hold territory that was not incorporated into the United States or covered by all constitutional provisions.<sup>209</sup>

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 constitutional structural and substantive 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 solution was to infuse the Constitution with international law powers, as mediated by some limited constitutional protections.

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The pure inherent powers approach, unhinged from constitutional text, is substantially disfavored today. The Court has to some degree “constitutionalized” the doctrine 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 Indian affairs has been attributed to the Territory,<sup>210</sup> Treaty, and Indian Commerce clauses,<sup>211</sup> while the immigration power has been derived from the

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<sup>205</sup> *Id.* at 369 (Fuller, C.J., dissenting). *See also id.* at 386 (Harlan, J., dissenting) (“It 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”).

<sup>206</sup> *Dorr v. United States*, 195 U.S. 138 (1904).

<sup>207</sup> *Id.* at 142. The Court has continued this practice. E.g., *Harris v. Rosario*, U.S. 446 U.S. 651 (1980) (deriving congressional power from the Territory Clause).

<sup>208</sup> *Id.* at 140, 142, 146.

<sup>209</sup> *Id.* at 143.

<sup>210</sup> 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).

<sup>211</sup> E.g., *United States v. Lara*, 541 U.S. 193, 124 S.Ct. 1628, 1633 (2004) (“This Court has traditionally identified the Indian Commerce Clause and the Treaty Clause as sources of [federal Indian] power”); *Morton v.*

Naturalization<sup>212</sup> and Foreign Commerce Clauses.<sup>213</sup> 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.”<sup>214</sup> In immigration cases, the Court also has continued to seek authority in unspecified “foreign affairs” powers<sup>215</sup> and to invoke “ancient principles of the international law of nation states” to withhold constitutional protection from aliens.<sup>216</sup>

Moreover, the constitutionalization of the source of federal power has not severed the 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 modified somewhat. But rationales that allowed the exercise of governmental power based on doctrines of inherent powers and international law now simply parade an 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 has consistently failed to recognize the evolving nature of the international principles concealed within the plenary powers and to apply relevant international law limitations. Constitutionalization also has not brought any searching reconsideration of the Court’s assumption that constitutional limitations operate much more weakly in these contexts.

From a legitimacy perspective, the inherent powers cases are the most troubling of those considered in this article. Even here, however, the legitimacy concern arises not from the Court’s consideration of international law, but from its overall constitutional methodology. It is the Court’s abandonment of the concept of enumerated and limited powers, and its importation of international law while failing to consider how the international rule was received and limited by the constitutional system that is most problematic.

#### F. The Community Standard Cases

The final category of cases in which the Supreme Court has looked to international law and practice to lend substantive meaning to a constitutional rule is the “community standard” cases. These are cases in which the Court interprets a constitutional provision, such as “due process,” “liberty” or “cruel and unusual punishment” as requiring consideration of the basic rights of the person. International opinion accordingly comes in as one element in the Court’s search for fundamental values.

The starting point for the inquiry in these cases is constitutional text. Thus, what is “cruel” under the Eighth Amendment may warrant consideration of what practices have been

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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”).

<sup>212</sup> *INS v. Chadha*, 462 U.S. 919, 940 (1982) (relying on naturalization clause).

<sup>213</sup> *Toll v. Moreno*, 458 U.S. 1, 10 (1982). See also *Mathews v. Diaz*, 426 U.S. 67 (1976).

<sup>214</sup> *United States v. Lara*, 541 U.S. 193, 124 S.Ct. 1628, 1634 (2004), citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315–22 (1936).

<sup>215</sup> *Toll v. Moreno*, 458 U.S. 1, 10 (1982). See also *Mathews v. Diaz*, 426 U.S. 67 (1976).

<sup>216</sup> *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972).

outlawed under international treaties and customary international law. What is “unusual” on its face requires consideration of how common, or uncommon, a particular practice is,<sup>217</sup> and practices both in the United States and the global community can be relevant to this inquiry. Under substantive due process, the Court has looked to community standards to determine what provisions in the Bill of Rights are sufficiently fundamental to “principles of ordered liberty” to warrant incorporation against the states or to otherwise prohibit government intrusion. Under this approach as well, international standards are relevant as an element in the search for unenumerated fundamental rights.

The community standard cases are the most controversial in current scholarly debates regarding the relationship between international law and constitutional interpretation, and include *Roper* and *Atkins*, and (with respect to the use of comparative law) *Lawrence*. Unlike many of the cases addressed above, in which international law provided a significant part, if not all, of the rule being adopted, international law in these cases is generally invoked to bolster a conclusion that the Court already finds warranted based on a domestic consensus. Thus, ironically, it is the context in which international law plays perhaps the weakest role in constitutional analysis that has provoked the greatest controversy.

### 1. Eighth Amendment Cruel & 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.<sup>218</sup> In *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.”<sup>219</sup> 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*.”<sup>220</sup> Thus, the Court examines any particular punishment “in light of the basic prohibition against inhuman treatment.”<sup>221</sup> The question is what punishments are “barbaric” or “‘excessive’ in relation to the crime committed”<sup>222</sup> based on the “broad and idealistic concepts

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<sup>217</sup> *Stanford v. Kentucky*, 492 U.S. 361, 369 (1989) (Court’s approach to 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 v. Dulles*, 356 U.S. 86, 100 n. 32 (1958) (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).

<sup>218</sup> E.g., *Trop v. Dulles*, 356 U.S. at 99 (plurality opinion) (“The exact scope of the constitutional phrase ‘cruel and unusual’ has not been detailed by this Court.”).

<sup>219</sup> *Weems v. United States*, 217 U.S. 349, 373, 378 (1910).

<sup>220</sup> 356 U.S. 86, 100-101 (1958) (opinion of Warren, C.J., joined by Black, Douglas, and Whittaker, JJ.) (emphasis added).

<sup>221</sup> *Id.* at 100, n. 32.

<sup>222</sup> *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion).

of dignity, civilized standards, humanity, and decency” that the Amendment embodies.<sup>223</sup> These touchstones for analyzing the Eighth Amendment invite consideration of the values embodied in international rules.

Of all the Court’s 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,”<sup>224</sup> and that statelessness may lead to banishment, “a fate universally decried by civilized people.”<sup>225</sup> The plurality noted that “[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as a punishment for a crime,” and that of 84 countries surveyed by the United Nations, only two imposed denationalization as a penalty for desertion.<sup>226</sup> Thus, “[i]n this country,” the opinion concluded, “the Eighth Amendment forbids this to be done.”<sup>227</sup> In contrast to later cases, the Court did not consider jury practices nor, because the law at issue involved an exclusive federal authority, could the Court consider the practices of the several states.

*Trop*’s resort to widespread foreign practice has recently been dismissed as the view of a minority of the Court.<sup>228</sup> 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.”<sup>229</sup> 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.<sup>230</sup> 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.<sup>231</sup> 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 bestowed a weaker role for either foreign practice or international law. In holding that imposition of the death penalty for rape violated the cruel and unusual punishment clause in *Coker v. Georgia*, the plurality observed that Eighth Amendment judgments “should be informed by objective factors to the maximum possible extent.” These included “attention to public attitudes . . . history and precedent, legislative attitudes, and the response of juries.”<sup>232</sup> The plurality accordingly observed that state practice and jury verdicts rarely imposed the sentence of death for rape.<sup>233</sup> The opinion limited its

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<sup>223</sup> *Estelle v. Gamble*, 429 US 97, 102 (1976). 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.”).

<sup>224</sup> *Id.* at 102 (citing a U.N. study on statelessness).

<sup>225</sup> *Id.*

<sup>226</sup> *Id.* at 102-103 & nn. 37, 38.

<sup>227</sup> *Id.* at 103.

<sup>228</sup> *Atkins v. Virginia*, 536 U.S. at 304 (Rehnquist, C.J., dissenting). See discussion *infra* Part I.

<sup>229</sup> *Francis v. Resweber*, 329 U.S. 459, 469 (1947) (Frankfurter, J., concurring).

<sup>230</sup> *Id.* at 126 (Frankfurter, J., dissenting with Justices Burton, Clark and Harlan).

<sup>231</sup> *Id.* at 126-27, quoting *Weems v. United States*, 217 U.S. 349, 378 (1910).

<sup>232</sup> *Id.* at 592.

<sup>233</sup> 433 U.S. 548, 596 (1977) (plurality opinion of White, J., joined by Stewart, Blackmun, and Stevens, JJ.)

consideration of international practice to a footnote, which observed that “[i]n *Trop v. Dulles*, the plurality took pains to note the climate of international opinion concerning the acceptability of a particular punishment. It 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.”<sup>234</sup> 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 death penalty for rape is an indispensable part of the States’ criminal justice system.”<sup>235</sup>

*Enmund v. Florida*,<sup>236</sup> 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.<sup>237</sup> In a footnote, and relying on *Coker*, the majority also observed that “‘the climate of international opinion concerning the acceptability of a particular punishment’ is an additional consideration which is ‘not irrelevant’” to the Eighth Amendment analysis.<sup>238</sup> 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.”<sup>239</sup>

In invalidating the death penalty for a person under sixteen at the time of the offense in *Thompson v. Oklahoma*, five members of the Court appeared to consider international treaties relevant to the Eighth Amendment inquiry<sup>240</sup> in addition to widespread comparative practice. 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.<sup>241</sup> 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”<sup>242</sup> to execute Thompson. Invoking the *Trop* line of cases for the relevance of

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<sup>234</sup> *Id.* at 596, n. 10, citing *Trop v. Dulles*, 356 U.S. 86, 102 (1958) (citation omitted); 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).

<sup>235</sup> *Id.* at 592 n. 4.

<sup>236</sup> 458 U.S. 782 (1982).

<sup>237</sup> *Id.* at 788-96.

<sup>238</sup> *Id.* at 796-97, n. 22 quoting *Coker v. Georgia*, 433 U.S. 584, 596, n. 10 (1977).

<sup>239</sup> *Id.* (citations omitted). The Court also observed that death sentences for such murders were frequently commuted.

<sup>240</sup> 487 U.S. 815, 830-31 & nn. 31, 34 (1988) (plurality opinion of Stevens, J., joined by Brennan, Marshall, and Blackmun, JJ.); *id.* at 851 (O’Connor, J.) (concurring in the 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). See also Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 Yale L. J. 39, 47 (1994) (noting that “both 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.”) 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.

<sup>241</sup> *Id.* at 822 (plurality opinion).

<sup>242</sup> *Id.* at 838.

international opinion, Stevens 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."<sup>243</sup> He also noted that the juvenile death penalty was prohibited by three major human rights treaties: the International Covenant on Civil and Political Rights,<sup>244</sup> the American Convention on Human Rights,<sup>245</sup> and the Fourth Geneva Convention,<sup>246</sup> the latter of which had been ratified by the United States.<sup>247</sup> Justice O'Connor's opinion concurring in the judgment also cited these treaties.<sup>248</sup>

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.<sup>249</sup> Scalia maintained that "[t]he 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."<sup>250</sup> However, he continued,

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. In the present case, therefore, the fact that a majority of foreign nations would not impose capital punishment upon persons under 16 at the time of the crime is of no more relevance than the fact that a majority of them would not impose capital punishment at all, or have standards of due process quite different from our own.<sup>251</sup>

Justice Scalia's apparent acceptance 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*, prior cases finding an international consensus have found a national consensus first, 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, as Scalia suggested. They simply had disagreed with Scalia by finding that a national consensus was present. In this context, the plurality's resort to

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<sup>243</sup> *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.

<sup>244</sup> Art. 6(5), Annex to G.A.Res. 2200, 21 U.N. GAOR Res.Supp. (No. 16) 53, U.N. Doc. A/6316 (1966).

<sup>245</sup> Art. 4(5), O.A.S. Official Records, OEA/Ser.K/XVI/1.1, Doc. 65, Rev. 1, Corr. 2 (1970).

<sup>246</sup> Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, August 12, 1949 [1955], Art. 68, 6 U.S.T. 3516, 3560, T.I.A.S. No. 3365.

<sup>247</sup> *Thompson v. Oklahoma*, 487 U.S. 815, 830-31 & nn. 31, 34 (1988) (plurality opinion).

<sup>248</sup> *Id.*

<sup>249</sup> 487 U.S. at 869 n. 4 ("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.")

<sup>250</sup> *Id.* quoting *Palko v. Connecticut* 302 U.S. 319, 325 (1937) (Cardozo, J.).

<sup>251</sup> *Id.*

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*,<sup>252</sup> Justice Scalia wrote for the majority to reject the claim that the Eighth Amendment prohibited capital punishment for persons aged 16 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.<sup>253</sup> The relevant standards of decency, he argued, were those of "modern American society."<sup>254</sup>

*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 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.<sup>255</sup> Any broader inquiry under the Eighth Amendment would leave judgments under the Amendment to the "subjective views of individual judges."<sup>256</sup>

Justice Brennan now dissented for the four members of the *Thompson* plurality. Brennan challenged the majority's "revisionist view" of the Eighth Amendment,<sup>257</sup> 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,"<sup>258</sup> the views of professional organizations with expertise, and an independent judicial inquiry into whether a punishment was proportionate and satisfied its acceptable penal goals.<sup>259</sup> Justice Scalia's contrary approach, Brennan argued, would abandon the Eighth Amendment's protective role as a check on political majorities.<sup>260</sup>

With respect to foreign opinion, 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."<sup>261</sup> 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,<sup>262</sup> Brennan additionally observed that "[w]ithin the world community, the imposition of the death penalty for juvenile crimes appears to be

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<sup>252</sup> 492 US 361 (1989).

<sup>253</sup> *Stanford v. Kentucky*, 492 U.S. 361, 370, n. 1 (1989) ("We emphasize that it is *American* conceptions of decency that are dispositive. . . . While 'the 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 permitting, in our Constitution as well, . . . they cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people.'")

<sup>254</sup> *Id.* at 369.

<sup>255</sup> *Id.* at 369.

<sup>256</sup> *Id.* at 369.

<sup>257</sup> *Id.* at 391 (Brennan, J., dissenting).

<sup>258</sup> *Id.* at 384 (Brennan, J., dissenting).

<sup>259</sup> *Stanford*, 492 U.S. at 390-91.

<sup>260</sup> *Id.* at 391-92.

<sup>261</sup> *Id.* at 389,

<sup>262</sup> *Id.* at 390 (Brennan, J., dissenting).

overwhelmingly disapproved.”<sup>263</sup> In the previous decade, only 8 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 U.N. resolutions, prohibited the juvenile death penalty.<sup>264</sup>

*Atkins v. Virginia*<sup>265</sup> resurrected the *Thompson* Court’s approach to Eighth Amendment analysis, including restoring the relevance of international practice. In holding that execution of the mentally disabled constituted cruel 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.”<sup>266</sup> 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.”<sup>267</sup>

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.”<sup>268</sup> The opinion urged that while such “additional 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.”<sup>269</sup>

Despite the relatively inconsequential role of foreign 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 also wrote separately specifically “to call attention to the defects in the Court’s decision to place weight on foreign laws,” professional and religious organizations, and opinion polls, which he viewed as unsupported by precedent and antithetical to principles of federalism.<sup>270</sup> Rehnquist reiterated Scalia’s view from *Stanford* that the opinions of state legislatures and juries were the only relevant considerations.<sup>271</sup> 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.”<sup>272</sup> The Chief Justice viewed *Stanford* as having “soundly rejected” the idea that such information was relevant to establishing “a national consensus.”<sup>273</sup> Rehnquist also challenged the doctrinal pedigree of

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<sup>263</sup> *Id.* at 390 (Brennan, J., dissenting). Brennan noted that over 50 countries had abolished the death penalty entirely; 27 no longer imposed it in practice, and among the world’s retentionist countries, 65 prohibited the execution of juveniles. In addition, some of the 61 countries that retained the death penalty and had provisions exempting juveniles had ratified international treaties prohibiting the juvenile death penalty.

<sup>264</sup> *Id.* at 389-90 & n. 10.

<sup>265</sup> 536 U.S. 304 (2002).

<sup>266</sup> 536 U.S. at 312.

<sup>267</sup> *Id.* at 312-13.

<sup>268</sup> *Id.* at 316, n. 21, citing Brief for the European Union as *Amicus Curiae* in *McCarver v. North Carolina*, O.T. 2001, No. 00-8727, at 4.

<sup>269</sup> *Id.* at 316, n. 12.

<sup>270</sup> *Id.* at 322 (Rehnquist, C.J., dissenting).

<sup>271</sup> *Id.* at 324.

<sup>272</sup> 536 U.S. at 324.

<sup>273</sup> *Id.* at 325.

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,” the *Trop* plurality “represent[ed] the view of only a minority of the Court [and] offered no explanation for its own citation, and there [accordingly was] no reason to resurrect this view” given the Court’s rejection of it in *Stanford*.<sup>274</sup>

Justice Scalia condemned the majority decision as lacking support in either the text or history of the Eighth Amendment or in current public attitudes.<sup>275</sup> “Seldom,” he criticized, “has the opinion of this Court rested so obviously upon nothing but the personal views of its members.”<sup>276</sup> 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.’”<sup>277</sup> “Equally irrelevant” to the views of professional organization and opinion polls, he wrote, “are the practices of the ‘world community,’ whose notions of justice are (thankfully) not always those of our people.”<sup>278</sup>

The dissenters’ vehemence over the citation to foreign 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 that foreign practice should not determine the existence of a national consensus, but could help establish that that consensus reflects fundamental values. The dissenters’ primary disagreement with the majority was on the finding of a national consensus. Second, Chief Justice Rehnquist’s attack on the doctrinal support for resort to foreign practice is somewhat disingenuous. 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 current Court claimed to accept that the relevant test under the Eighth Amendment is the “evolving standards of decency that mark the progress of a maturing society” and fundamental views of “humane justice.”<sup>279</sup> Nothing in this test appears to limit the appropriate judicial inquiry to American views on this subject. To the contrary, the test itself invites consideration of widespread international values regarding what standards of decency mark the progress of “a maturing society,” and the principles of “humane justice.” The relevant scope of inquiry under this test may be the values of democratic societies, as Justice Scalia noted in *Thompson*. But nothing on its face limits the inquiry to potentially parochial American views, to the exclusion of more universal international values. 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.<sup>280</sup>

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<sup>274</sup> *Id.* at 325.

<sup>275</sup> *Id.* at 337 (Scalia, J., dissenting).

<sup>276</sup> *Id.* at 338 (Scalia, J., dissenting).

<sup>277</sup> *Id.* at 347.

<sup>278</sup> 536 U.S. at 348.

<sup>279</sup> *Weems v. United States*, 217 U.S. 349, 378 (1910).

<sup>280</sup> 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, 120 S.Ct. 459 (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. 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. 120 S.Ct. at 462-63 (Breyer, J., dissenting from the denial of

In *Roper*, the majority finally robustly re-committed itself to consideration of international law and reaffirmed a role for an independent judicial determination of what constitutes cruel and unusual punishment. 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. The Court rejected the suggestion that the United States' entry of a reservation to Article 6(5) of the International Covenant on Civil and Political Rights constituted meaningful evidence of a lack of national consensus on the question, noting 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.<sup>281</sup> 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."<sup>282</sup> 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. Foreign state practice also supported the finding, since only seven countries other than the United States had imposed the penalty in the prior 15 years. The Court finally offered a detailed consideration of developments in the United Kingdom, since the language of the cruel and unusual punishments clause derived from the 1689 English Declaration of Rights.

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"<sup>283</sup> and offered a classic global community standards justification: "[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."

Justice Scalia in dissent (joined by Justice Thomas and Chief Justice Rehnquist), 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 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

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certiorari) (citing decisions of the Privy Council, the Supreme Courts of India and Zimbabwe, and the European Court of Human Rights). Breyer conceded that there was no foreign consensus on this question, and that "obviously, . . . foreign authority does not bind us." *Id.* at 463. 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.* Justice Breyer's reasserted this view in objecting to the Court's denial of certiorari in *Foster v. Florida*, 537 U.S. 990, 123 S.Ct. 470 (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 certiorari). 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 in denial of certiorari).

<sup>281</sup> *Id.* at \_\_\_ (slip op. at 13).

<sup>282</sup> *Id.* at \_\_\_ (slip op. at 21).

<sup>283</sup> *Id.* at 24.

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.” Scalia questioned (without support) whether foreign states actually comply with the international prohibition on the execution of juveniles, and then contended that comparative foreign practice at any rate was irrelevant since the U.S. death penalty system considers mitigating circumstances while some other countries do not.

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.” Without differentiating international law from foreign practice, Scalia criticized the Court of 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.

Cases such as *Roper*, where international law has clearly articulated a position contrary to U.S. law, and where that international rule is supported by near universal state practice, are extraordinarily rare. It is rare for the international rule to be so brightly defined and universally accepted. Likewise, it thankfully is equally rare for United States penal practices to be so flatly out of step with an international rule.<sup>284</sup> Thus, cases where international *law*, as opposed to foreign state practice, is both on all fours with the constitutional question and overwhelmingly persuasive, should themselves be extraordinary. But where, as in *Roper*, the international consensus exists, its consideration seems entirely consistent with the search for what is “cruel and unusual.”<sup>285</sup>

Where such a rule 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 “a reason to disagree with the judgment reached by the citizenry and its legislators.”<sup>286</sup> This was the *Trop* plurality’s approach, and is what Justice Scalia’s dissent in *Roper* accused the Court of doing.

But the *Roper* majority’s view of the role of international law is much more modest. While *Roper* solidly confirmed a 50 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

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<sup>284</sup> 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. *Roper*, slip op. at 17. He did not explore, however, whether states have entered reservations or other qualifications to this prohibition, or whether actual state practice comports with ratification policies.

<sup>285</sup> Cite E. Young, Mark Weisburd.

<sup>286</sup> *Id.* at 312-13.

a more robust role to perceived uniform foreign practice to invalidate a federal statute, is fundamentally illegitimate.

## 2. Constitutional “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.<sup>287</sup> Judicial decisions construing the Fifth and Fourteenth Amendment due process clauses accordingly have looked to principles “implicit in the concept of ordered liberty”<sup>288</sup> to define the substantive limits due process imposes on government action. The Court’s substantive due process analysis has resorted to community standards of liberty both in determining the extent to which the Bill of Rights should be incorporated against the states through the Fourteenth Amendment and in prohibiting arbitrary and conscience-shocking government behavior. The Court’s analysis in these contexts consistently has analogized the search for liberties fundamental to Anglo-American traditions to those fundamental to all free societies. Thus, Justice Cardozo in *Palko v. Connecticut* equated the search for principles “so rooted in the tradition and conscience of *our* people as to be ranked as fundamental” with principles generally “implicit in the concept of ordered liberty.”<sup>289</sup> 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.”<sup>290</sup> The search for due process, in short, is a search for fundamental “human rights.”<sup>291</sup> 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 on occasion.

## 3. The Incorporation Doctrine

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<sup>287</sup> *Rochin v. California*, 342 U.S. 165, 170 (1951). As Justice Story observed, “[t]he 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.’” 3 Story, *Commentaries on the Constitution of the United States* 715-16 (1883), *quoted in* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (3<sup>rd</sup> ed., vol. 1, 2000). 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,” *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965); see also *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (Goldberg, J., concurring) (invoking the Ninth Amendment as recognizing a “concept of liberty” protected by the Constitution); *Id.* at 500 (Harlan, J., concurring in the judgment) (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.

<sup>288</sup> *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

<sup>289</sup> *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (Fourteenth Amendment does not incorporate the Fifth Amendment prohibition against double jeopardy against the states). *Id.* at 326 (Due process is “dictated . . . [by] the essential implications, of liberty itself”). *Duncan v. Louisiana* 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. 391 U.S. 145, 148-49 n. 14 (1968). *See also* *Moore v. East Cleveland*, 431 U.S. 494, 503-504 & n. 12 (1977) (applying *Duncan* approach to substantive due process).

<sup>290</sup> LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 778-79 (2d ed., 1988).

<sup>291</sup> *Rochin v. California*, 342 U.S. 165, 169 (1952).

The doctrine of substantive due process has roots in the nation's early natural law tradition.<sup>292</sup> In *Loan Association v. Topeka*, the Court invalidated a municipal ordinance on the grounds that “[t]here are 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.”<sup>293</sup> By the latter 1800’s, the Court began looking to common law principles for the limits on state authority imposed by substantive due process.<sup>294</sup>

*Hurtado v. California*,<sup>295</sup> 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.<sup>296</sup> The majority rejected this claim based on both text and history.<sup>297</sup> The Court defined due process as embodying the limits of “original justice”<sup>298</sup> on “arbitrary power.”<sup>299</sup> Due process, in other words, constituted not “a particular mode of procedure in judicial proceedings” but “the general principles of public liberty and private right, which lie at the foundation of *all free government*.”<sup>300</sup> While common law traditions were relevant to identifying these principles, so were the fundamental practices of other free societies:

The constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of the 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 Carta, 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*

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<sup>292</sup> See, e.g., *Fletcher v. Peck*, 10 U.S. (6 Cranch.) 87, 139, 135 (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); *Terrett v. Taylor*, 13 U.S. (9 Cranch.) 43, 52 (1815) (state law divesting church property violated “principles of natural justice” and “fundamental laws of every free government,” as well as the “spirit and letter” of the Constitution). For further discussion, see LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1338 (3<sup>rd</sup> ed., vol. 1, 2000).

<sup>293</sup> 87 U.S. (20 Wall.) 655, 662-63 (1874).

<sup>294</sup> E.g., *Barbier v. Connolly*, 113 U.S. 27, 31 (1885) (due process clause protects against arbitrary deprivations of common law liberty).

<sup>295</sup> 110 U.S. 516 (1884) (murder prosecution by information rather than indictment does not violate due process). See discussion in Neuman, *The Uses of International Law in Constitutional Interpretation*, *supra* note 22, at 83.

<sup>296</sup> U.S. CONST., Amend. 5 (“[n]o person shall be held to answer for a capital . . . crime, unless on a presentment or indictment of a Grand Jury”).

<sup>297</sup> 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. 110 U.S. at 534-35. The Court also concluded that trial by information had been recognized at common law.

<sup>298</sup> *Id.* at 532.

<sup>299</sup> *Id.* at 536.

<sup>300</sup> *Id.* at 520-21. *Accord id.* at 536 (“[T]here are such rights in every free government beyond the control of the state”).

*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.*<sup>301</sup>

Thus, the Court recognized that “fundamental principles of liberty and justice which lie at the base of *our* . . . civil and political institutions” were properly informed by “the best ideas of all systems and every age.”<sup>302</sup>

*Palko v. Connecticut* 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,<sup>303</sup> 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”<sup>304</sup> with principles so foundational generally “that a fair and enlightened system of justice would be impossible without them.”<sup>305</sup> Due process barred only practices that reasonable people believed were “repugnant to the conscience of mankind.”<sup>306</sup> Cardozo invoked foreign practice in support of this analysis,<sup>307</sup> but did not rely on international law.

#### 4. Protection against Arbitrary Government Action

The Court has applied a similar approach in determining the inherent limits that due process imposes on all “arbitrary . . . and purposeless restraints.”<sup>308</sup> Such fundamental rights cannot be infringed by governmental action absent a compelling state interest. In *Rochin v. California*, for example, Justice Frankfurter famously defined due process as prohibiting “conduct that shocks the conscience.”<sup>309</sup>

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. The Court instead tends to limit its consideration to anecdotal comparative foreign examples or to generic assertions that a practice is accepted by all free countries or “throughout Western civilization,” with little analysis or support. International authority also could be used in a variety of ways in these cases. It may be used to support a claim that a right is implicit in ordered liberty,<sup>310</sup> to deny such a claim,<sup>311</sup> to rebut a claim that a

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<sup>301</sup> *Id.* at 530-31 (emphasis added).

<sup>302</sup> *Id.* at 535, 536. 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 538, 542 (Harlan, J., dissenting).

<sup>303</sup> *Id.* at 325 (discussing the evolution of freedom of thought and speech protected through the Fourteenth Amendments).

<sup>304</sup> *Id.* at 328 (quoting *Hebert v. Louisiana*, 272 U.S. 312).

<sup>305</sup> *Id.* at 325.

<sup>306</sup> *Id.* at 322.

<sup>307</sup> “[D]ouble 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).

<sup>308</sup> *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

<sup>309</sup> 342 U.S. 165, 172 (1952). See also *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) (“executive abuse of power . . . which shocks the conscience . . . is ‘arbitrary in the constitutional sense’”).

<sup>310</sup> *Lawrence v. Texas*, 123 S. Ct. at (citing foreign examples to support finding of an “emerging awareness” when *Bowers* was decided that liberty protected fundamental decisions about private sexual conduct.)

right is not implicit in ordered liberty,<sup>312</sup> or to support or rebut a claim of a compelling state regulatory interest.<sup>313</sup>

Although international law (as distinguished from comparative practice) has played a very limited role in due process analysis, as in the Eighth Amendment context, international law could play a more robust role. To the extent that the substantive due process inquiry attempts to discern values fundamental to all free societies, the terms of widely ratified international treaties establishing basic rules for governmental treatment of citizens, such as the International Covenant on Civil and Political Rights and the Torture, Genocide, and Geneva Conventions should be an appropriate sounding board. Conversely, the circumstances in which such international treaties recognize exceptions to prohibitions should also be relevant to identifying the existence of a compelling governmental interest, though they would not be determinative of this question.

As with the Eighth Amendment cases, controversy over the Court's substantive due process analysis reaches far beyond the relevance of foreign authority. 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 "reluctance to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended."<sup>314</sup> This article should not be read as urging 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.

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From the perspective of legitimacy, the Court's approach to the community standards cases is not notably different from the other categories considered in this article. The Court's willingness to look to international standards in this context is somewhat analogous to that the approach in category II, since the Court reads the constitutional term ("due process," "liberty") as embodying, in part, an international conception regarding the basic rights of human beings. In contrast to many of the

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<sup>311</sup> E.g., *Bowers v. Hardwick* 478 U.S. 186, 196 (1986) (Burger, C.J., concurring) (pointing state regulation of sodomy's "ancient roots" throughout the history of Western civilization to deny a claim that criminalization of homosexual sodomy infringed on constitutional liberty interests).

<sup>312</sup> E.g., *Roe v. Wade*, 410 U.S. 113, 130-38, 140 (1973) (offering consideration of liberal historical abortion practices ranging from the Greeks and Romans through English and American practice to conclude that women previously enjoyed a substantially broader right to choose and thus rebut the claim that abortion was inherently subject to state regulation). See also *Lawrence v. Texas*, 123 S. Ct. at 2481, *Id.* at 2481, *citing Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (1981) para. 52 ("the [*Dudgeon*] decision is at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization").

<sup>313</sup> *Lawrence*, 123 S.Ct. at 2483 ("[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.").

<sup>314</sup> *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) (substantive due process does not obligate government to provide a safe workplace).

categories above, moreover, where international law played a robust role and at times established the entire rule of decision, international law generally has played a secondary and minimal role in the Court's overall analysis of community standards cases. With the possible exception of *Trop v. Dulles*, the community standard 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 the death penalty and due process contexts largely has been limited to supporting a perceived domestic community consensus.

### III. LESSONS FROM THE INTERNATIONAL CASES

This section examines the implications of the cases examined above for the debate over the relationship between international law and 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 for the length of 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."

The cases also offer some guidelines regarding the relationship between international law and constitutional interpretation. They rebut, for example, the contention of some scholars that resort to international law can be meaningfully limited by the subject matter of a particular constitutional provision. They also indicate that the Court generally has viewed international law as an evolving concept and has applied contemporary rules of international law, rather than limiting the role of international law to norms prevailing at the nation's founding. The cases further acknowledge that international law imposes limits on sovereign authority.

The cases also pose a number of difficulties for advocates of resort to international law in constitutional analysis. The cases do not reveal any particular methodology regarding when resort to international law is appropriate, and the Court's application of international law at times is sloppy or opportunistic. Furthermore, resort to international law in constitutional analysis is not invariably rights-protective. To the contrary, the Court frequently has invoked international law to expand governmental power at the expense of individual rights, and at times has employed it in ways that distort or deny existing constitutional rights protections. Finally, the cases do not confront questions about the implications of the resort to international law in constitutional governance. The cases, in short, underscore both the relevance of international law and raise 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 provide 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 in one or more of the categories above include John Marshall, Story, Taney, Bradley, Field, Brown, Gray, Fuller, Miller, John Marshall Harlan, White, Cardozo, Sutherland, Jackson, Frankfurter, Warren and Brennan. The Court also has invoked international law in contexts far beyond the community standards cases that have been the focus of current debates, including in cases involving the

war, treaty, and immigration powers, authority over Indians, the powers to borrow money and exercise eminent domain, the definition of involuntary servitude and personal jurisdiction under the due process clause.

The cases further demonstrate that *subject matter* 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 construing a “foreign,” rather than “domestic” constitutional clause.<sup>315</sup> Neither approach appears satisfactory, for several reasons.

First, other than the Offences clause, “textual invitation” for such resort is patent in few of the Constitution’s provisions. The treaty clause is a plausible candidate for resort to international rules, since treaties are principle instruments and repositories of international law and necessarily implicate U.S. interaction with foreign states. It would be odd, therefore, to approach questions of treaty interpretation based on wholly domestic legal standards utterly uninformed by international rules, and such an approach could raise diplomatic conflicts with other states. Because wars generally involve conflicts with foreign states, the war powers also are an area where resort to international rules might seem particularly appropriate, at least to ensure that the U.S. warmaking authority comports with that of other nations.

Even with respect to the treaty and war areas, however, resort to international standards is not invariably appropriate, given the Framers’ overt desire to constrain foreign relations powers recognized under then-existing international standards. Provisions such as the Suspension Clause and the Third Amendment’s prohibition against quartering of soldiers<sup>316</sup> were clearly intended to limit sovereign prerogative in warmaking, as were structural distributions of authority between the President, Congress, and the courts. Likewise, principles of federalism may limit the substantive scope of the U.S. treaty-making power to some sub-set of the areas allowable under international law.

It is also not obvious from the text and purpose of the Constitution that the foreign affairs clauses should be isolated for presumptive construction in light of international rules. Efforts to limit the application of international law to “foreign” clauses can be questioned on their face, given the longstanding debate over whether constitutional authorities can be meaningfully categorized as “domestic” or “foreign.”<sup>317</sup> Many “local” actions may have significant foreign affairs implications, as the Court’s recent jurisprudence in other contexts suggests.<sup>318</sup> Moreover, as discussed with respect to the community standards cases above,

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<sup>315</sup> See *supra* note 30.

<sup>316</sup> 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.”).

<sup>317</sup> Cite to E. Young; P. Spiro. The question also was of concern to the Framers. In Federalist No. 80, 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.”

<sup>318</sup> E.g., *American Ins. Ass’n v. Garamendi*, 539 U.S. 396 (2003) (invalidating California holocaust insurance act as infringing on U.S. foreign relations); *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2001) (invalidating Massachusetts Burma law 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

concepts such as “liberty” and “cruel and unusual” punishment 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 is not limited to such contexts. The appropriate touchstone is whether international law is relevant to the question at issue, not whether an obvious textual invitation is present.

Whether or not international law speaks to an issue also does not meaningfully limit the subject areas where international law may be relevant, since very few constitutional questions arise in the modern era on which international law is silent. Longstanding international law rules address questions of territoriality, international commercial relations, war and treaty powers, the rights of aliens and indigenous peoples and slavery, and the modern international human rights regime has further expanded the breadth, and depth, of international doctrine. Thus, Louis Henkin has argued that international law may be relevant to determining the meaning of a wide range of constitutional concepts, including equal protection, unreasonable searches and seizures, due process and fair trials, as well as determining the permissible limitations that governments may impose on such principles and the possible scope of governmental interests.<sup>319</sup>

Finally, the Supreme Court has not confined its resort to international law either to clauses that textually “invite” consideration of international norms or to “foreign” enumerated provisions. To the contrary, in the enumerated provisions cases, the Court looked to international law in construing provisions such as the First Amendment in *Boos v. Barry* and the Thirteenth Amendment in *Robertson v. Baldwin*, neither of which facially invites resort to international law or overtly implicates foreign relations. The inherent powers decisions in *Julliard v. Greenman* and *Kohl v. United States*<sup>320</sup> looked to the sovereign authority of states for a power to borrow money and the power of eminent domain.<sup>321</sup> The community standards cases likewise looked to international standards in construing the power to denationalize citizens and to execute juveniles under the Eighth Amendment. The most interesting decision for this discussion may be the decision in *Pennoyer*, in which the Court analogized from international law rules regarding relations among sovereigns to explain the structural relationship between the several U.S. states and resolve interstate disputes.

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. Thus, subject matter does not provide simple categorical answers to the question of when resort to international law is appropriate.

The Court’s invocation of international norms also does not appear to turn on any particular approach to constitutional interpretation. Instead, the Court has employed many of the ordinary modes of constitutional analysis – original understanding, text, structure, history,

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International Court of Justice. *Avena* (Mexico v. United States); *LaGrand* (Germany v. United States); *Breard* (Paraguay v. United States).

<sup>319</sup> Louis Henkin, *International Human Rights Standards in National Law: The Jurisprudence of the United States*, in *ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS* (B. Conforti and F. Francioni, eds, 1997) 198.

<sup>320</sup> 91 U.S. 367 (1875).

<sup>321</sup> *Kohl v. United States*, 91 U.S. at 371-72.

doctrine, and prudentialism – to support resort to international authority. Each of these methodologies has led the Court to look to international law in certain cases, but no particular constitutional approach is predominant. 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*. *Structure* appeared to play a role in the Court’s approach in deriving an inherent national power to exclude aliens in *Chae Chan Ping*, 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 *text* and *doctrine* in the community standards cases to invite consideration of international standards in identifying protected normative values of liberty and cruel and unusual punishment. *Prudential* considerations and perhaps *originalism* supported resort to the laws of war in construing the President’s power to seize enemy property in *Brown v. United States*, 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.

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 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 Evolving

The cases are also notable in applying international law as an evolving body of doctrine. The Court almost uniformly has viewed contemporary international rules as the appropriate normative reference and purports to adopt those prevailing international rules.<sup>322</sup> *Trop v. Dulles* and the other Eighth Amendment community standards cases expressly look to “evolving” standards of decency, but the Court consistently applies international law as an evolving body of doctrine across the other categories of cases as well. Cases addressing the government’s war powers, for example, reliably invoke the contemporary rules of war.<sup>323</sup> The inherent powers immigration and territory cases similarly applied late-nineteenth century principles regarding authority over aliens<sup>324</sup> and acquired territories.<sup>325</sup>

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<sup>322</sup> E.g., *Arver*; *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).

<sup>323</sup> E.g., *Brown v. U.S.*; *Prize Cases*, *Quirin*, *Hamdi*. Justices at times have expressly recognized the evolving nature of the international norm being applied. In *Brown v. U.S.*, 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. U.S.*, 12 U.S. (8 Cranch) 110, 125 (1814) (relying on the “mitigated law of nations”). Accord *id.* at 145 (Story, J., dissenting) (applying “the modern law of nations”).

<sup>324</sup> *Chae Chan Ping*; *Fong Yue Ting*.

<sup>325</sup> *Jones v. United States*.

Treating international law as an evolving concept is consistent with the fact that the Court generally does not rely on a narrow originalist justification for its resort to international law. An originalist approach would contend that the Framers understood a particular constitutional provision to incorporate international norms. A static originalist approach might also seek to confine the constitutional doctrine to whatever international rule existed at the founding.<sup>326</sup> Justice Ginsburg has criticized this approach as “frozen-in-time.”<sup>327</sup> An alternative 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, and that those international norms would evolve as international law developed. In other words, an organic conception of originalism would view the framers as understanding that the Constitution should be interpreted in light of an evolving body of international law.

To the extent that the Court appears to be inspired by an originalist conception in its invocation of international law, it appears to have adopted the latter, organic approach.<sup>328</sup> 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.<sup>329</sup> The Court generally accompanies citations to Vattel with citations to more contemporary international law writers, however, as it did in *The Prize Cases*, *Jones v. United States*,<sup>330</sup> *Nishimura Ekiu*, and *Fong Yue Ting*.<sup>331</sup> In upholding the draft in *Arver v. United States*,<sup>332</sup> for example, the Court cited Vattel for the proposition that the right to compel military service lies at “the very conception of a just government,”<sup>333</sup> but also concluded that this remained the contemporary rule, as indicated by nearly universal modern practice.<sup>334</sup> Even when the Court has expressly offered an originalist justification for looking to international law, as it did in upholding the power to establish consular courts abroad in *In re Ross* and the power to issue legal tender in *Julliard v. Greenman*, the Court appears to assume that international law has carried the rule forward

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<sup>326</sup> Chief Justice Taney articulated this view in *Dred Scott*, as follows:

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

*Scott v. Sandford*, 60 U.S. (19 How. 393, 426 (1857)).

<sup>327</sup> Ruth Bader Ginsburg, *Looking Beyond Our Borders*, *supra* note 6, at 14 (on file with the author).

<sup>328</sup> Henry Monaghan, *cite*

<sup>329</sup> *See* Neuman, *supra* note 22, at 83.

<sup>330</sup> 137 U.S. 202, 212 (1890) (citing Vattel, Wheaton, Halleck, Phillimore, and Calvo for the authority to govern acquired territory). Compare

<sup>331</sup> *Kohl v. United States*, 91 U.S. 367, 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.”)

<sup>332</sup> 245 U.S. 366 (1918). The case construed the powers to declare war and raise armies. U.S. CONST., Art. I, § 8, cl. 11, 12.

<sup>333</sup> *Id.* at 378, citing EMER DE VATTEL, THE LAW OF NATIONS.

<sup>334</sup> *Id.* at 378, n. 1 (citing the practices of 36 countries).

unchanged to the date of the case, and may cite contemporary practice in support of this point.<sup>335</sup> In other cases, the Court simply invokes the modern international law rule.<sup>336</sup>

In short, the Court has almost uniformly looked to international law as an evolving body of doctrine, and has applied the contemporary rules of international law in its constitutional analysis. To the extent that the Court's approach is informed by an originalist conception, it appears to adopt an organic originalist approach, which understands the Constitution as having been intended to incorporate, to some degree, an evolving body of international norms. Moreover, the Court's consistent resort to contemporary international rules when it looks to international law in cases across the constitutional spectrum, suggests that the resort to contemporary international rules in the community standards cases does not reflect a peculiar effort by certain justices to remake American society according to their particular social vision, but instead represents a deeper, reflexive assumption about the propriety of resort to international rules.

### C. 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* 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). It is unclear whether the Court properly invoked international law in the immigration cases, since many international writers recognized greater protections for denizens and long term residents that the Court failed to acknowledge.<sup>337</sup> Scholars also have noted that the principle of strict territorial limits in *Pennoyer* had eroded by the time of that decision.<sup>338</sup>

At other times, the Court's methodology in determining international law appears flawed. Here, 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 his resort to international standards. There is nothing patently incorrect about considering 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,<sup>339</sup> 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 an exception to involuntary servitude. Instead, Brown failed by looking to the practices of states where slavery was *lawful* to try to identify an exception to involuntary servitude. He failed in his choice of sources. The proper inquiry should have focused on the extent to which countries with

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<sup>335</sup> *Julliard v. Greenman*; *In re Ross*; *Johnson v. Eisentrager*.

<sup>336</sup> E.g., *Pennoyer*.

<sup>337</sup> See discussion *infra* Part II.B.

<sup>338</sup> See Juenger, *A Shoe Unfit for Globetrotting*, 28 U.C. DAVIS L. REV. 1027, 1029 (1995) (noting that "long before Justice Field decided *Pennoyer*, the English . . . had already given up on requiring service in the forum"). See also the Exchange.

<sup>339</sup> Cite.

analogous *prohibitions* on involuntary servitude recognized an exception for coercing labor from seamen. Brown's modern examples also suggested that there was no international consensus that the exception he sought existed.<sup>340</sup> The case thus illustrates the importance of determining *what* international authority is appropriate for consideration regarding any particular question. Just as prior U.S. practice may not be relevant to the construction of a provision that was 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 construed to comport with such 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 *consensus* regarding fundamental liberties.

Finally, at times it appears that although the Court may have properly construed the international rule, its application of traditional modes of analysis to conclude that the rule is relevant 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,<sup>341</sup> for example, seems improbable, given the Founders' desire to reject the authoritarian colonialism of England.<sup>342</sup>

It should go without saying that resort to international standards in constitutional analysis can only be legitimate to the extent that the Court makes a determined effort to accurately construe and apply international law, and to meaningfully validate claims of widespread state practice.

#### D. International Law as Rights-Diluting

In sharp contrast to the assumptions of many current proponents and detractors of resort to international law in constitutional interpretation, international law has played a decidedly mixed role with respect to advancing individual rights. Certainly, resort to international law is not invariably rights-enhancing. To the contrary, resort to international law for a constitutional rule of decision frequently has enhanced federal authority, at times at the expense of individual rights. Even in cases where the Court has invoked international law or practice to interpret an individual rights provision, the end result often has been to uphold the exercise of government power rather than to restrain it.

The Court's jurisprudence has been rights-diluting in three ways. First, in cases in which the Court has looked to international law to define the scope of government authority to act, the Court on occasion has failed to recognize and apply limits on that power 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 longstanding resident aliens in *Chae Chan Ping* and *Fong Yue Ting*, for example, the Court refused to acknowledge the limitations that international law imposed on the exercise of this power over denizens and other long-term resident aliens.<sup>343</sup>

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<sup>340</sup> 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.

<sup>341</sup> *Dorr v. United States*.

<sup>342</sup> 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 3 JARED SPARKS, *THE LIFE OF GOUVERNEUR MORRIS* 192 (Boston, Gray & Bowen 1832), discussed in Cleveland, *Powers Inherent in Sovereignty*, *supra* note 149, at 167, n. 1148.

<sup>343</sup> Cleveland, *Powers Inherent in Sovereignty*, *supra* note 149, at 83–87.

Second, to the extent that the Court has invoked international law in support of broad governmental power, the Court at times also 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 individual rights protections in the constitutional text. The immigration and Indian inherent powers cases are probably the most egregious example of this maneuver. In both areas, the Court elevated the international authority to a power so plenary that it appeared largely unlimited by due process or other constitutional protections.<sup>344</sup> Likewise, in the *Insular* cases, although the Court ultimately rejected the claim that constitutional protections were irrelevant to territorial governance, the Court nevertheless found that the power to govern territories, as derived from international law, severely limited the constitutional protections that applied. *In re Ross* also upheld application of the treaty power to establish consular courts abroad, and then applied principles of territoriality to deny the application of constitutional protections to that process.

Finally, even where the Court has invoked international law in construing individual rights protections, rather than in construing enumerated powers, the effect frequently has been rights-diluting. An example is Justice Brown's construction of the Thirteenth Amendment in *Robertson v. Baldwin*, in part because the Court's analysis of international law in that case suffers from the defects previously addressed. Even in the substantive due process cases, foreign practice has been invoked to deny claimed individual rights as well as to protect them.<sup>345</sup> This is due at least in part to the Court's search for principles fundamental to free societies as the touchstone for identifying due process rights. If the question whether a right is fundamental turns on whether *any* free society denies that right, or whether, as Justice Cardozo put it in *Palko*, *any* right-minded person could reasonably believe a government action was acceptable, then a few contrary foreign examples are likely to undermine a claim of right, while near-uniform acceptance would be required for the right to be recognized. The Court's 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 were decided when neither international law nor the Constitution imposed robust limits on governmental power. The Court's older decisions, and particularly those decided before the rise of the modern international human rights regime,<sup>346</sup> were adopted during a time when international law imposed substantially fewer limits on sovereign authority over individuals. The older cases were also decided during a period when the imposition of *constitutional* individual rights to constrain governmental action was rare.<sup>347</sup> Thus, the older cases may reflect, not so much

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<sup>344</sup> *Id.* at 77–123.

<sup>345</sup> E.g., *Hurtado*, *Palko v. Connecticut*; Bowers (C.J. Burger, concurring). *Cf.* *Reynolds v. U.S.* 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.”)

<sup>346</sup> 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. But 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.

<sup>347</sup> Justice Brown's opinion in *Robertson v. Baldwin*, for example, becomes less surprising in light of the fact that Brown also was the author of *Plessy v. Ferguson*, and declined to find any applicable constitutional protections in *Downes v. Bidwell*. Thus, Brown's tortuous interpretive approach in that case may have had less to do with

abuse of international norms to dilute individual rights, as the weaker state of individual rights overall in the era.

The observation is also qualified by the observation that Justices have recognized the limitations imposed by international law and have enforced those limits in some contexts. In the enumerated provisions category, *Pennoyer v. Neff* notably limited the scope of state judicial authority based on international rules of sovereign territorial jurisdiction.<sup>348</sup> *De Geoffrey v. Riggs* portrayed international norms as limiting the scope of the federal treaty power. The *Cunard* majority construed the Eighteenth Amendment in light of international law principles of territoriality to deny the application of prohibition rules to U.S.-flagged vessels outside of U.S. territorial waters. *Brown v. United States* also employed international law to limit executive war powers, at least in the absence of specific authorization from Congress. Community standards cases like *Trop v. Dulles* and *Thompson v. Oklahoma* also invoked limits under international law and practice in support of constitutional constraints on government power. The inherent powers cases rarely acknowledged limits on governmental power. But in *Worcester v. Georgia*, Chief Justice Marshall retreated from his broad articulation of the discovery doctrine in *Johnson v. M'Intosh* and looked to international law and the discovery doctrine to emphasize the limits that international law imposed, through the constitutional structure, on Georgia's authority over the Indians. Other jurists have also acknowledged the limits that international law imposed, even when those limits are not directly implicated in the question before the Court. In *Brown v. United States*, Justice Story asserted in dissent that the President could exercise all powers authorized by "the modern law of nations," but that he could not confiscate enemy *debts*, since this was not allowed by international law.<sup>349</sup> In short, the war powers imputed to the President from international law were limited to the scope of those international rules.<sup>350</sup>

Principled application of international law in constitutional analysis requires that a court also apply the limitations imposed by international law when it looks to international rules as a source of constitutional power, and that international law should not be employed to undermine or distort protections – whether rights-based or structural – that the Constitution was designed to preserve. These questions will be explored further in the next section.

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In sum, the international law cases provide lengthy doctrinal support for the relevance of international law to constitutional adjudication. Indeed, given the Court's longstanding 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 authority. The content of other sovereign powers, such as modern powers over immigrants and Indians, also substantially derives from international law. The cases also establish that international law should be treated as an evolving body of doctrine. The cases, however, reveal no overarching

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his theory of the relationship between international law and constitutional protection than with his consistently restrictive view of the scope of individual liberties.

<sup>348</sup> See discussion *infra* Part I.

<sup>349</sup> 12 U.S. (8 Cranch) 110, 145-46 (1814) (Story, J., dissenting).

<sup>350</sup> 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. 262 U.S. 100, 122-24, 132 (1923) (Sutherland, J., dissenting).

principle governing when the Court should resort to international law as an authoritative interpretive tool. Other than the justifications addressed above, 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 seeks to answer these difficult normative questions by considering countermajoritarian criticisms of the use of international law, setting forth four principles to guide the application of international law in constitutional interpretation, and then illustrating the operation of those principles by applying them to the decision in *Hamdi v. Rumsfeld*.

#### IV. Legitimacy and the Democracy Deficit

The Court's caselaw involving the use of international law makes little or no effort to explore recently raised concerns about the countermajoritarian implications of the practice.<sup>351</sup> Although a number of objections have been posed 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, the primary objection raised to consideration of international law in constitutional interpretation is that the practice suffers from a democracy deficit. The objection appears to have two dimensions: The first raises the classic countermajoritarian concern that constitutional adjudication that invalidates state or national legislation violates principles of democratic governance by supplanting the majoritarian wishes of duly elected representatives with the views of judges who are unelected and unaccountable. This concern would seem to be easily rebutted, since to the extent that the Constitution imposes limits on legislative decision-making through the structures of federalism and separation of powers and individual rights provisions, judicial enforcement of those rights and relationships is necessarily non-majoritarian. In this sense, constitutional analysis that considers international law is no more, or less, countermajoritarian than any other. But the fact that judicial review is non-majoritarian does not mean it is undemocratic, since structural divisions of governmental authority and protections for individual rights are designed precisely to constrain raw majoritarianism to ensure more effective democratic governance.

The second aspect of the "democratic deficit" concern regarding the use of international law is more applicable, but ultimately is equally unsatisfying. This is the concern that international law is neither a product of American democratic processes, nor a part of American "traditions." It is created by foreigners through undemocratic processes and thus is alien to the American constitutional tradition. 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 U.N. system and the creation of modern international treaties ranging from human rights and humanitarian law to international intellectual property and international trade. In the post-9/11 world, the United States maintains that the

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<sup>351</sup> Ely, *Democracy and Distrust*.

adoption of the Bush preemption doctrine does not breach, but alters, traditional rules regarding the international use of force. The familiar quip that ‘other nations may violate international law; the United States makes precedent,’ may overstate the case, but contains an important kernel of truth regarding the significance of U.S. influence over the international legal system.

Second, the concern that international law is not the product of democratic institutions, to the extent that it is correct, is a red herring. 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. Thus, it cannot be the non-democratic (or non-majoritarian) process that creates international law that renders it ineligible for use in constitutional analysis.

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.<sup>352</sup> Reliance on examples from history, Anglo-American traditions, and practices under the common law 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 ancestors, 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 decision-making over the course of the nation’s history reflects a tradition that assumes that international law *is* a significant part of the American constitutional tradition and that international law has been viewed as a legitimate source of law in constitutional interpretation throughout the course of the nation’s history. The cases considered above demonstrate that resort to international law to inform constitutional meaning is one of many longstanding and accepted U.S. interpretive traditions. International rules, in other words, historically have been legitimate “rules of recognition.”<sup>353</sup> Indeed, a nineteenth-century judge would find the modern objection quite baffling, since in the last century, international law was assumed to inform the meaning of many constitutional concepts that are now considered entirely “domestic,” including concepts of commerce, freedom of contract, eminent domain, and so on.

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

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<sup>352</sup> See, e.g., Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. Rev. 1971, 2006 (2004) (“the U.S. Constitution is supposed to reflect *our own* fundamental legal and political commitments . . . It is the self-giveness of the Constitution . . . that gives it authority as law.”) (emphasis added).

<sup>353</sup> 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).

filtering through domestic U.S. legislative or judicial processes, that would constitute a basic abdication of the judicial function.<sup>354</sup>

But considering international values as one element in the test for identifying cruel and unusual punishments under the Eighth Amendment, or even the more Court's more robust use of international law to effectively provide the rule of decision in other constitutional contexts, 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.

## V. TOWARD A PRINCIPLED ROLE FOR INTERNATIONAL LAW

The Court's decisions looking to international law to provide constitutional meaning demonstrate the relevance of international law to constitutional analysis and raise challenging questions regarding when the practice is appropriate and what criteria should govern this judgment.

Under any constitutional system, 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."<sup>355</sup> Thus, although an international law rule may be relevant to a constitutional question, it is the domestic constitution that determines the extent to which any received international law principle operates within that structure.<sup>356</sup> As noted in Part I, above, international law alone cannot 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 level.

The point that it is the Constitution that determines the operation of international law within its structure has 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.

On the other hand, Chief Justice Taney made the opposite mistake in rejecting the relevance of international law in *Dred Scott*.<sup>357</sup> "[I]n considering the question before us," Taney wrote, "it 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. . . .

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<sup>354</sup> Cite Aleinikoff.

<sup>355</sup> HENRY W. HALLECK, INTERNATIONAL LAW; OR RULES REGULATING THE INTERCOURSE OF STATES IN PEACE AND WAR (1861), ch. 33, § 14 (emphasis added). Halleck was rejecting Chief Justice Marshall's suggestion in *American Insurance v. Canter* that international law rules of conquest might definitively resolve the question of the Constitution's application to newly acquired territories.

<sup>356</sup> *Accord* Pollard v. Hagan, 44 U.S. (3 How.) 212, 225 (1845) (invoking international law to hold 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").

<sup>357</sup> *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

[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.”<sup>358</sup> Taney’s argument that the law of nations should not “enlarge” the powers of the government, however, begged the question of the relationship between international law and the Constitution. 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 whether the constitutional powers themselves are informed by international norms.

Taney himself elsewhere recognized that international law could provide the substantive content for constitutional powers and that the Constitution determined the operation of such international rules.<sup>359</sup> In *Holmes v. Jennison*, for example, Taney argued that the scope of the treaty clause could be 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.”<sup>360</sup> The view asserted by Taney, Justice Harlan, and others that the national government does not enjoy the full panoply of powers held by sovereign nations, given the “peculiar” limited sovereignty of the United States, is also fully consistent with this approach.<sup>361</sup> Conceding that the Constitution limits the powers enjoyed by other eighteenth-century governments is a truism that says nothing about the extent to which the powers conferred by the Constitution, or the limits imposed by that instrument, are informed by international rules. It simply recognizes that the operation, if any, of the international law rule must be filtered through principles established by the government’s founding document.

Determining when it is appropriate to consider international sources and what role they should play in relation to a constitutional structure 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.<sup>362</sup> Some constitutions, such as that of Argentina,<sup>363</sup> Venezuela, Austria,<sup>364</sup> and the Netherlands,<sup>365</sup> explicitly allow certain international obligations to be given constitutional status. Others, such as the constitutions of

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<sup>358</sup> *Id.* at 451.

<sup>359</sup> Indeed, Taney invoked sovereign international powers to recognize sweeping federal constitutional authority over Indians in dicta in *Rogers v. United States*. See discussion *infra* Part II.B..

<sup>360</sup> 60 U.S. at 569. See discussion *infra* Part II.A.

<sup>361</sup> *Id.* at 401 (“[A]lthough it [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).

<sup>362</sup> Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 STAN. L. REV. 1863, 1890-1897 (2003).

<sup>363</sup> The current constitution of Argentina establishes 11 specified human rights treaties as having constitutional status, and authorized the addition of other human rights treaties to this rank through a supermajority vote in the legislature. CONSTITUCIÓN ARGENTINA, art. 75(22). For an illuminating discussion of this provision and its application by the Argentine courts, see Janet Levit, *The Constitutionalization of Human Rights in Argentina: Problem or Promise?*, 37 COLUM. J. TRANSNAT’L L. 281 (1999).

<sup>364</sup> 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 discussion in Neuman, *Human Rights and Constitutional Rights*, 55 STAN. L. REV. at 1890 & n. 88.

<sup>365</sup> 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. See also NATIONAL TREATY LAW AND PRACTICE 133 (M. Leigh et al., eds., 1999).

Spain<sup>366</sup> and South Africa,<sup>367</sup> provide that international law must be considered in interpreting fundamental constitutional rights. Thus, in South Africa, courts must examine the international norms relevant to constitutional individual rights questions, even if the international norms are not directly binding on South Africa.<sup>368</sup> But the courts are not obligated to follow the international rule, if other considerations prove compelling.

Constitutional systems such as these address the relationship between some international norms and constitutional principles more explicitly than the U.S. Constitution, which leaves international law's role in constitutional analysis largely to judicial interpretation. But such constitutions still pose interpretive difficulties. In "consider[ing] international law," for example, a South African court would confront the same question as a court in the U.S.: 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? And while many constitutions require resort to international law in construing individual rights, they leave to the courts to determine when international rules may be relevant to other constitutional questions. Discerning the appropriate role of international law in constitutional interpretation in any of these contexts accordingly requires a deeper examination of both the international law rule and the domestic constitutional equation to which it relates.

The remainder of this section proposes 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 – that is relevant to the constitutional question at issue. Many constitutional questions, of course, have no international legal parallel. In those cases which do, however, I argue that in sorting out this relationship, courts should consider (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 and whether states comply with it in practice; (3) the extent to which the international norm has been accepted or rejected by the United States; and (4) any limits that international law imposes on operation of the international rule. Application of 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 embodied in the Constitution.

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<sup>366</sup> The Spanish Constitution of 1978 provides that "norms relative to basic rights and liberties which are recognized by the Constitution, shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements on those matters ratified by Spain." CONSTITUCIÓN ART. 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 364, at 1895, n. 101.

<sup>367</sup> 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. § 39(1) (1997) (emphasis added).

<sup>368</sup> *South Africa v. Grootboom*, 2001 (1) SALR 46, 63 & n. 29 (CC), discussed in Neuman, *Human Rights and Constitutional Rights*, *supra* at 1897 & nn. 107-108.

## A. Constitutional Receptiveness to the International Rule

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 be received by the constitutional structure. This inquiry breaks down into two separate questions: whether the specific constitutional provision at issue poses some obstacle to the international rule, and whether some other aspect of the constitutional design, including structure and individual rights protections, partially limits or completely bars operation of the international law rule. In *Chae Chan Ping* and other inherent powers cases, the Court failed to engage in either part of this analysis, and simply assumed that international law powers must be possessed by the U.S. government in their full force, without any consideration of how those international powers were received by the constitutional structure or whether the Constitution imposed limits on them.

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.” They had carefully studied other democratic and federal systems, and they intended for the United States to take its place among the community of nations by adhering to international law. 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 in general thus was significantly more “monist,” in assuming that international law was part of domestic law, than the contemporary American view.<sup>369</sup>

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 through the practices of authoritarian states. Traditional powers of sovereign prerogative such as warrmaking were constitutionally limited and distributed,<sup>370</sup> and the 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. Any effort to determine the appropriate relationship between international law and the Constitution accordingly must recognize that that instrument both received and rejected international rules.

Determining the Constitution’s receptiveness requires consideration of the specificity or generality of the relevant constitutional text, the historical interpretation of the provision, the extent to which the constitutional question is genuinely settled or unsettled, and the distinctiveness of the established constitutional rule from the international approach (or the extent to which the international rule would alter preexisting domestic interpretive approaches).

Clear contrary text could bar consideration of an international norm. Thus, the Fifth Amendment’s requirement of grand jury indictment for most capital crimes would bar

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<sup>369</sup> See Harold H. Koh, *International Law as Part of Our Law*, 98 AM. J. INT’L L. 43-45 (2004) (discussing resort to international authority in the Founding era).

<sup>370</sup> 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.”)

application of an international law rule that allowed prosecution based on information by the federal government in most circumstances.<sup>371</sup>

A longstanding, consistent, and entrenched interpretation based on original understanding or some other doctrinal rule also could suggest that an international rule was barred by the constitutional design. The mere fact that a clause originally was intended to depart from then-existing international practices, however, would not itself definitively resolve the question whether international law may be relevant *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' own constitutional norms.<sup>372</sup> A contrary doctrinal rule of longstanding and consistent judicial application could include judicial construction of the First Amendment, which does not allow the governmental prohibition of war propaganda that international law mandates.<sup>373</sup> Other accepted methodologies of constitutional interpretation, such as history, doctrine, or prudential considerations, may weigh toward or against application of the international rule in any given context.

Traditional modes of analysis may combine in some circumstances to erect a constitutional barrier to an international rule. In holding that persons of Chinese descent could be natural born citizens under the Fourteenth Amendment in *United States v. Wong Kim Ark*,<sup>374</sup> the Supreme Court relied in part on the Amendment's textual application to "all persons" born "subject to the jurisdiction" of the United States. However, 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 United States government urged was the majority international rule.<sup>375</sup> The Court ultimately concluded that the text, history and purpose of the Fourteenth Amendment<sup>376</sup> all barred resort to the alleged international rule governing citizenship.<sup>377</sup>

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<sup>371</sup> Cf. International Covenant on Civil and Political Rights, art. 9 ("Anyone who is arrested . . . shall be promptly informed of any charges against him").

<sup>372</sup> Lillich, *International Human Rights in U.S. Courts*, cite.

<sup>373</sup> International Covenant on Civil and Political Rights, art. 20 (requiring that states legally prohibit "[a]ny propaganda for war" and "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility, or violence").

<sup>374</sup> 169 U.S. 649 (1898).

<sup>375</sup> 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).

<sup>376</sup> 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 the 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 169 U.S. at 675-76 (discussing 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").

<sup>377</sup> 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*, 3 Pet. 248 (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

Recognition of an established interpretive barrier creates a strong, but not wholly insurmountable, obstacle to receipt of an international rule. Principles of *stare decisis* would support adherence to the established rule. I say not wholly insurmountable, because judicial construction of constitutional provisions does evolve. It is, after all “a constitution we are expounding.”<sup>378</sup> The persistent presence of a contrary international rule thus could raise the question whether a domestic practice should be reconsidered, though not definitively resolve it. Indeed, a court *should* consider the existence of a contrary international rule and the reasons supporting the international community’s adoption of that rule. The court nevertheless may not find the explanation for the international rule persuasive and may ultimately be more convinced by the reasons supporting the existing contrary constitutional practice.

The search for interpretive barriers to receipt of an international norm concededly is a flexible standard. Jurists such as Justice Scalia who believe international law should always be irrelevant to constitutional analysis presumably would find that interpretive barriers precluded consideration of international norms in any particular circumstance. The question in *Printz v. United States*<sup>379</sup> was the relevance of comparative, rather than international law, sources, but the debate in that case illustrates the difficulty in identifying constitutional barriers. Although the Constitution does not expressly address whether Congress may “commandeer” state officers to execute federal laws, Justice Scalia concluded that structure, history, practice, and doctrine conclusively established that respect for state sovereignty constitutionally barred such action. The question, in other words, was settled. Justice Breyer, by contrast, found these sources to be 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 of an unsettled question.<sup>380</sup> The fact that identifying constitutional barriers 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. In short, the relevance of an international rule will depend to some degree on the ambiguity of a constitutional provision. 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 is near the other extreme of the spectrum in terms of constitutional ambiguity. The principle of commandeering is not expressly set forth in the Constitution’s text, and is highly doubtful with respect to either intent or structure.

If a court concludes that a particular constitutional provision is open to being informed by international legal principle, the court must then consider to what extent other aspects of the constitutional design may also constrain operation of the international rule. It would be entirely possible for other aspects of the constitutional design, including structural and individual rights

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(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”).

<sup>378</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

<sup>379</sup> *Printz v. United States*, 591 U.S. 898 (1977).

<sup>380</sup> *Id.* at 977 (Breyer, J., dissenting) (observing that foreign sources “may 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* (K. Nicolaidis and R. Howse, eds., 2001), at 213.

considerations, to restrict domestic operation of an international norm. Thus, the dissenters in *Fong Yue Ting* contended that even if Congress possessed authority to deport aliens derived from international law, that power must be exercised consistent with due process and other express protections in the Constitution. 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.

The structure and purpose of the Constitution also suggest that constitutional protections should not lightly be read to fall below the minimum standards set by the international community. This assumption is based on two considerations. First, rights protections under international law represent a minimum or baseline standard for acceptable state behavior that even authoritarian countries have agreed to protect. As such, international law represents the least common denominator of acceptable state behavior. Second, one of the Constitution's guiding principles was to raise the bar for human rights and to set a modern standard for protection of individual liberties. To the extent that our founding document departed from the international norms of the day, it did so primarily to protect individuals from governmental interference. This was accomplished both through the structural principles of separation of powers and federalism, and through the Constitution's express protections for individual rights. It is, of course, possible that modern international human rights protections have caught up with, or even surpassed, constitutional norms that the Framers considered visionary in their day. But both respect for the Constitution's underlying purpose and recognition of this function of international law suggest that U.S. conduct that falls below the international least common denominator should raise serious questions. For the same reasons, however, minimum international standards that are acceptable to authoritarian states should not impose a presumptive cap on the level of protection our Constitution and democratic system are intended to provide.<sup>381</sup>

This approach also has found support in U.S. constitutional analysis. The Supreme Court's longstanding rule that Eighth Amendment jurisprudence should be tied to the "evolving standards of decency that mark the progress of a maturing society" incorporates this principle, as does the Court's jurisprudence tying substantive due process to "principles of ordered liberty." Moreover, in *Miranda v. Arizona*, the Court noted with approval the restrictions on interrogations imposed by England, Scotland, and India, and concluded that the Fifth Amendment should be construed to afford at least as much protection, given the U.S. Constitution's more explicit protection of the rights:

[I]t is consistent with our legal system that we give at least as much protection to these rights as is given in the jurisdictions described. We deal in our country

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<sup>381</sup> To the extent that other foreign constitutions expressly incorporate international obligations into their constitutional analysis or require that the constitution be construed "in conformity with" international law obligations, they do so with respect to fundamental rights. See *discussion supra*. In confrontations between domestic rights and international law human rights in such systems, Gerald Neuman has suggested that the requirement that national constitutional individual rights be interpreted "in conformity with" human rights treaty obligations "should be understood as making the treaties the minimum level of constitutional protection." Neuman, *Human Rights*, *supra* note 364, at 1896. But see Judgment 62/82 of 15 October 1982 (decision by Spanish constitutional court using "protection of morals" criterion from European Convention on Human Rights to impose a limit on freedom of expression not otherwise recognized by the Spanish Constitution), discussed in Neuman, *supra* at 1896, n. 104.

with rights grounded in a specific requirement of the Fifth Amendment of the Constitution, whereas other jurisdictions arrived at their conclusions on the basis of principles of justice not so specifically defined.<sup>382</sup>

A presumption that the level of constitutional protection should not fall below an established international baseline is subject to the criticism that it is sometimes difficult to determine whether an approach is more or less rights-protective.<sup>383</sup> Individual rights may be implicated on both sides of an issue. Thus, the question whether the First Amendment should allow regulation of hate speech pits the interests of speakers against the interests of those who seek protection from offensive speech. Questions of reproductive choice may pit a woman's interest in being free from state regulation against the perceived interests of a fetus. Such dilemmas may be resolved in some contexts by allowing the preexisting domestic rule to prioritize the relevant rights at stake. Nevertheless, true conflicts between recognized constitutional rights will be inevitable in some contexts, and the international baseline will not suggest a default outcome in those cases.

## 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 state practice conforms to the rule. These questions go to the persuasive force of the international rule. Clear definition helps ensure accurate application of the international rule, while broad international support may suggest a well-grounded reason for the norm.<sup>384</sup> Thus, a norm that is set forth in a treaty creates legal obligations, but that norm may be more, or less, persuasive depending upon how widely the treaty has been ratified and how consistently states have respected that treaty obligation in practice. Widespread ratification supported by near universal state practice, as was the case with the juvenile death penalty in *Roper*, would be entitled to greater persuasive weight than empty ratifications.<sup>385</sup> Moreover, norms rising to the level of customary international law, which reflect widespread and consistent state practice taken under a sense of legal obligation, should have greater persuasive force than equally widespread state practice that but simply reflected the overlapping sovereign choices of individual states rather than a binding legal obligation.

Lack of international consensus on a particular question does not necessarily render resort to international values irrelevant, though it may reduce the persuasiveness of the reasons for accepting any particular rule. The United State's recognition of "tag" jurisdiction as constitutionally protected<sup>386</sup> 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. There is, however, 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 enjoys neither the status of international law nor uniform acceptance by states. Although reasons may

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<sup>382</sup> *Miranda v. Arizona*, 384 U.S. 486, 489-90 (1966).

<sup>383</sup> Alford, *supra* note 30; Larsen, *supra* note \_\_\_\_.

<sup>384</sup> *Sosa v. Alvarez-Machain*.

<sup>385</sup> Oona Hathaway, *cite*.

<sup>386</sup> *Burnham v. Superior Court of California*, 495 U.S. 604 (1990).

exist to consider modifying the Court's approach to tag jurisdiction to comport more closely with foreign practice, universal adherence to a contrary international legal rule would offer a significantly more compelling case.<sup>387</sup>

International norms regarding reproductive choice may offer a similar example. Some scholars have observed that measuring U.S. privacy protections against foreign *practice* could undermine domestic constitutional protection for reproductive choice, since abortion is more strictly regulated practically everywhere in the world.<sup>388</sup> International *law* however, speaks in no particular direction on the question of reproductive choice. Although the American Convention states that life begins at conception,<sup>389</sup> there is no international consensus on this point. While a court would be entitled to consider the absence of any international consensus on protecting abortion rights, 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 to some degree on the extent to which that rule has been accepted or rejected by the United States. U.S. acceptance of an international norm could be articulated 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 the Law of the Sea Convention); (3) principles of customary international law, established through widespread and consistent state practice taken under a sense of legal obligation, to which the United States has not persistently objected (see discussion below); 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.<sup>390</sup> A U.S. signature of 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 U.S. to refrain from acts that would defeat the object and purpose of the treaty, unless and until the U.S. formally expresses its intent not to ratify.<sup>391</sup> A U.S. signature thus indicates some moderate support for the treaty, but suggests something much weaker than full blown acceptance.

Conversely, U.S. rejection of an international rule may be accomplished either through (1) the United States' persistent objection to a norm of customary international law; or (2) U.S. adoption of an effective reservation, declaration, or understanding to a treaty provision that rejects or modifies the United States' acceptance of the particular treaty rule. The United States' failure to sign or ratify a treaty would be neutral in this context. It would indicate that the United States had not consented to be bound by the treaty. But failure to ratify would not establish that the United States had rejected any principles of customary international law implicated by the treaty, absent other evidence that the United States had persistently objected to the customary international law rules.

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<sup>387</sup> Cf. Hartford Insurance (Scalia, J., dissenting).

<sup>388</sup> Alford, *supra* note 30; Larsen, *supra* note \_\_\_. See also Roper (Scalia, J., dissenting).

<sup>389</sup> American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 673 (1970), art. 4(1) (The right to life "shall be protected by law and, in general, from the moment of conception").

<sup>390</sup> Vienna Convention on the Law of Treaties, art. 64 ("If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates"). Edward T. Swaine, *Unsigning*, 55 STAN. L. REV. 2601 (2003).

<sup>391</sup> Vienna Convention on the Law of Treaties, art. 18(a).

U.S. acceptance of an international principle is relevant to a court's analysis for three reasons. First, international legal obligations that are operative on the United States may create important governmental interests relevant to constitutional inquiry, as the Court recognized in *Boos v. Barry*. The government may therefore invoke the fact that it is bound by an obligation to a treaty partner, or to the broader international community, in support of claim that an exercise of power is constitutionally legitimate. International law would not automatically establish a compelling governmental interest,<sup>392</sup> or otherwise constitutionally legitimate the exercise of government power, and any claim of a constitutional governmental interest or authority arising from an international law obligation would have to be considered according to four principles discussed herein. 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 the norm. Where a customary international law or treaty obligation is widely accepted in the international community and has not been explicitly rejected by the United States, reasons of international comity, 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 may weigh in favor of aligning constitutional construction with the international rule.<sup>393</sup> Thus, although the fact that a rule is binding on the U.S. does not compel incorporation of the rule at the constitutional level, as discussed previously, it does strengthen the rule's persuasiveness.

Third, 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 (on this point, more below). In short, like the principle of norm universality discussed above, U.S. acceptance of a rule will strengthen the principle's persuasiveness in constitutional analysis.

On the other hand, U.S. rejection of an international norm, whether through a treaty reservation or persistent objection to a customary international norm, would weigh against the rule's persuasiveness in constitutional analysis. A norm's rejection by the political branches is relevant to a court's analysis for a number of reasons. Taking the actions of the political branches into account respects the structural relationships established by the Constitution regarding both separation of powers and federalism. Under our constitutional system, both treaties and customary international law enjoy sub-constitutional status.<sup>394</sup> 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.<sup>395</sup> Respect for the determinations of the political branches thus acknowledges the legitimate role

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<sup>392</sup> See, e.g., *Boos v. Barry*, 485 U.S. 412. Louis Henkin has suggested that treaty exceptions allowing governments to override human rights protections in contexts of public emergency or public health might be relevant to determining the existing of a governmental interest. Henkin, *International Human Rights Standards in National Law*, supra note 319, at 198. Although a complete examination of the issue of compelling governmental interests is beyond the scope of this paper, resort to international law to reduce existing constitutional protections should be significantly limited by the operation of the third and fourth principles set forth below.

<sup>393</sup> See *Brown v. U.S.*; *Holmes v. Jennison*.

<sup>394</sup> *Sosa v. Alvarez-Machain* (discussing status of CIL as federal common law).

<sup>395</sup> For a critical analysis of this principle, see Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853 (1987).

of the political branches in helping to choose the extent to which the U.S. will accept international norms into the domestic legal structure.

Consideration of the actions 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 the political branches would suggest that those branches believed that the norm should not be considered part of U.S. constitutional obligations. Prudential arguments for placing the United States in compliance with international rules would also be weaker where 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 against the courts' independent authority both to interpret international law and to determine constitutional meaning. The Constitution gives the federal courts authority to construe that instrument, as well as treaties, statutes and the common law. In fulfilling this obligation, federal courts have the power to be informed by international rules, and have exercised this power for more than two centuries.<sup>396</sup> Principles of statutory construction such as the *Charming Betsy* rule explicitly recognize this obligation. 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 Court's 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 should be owed to the political branches' rejection of governmental powers that may be derived from international law, while less deference should be owed in the construction of constitutional individual rights provisions. In cases involving the scope of governmental authority, if the political branches have declined to accept a power recognized under international law, deference by the Court in its constitutional analysis to the political branches' decision would support principles of separation of powers.<sup>397</sup> The political branches, of course, would remain free to embrace the international rule in the future, barring some other constitutional obstacle.

Judicial deference to the political branches' acceptance or rejection of international law is less appropriate in the individual rights context, however. Individual rights provisions are by definition counter-majoritarian constraints on the political branches, and their construction necessarily involves judicial second-guessing of actions of the political branches. A court would act properly in considering any determination of the political branches and the reasons underlying their decision. But to the extent that the role of courts in constitutional construction is to protect individuals from majoritarian action, deference to the interpretations of the political branches is inappropriate.

Interpretation of the Cruel and Unusual Punishment Clause community standards cases falls somewhere in between these two positions with regard to the deference due to the political branches' international law determinations. Under the *Roper / Atkins* approach, at least, the

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<sup>396</sup> *E.g.*, *The Paquete Habana*, 175 U.S. 677 (1900); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

<sup>397</sup> An example of such a situation might include the United States' recognition of absolute immunity for sitting foreign heads of state.

question whether a practice violates “evolving standards of decency” requires judicial consideration of both (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 law norm by the political branches is clearly pertinent to the first question, as Justice Scalia argued in *Roper*.<sup>398</sup> If customary international and treaty law prohibits a practice, but the political branches have clearly rejected the international rule, that determination is entitled to deference in the first half of the Eighth Amendment analysis. The determination of the political branches would not be controlling under the second half of the analysis, however, where a court is independently obligated to decide what is cruel and unusual.

Non-self-executing treaties raise complex issues regarding U.S. “acceptance” of an international rule. Non-self-executing treaties represent international obligations that the United States has accepted but which are not domestically judicially enforceable in some contexts.<sup>399</sup> As such, they send a mixed message regarding U.S. acceptance of the norm. To the extent that such treaties are invoked by the government as sources of meaning in construing the scope of a constitutionally enumerated government power, it would seem appropriate to view the treaty authority, and whatever limitations the treaty imposes on that authority, as accepted by the political branches. A declaration of non-self-execution also would not prohibit the Court from considering a principle embodied in a treaty in construing an individual rights clause.

Moreover, treaties that a court or the United States Senate<sup>400</sup> has declared non-self-executing may address rights and obligations that also enjoy the status of customary international law.<sup>401</sup> To the extent that a treaty includes norms that enjoy independent customary international law status, and to which the United States has not persistently objected, the declaration that the treaty is not self-executing should not bar judicial incorporation of the *customary* international law rule. As the Supreme Court recently implied in *Sosa v. Alvarez-Machain*, although a declaration of non-self-execution may render a treaty judicially unenforceable, there is no reason to interpret such a declaration as an effort by the Senate to obliterate whatever independent force widely accepted customary international norms related to

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<sup>398</sup> *Roper*, \_\_ U.S. at \_\_ (Scalia, J., dissenting).

<sup>399</sup> The term is applied inconsistently with sufficient frequency to warrant definition here. Carlos Vazquez, *Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L L. 695 (1995) (arguing that courts have applied at least 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 cause of action, to a conclusion that the terms of the treaty are too vague or precatory to establish a judicially enforceable rule. 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. Such treaties nevertheless have domestic legal effect in other contexts, as in serving as a basis for construing a statute consistent with the country’s international obligations, cf. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), or by creating authority for congressional legislation. *Missouri v. Holland*.

<sup>400</sup> I assume, for the purposes here, that such reservations are constitutionally effective. For further discussion of U.S. treaty ratification practices, see Bradley and Goldsmith, *Treaties, Human Rights and Conditional Consent*, 149 U. PA. L. REV. 399 (2000) (offering arguments in support of U.S. reservation practices); Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT’L L. 341, 346-48 (1995) (critiquing, *inter alia*, U.S. declarations that treaties are non-self-executing).

<sup>401</sup> E.g., Common Article III of the Geneva Conventions.

that treaty may have.<sup>402</sup> Treaties contain many provisions, and the Senate may decline to make a treaty self-executing for many reasons.

Reservations, declarations and understandings that control U.S. acceptance of the substantive meaning of a particular treaty provision are also relevant to determining whether the United States has accepted or rejected a norm. As with declarations that a treaty is not self-executing, such reservations do not constrain the operation of any separate principle of customary international law that is operative on the United States. But such provisions nevertheless merit consideration here, and can raise some difficult interpretive questions. The United States' 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 the Eighth Amendment cruel and unusual punishment clause<sup>403</sup> and the concept of liberty under substantive due process. In consenting to the Torture Convention, however, the United States Senate adopted a reservation providing that that the United States understood "cruel, inhuman and degrading treatment" as limited to the definition of cruel and unusual punishment under the U.S. Constitution.<sup>404</sup> In other words, the Senate proclaimed that U.S. constitutional doctrine should inform the meaning of the treaty obligation, rather than vice versa.<sup>405</sup> Such a pronouncement by the Senate indicates that the United States has accepted the treaty obligation only to the extent that it mirrors the constitutional meaning, and a court would be bound by the reservation in construing the meaning of the treaty provision. The reservation does not, however, establish that the United States is not bound to a broader international prohibition against cruel, inhuman and degrading treatment by other treaty and customary obligations. Moreover, in construing the constitutional prohibition on Cruel and Unusual Punishments, the reservation would not obligate the Court to ignore any extant international consensus regarding what constitutes cruel, inhuman, and degrading treatment.<sup>406</sup> The Court would not be required to incorporate any international definition of cruel, inhuman and degrading treatment into the Eighth Amendment prohibition, and its analysis should include consideration of why the political branches imposed this

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<sup>402</sup> In *Sosa v. Alvarez-Machain*, 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 Statute. The Court nevertheless separately 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. 124 S.Ct. at 2767-69.

<sup>403</sup> The Eighth Amendment has long been understood as prohibiting torture and related forms of abuse. *Estelle v. Gamble*, 429 US 97, 102 (1976) ("the primary concern of the drafters was to proscribe "torture(s)" and other "barbar(ous)" methods of punishment"); *In re Kemmler*, 136 U.S. 436, 447 (1890) ("Punishments are cruel when they involve torture..."); *Weems*, 217 U.S. at 370 (affirming that "punishments of torture, . . . and all others in the same line of unnecessary cruelty, are forbidden by that Amendment").

<sup>404</sup> U.S. reservations, declarations, and understandings, Convention Against Torture, Cong. Rec. S17486-01 (daily ed. Oct. 27, 1990), <http://www1.umn.edu/humanrts/usdocs/tortres.html> ("the 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.")

<sup>405</sup> For a critical analysis of this and other reservation practices, see Louis Henkin, *U.S. Ratification of Human Rights Conventions*, *supra* note 395, at 341. For an argument generally supporting the practice, see Bradley & Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399 (2000).

<sup>406</sup> *Cf. The Republic of Ireland v. The United Kingdom*, 2 E.C.H.R. (Ser. A) at 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).

definitional limitation on the treaty clause. But it would also be fully entitled to look to the customary international understanding when engaging in independent judicial construction of the constitutional protection.

Finally, 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.<sup>407</sup> In ratifying the International Covenant on Civil and Political Rights, for example, the United States entered a reservation to Article 6(5), which prohibits the execution of juveniles (defined as persons under 18 at the time of the crime). This reservation expresses the clear intent of the United States not to be bound by Article 6(5) of the treaty.<sup>408</sup> It is less clear, however, whether the United States is nevertheless bound by a customary international law prohibition on the execution of juveniles.<sup>409</sup> 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.<sup>410</sup> 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.<sup>411</sup> It is interesting, though not surprising, that the *Roper* Court did not attempt to confront these questions. The *Roper* majority, in other words, 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 the international rule as evidence of the global consensus on the question.

#### D. International Law Limits Accompany International Powers

The final requirement for a principled approach to international law in constitutional analysis is that consideration of international rules should include relevant limitations that international law imposes on the rule. Although the Court has recognized this obligation in principle, it has not always complied with it. As noted above, in the immigration context, the Supreme Court upheld the government's authority under international law to exclude and

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<sup>407</sup> Cf. Debate between Kennedy and Scalia in *Roper*.

<sup>408</sup> A significant controversy nevertheless exists regarding the validity of the reservation under international law. See U.N. Human Rights Committee, General Comment No. 24.

<sup>409</sup> 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 *Roper v. Simmons*, No. 03-633, Brief of *Amici Curiae* The European Union and Members of the International Community in Support of Respondent (2004).

<sup>410</sup> Inter-American Commission on Human Rights, Report No. 62/02, Merits Case 12.285, Michael Domingues v. United States, Oct. 22, 2002.

<sup>411</sup> For competing views on the status of the prohibition on the execution of juveniles, compare Harold H. Koh, *Paying "Decent Respect" to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1087 (2002), and Joan F. Hartman, "Unusual" Punishment: *The Domestic Effects of International Norms Restricting the Application of the Death Penalty*, U. CINCINNATI L. REV. 655 (1983); with Curtis Bradley, *The Juvenile Death Penalty in International Law*, 52 DUKE L. J. 485 (2002).

deport aliens, but failed to consider international rules regarding denizens that limited a government's ability to deport or banish long-term lawful residents.

A principled application of international law should require taking the powers with the constraints. The primary 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 derived from international law are accepted into the domestic system without the constraints that that considered international judgment also has found it appropriate to impose. In the immigration example, if the government's *constitutional* authority over aliens is based on powers defined by international law, then the government's constitutional authority logically also should be limited by the constraints that international law imposes.

Constitutional receipt of international norms also raises the question whether the resulting constitutional principles should further evolve as international law develops. Where clauses of the Constitution have been read as incorporating common-law principles, 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 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 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.<sup>412</sup> 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.

The better approach, it would seem, would be to allow a constitutional principle to evolve with the international rule it embodies. This would mean that, where an international norm was internalized into constitutional analysis, a court revisiting the constitutional doctrine 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. Such an evolution may raise objections that tying constitutional analysis to a changing international doctrine violates U.S. sovereignty and separation of powers. But domestic courts would retain control over this process, and a court would not be obligated to rigidly follow any development of 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, the court should remain conscious of those international origins and sensitive to the rule's evolution.

## VI. INTERNATIONAL LAW AND *HAMDI V. RUMSFELD*

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<sup>412</sup> See *supra* note 129.

This section illustrates the four principles set forth above by applying them to the Justices' approaches in *Hamdi v. Rumsfeld*. 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.<sup>413</sup> *Hamdi*, however, also posed a 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 that the President lacked independent constitutional power to detain Hamdi in the manner asserted.

Justices Souter, Ginsburg, Scalia, and Stevens all found that Congress' 2001 Authorization of Military Force did not constitute such authorization for reasons that are overwhelmingly convincing. However, if one agrees with Justice O'Connor that Congress had authorized the detention, her resort to international law in the ensuing constitutional analysis is consistent with the approach proposed here, and that opinion generally represents a principled application of international law in the process of constitutional adjudication.

Justice O'Connor's plurality opinion first 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"<sup>414</sup> 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"<sup>415</sup> as to be implicitly authorized by Congress.<sup>416</sup>

O'Connor's opinion next recognized in principle that international law also limited the scope of the President's detention power. She invoked the Geneva and Hague Conventions for the propositions that "detention may last no longer than active hostilities."<sup>417</sup> Furthermore, international law limited the power to the purpose of preventing return to the battlefield. O'Connor opinion suggested that detention could not be utilized for purposes of punishment or

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<sup>413</sup> 18 U.S.C. § 4001(a).

<sup>414</sup> 124 S.Ct. at 2641.

<sup>415</sup> 124 S.Ct. at 2640. 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.* at 2640.

<sup>416</sup> The plurality concluded that Congress had authorized the detention of U.S. citizens through its September 2001 Authorization for Use of Military Force, 115 Stat. 224 (authorizing the President to "use all necessary and appropriate force" against "nations, organizations, or persons" associated with the September 11, 2001 terrorist attacks).

<sup>417</sup> *Id.* at 2641 (plurality opinion), *discussing* Geneva Convention (III) Relative to the Treatment of Prisoners of War, adopted August 12, 1949, entered into force October 21, 1950; Hague Convention (II) on Law and Customs of War on Land, July 29, 1899, 32 Stat. 1817; Hague Convention (IV), Oct. 18, 1907, 36 Stat. 2301.

revenge, since these purposes were not authorized by the laws of war.<sup>418</sup> Moreover, “indefinite detention for the purpose of interrogation is not authorized.”<sup>419</sup>

Finally, the plurality recognized that the power derived from international law to detain citizen enemy combatants was limited by constitutional due process. O’Connor’s opinion 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.<sup>420</sup> Moreover, such detainees “unquestionably” had the right to counsel on habeas.<sup>421</sup> Even in its due process analysis, however, the plurality gave a nod toward international law. O’Connor suggested, 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.<sup>422</sup> Thus, the Court looked to an international standard as setting forth the possible minimum individual rights protections required by the Constitution. So, was the Court’s approach principled?

#### A. Constitutional Barriers to Norm Internalization

The most complex question facing the Court in *Hamdi* arose with respect to the first principle – the extent to which the Constitution limited receipt of the international law authority to detain enemy combatants. As noted above, this inquiry proceeds in two stages, requiring consideration, first, of whether the specific constitutional provision potentially informed by the international norm poses any barrier to consideration of the international rule, and second, whether any other aspect of the constitutional design, including individual rights provisions, limits the rule’s operation.

The first stage of this analysis was not extensively considered by the Court, and did not pose any substantial analytic difficulties. The Court did not expressly address the constitutional powers implicated by the decision other than the Commander in Chief power, although in finding that Congress had authorized the detentions, the Court presumably found that Congress had acted pursuant to the Declare War clause and possibly its regulatory authority over war making. The Court has looked to international law in construing these clauses in a long line of cases dating to at least the early 1800’s in *Brown v. United States*. Unlike cases in which the appropriateness of resort to international law may be a question of first impression, neither the clear text of these provisions, any entrenched original understanding, or any longstanding contrary doctrinal rule barred consideration of international law in this context. If anything, the doctrinal tradition affirmatively supported resort to international law.

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<sup>418</sup> *Id.* at 2640 (“The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again. Naqvi, Doubtful Prisoner-of-War Status, 84 Int’l Rev. Red Cross 571, 572 (2002) (“[C]aptivity in war is ‘neither revenge, nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war’”) (quoting decision of Nuremberg Military Tribunal, reprinted in 41 AM. J. INT’L L. 172, 229 (1947)); W. Winthrop, Military Law and Precedents 788 (rev.2d ed. 1920)).

<sup>419</sup> *Id.* at 2641.

<sup>420</sup> *Id.* at 2649 (plurality opinion).

<sup>421</sup> *Id.* at 2652 (plurality opinion).

<sup>422</sup> *Id.* at 2651. Geneva Convention (III) Relative to the Treatment of Prisoners of War, *supra* note 28, at art. 5.

The second stage of this analysis, however, addressing whether anything else in the constitutional design barred operation of the international law power to detain combatants, sharply divided the members of the Court. Even if one assumed that the Declare War and Commander in Chief powers absorbed some war-making authorities from international rules, and that the laws of war would allow the United States to detain citizens who raised arms against it in an international armed conflict, this would not resolve whether that international law power was partially or entirely qualified by other constitutional constraints.

Justice Scalia found that the Constitution completely barred the exercise of this power. Even assuming that the plurality was correct in its portrayal of authority to detain aliens as enemy combatants, Justice Scalia argued that the Constitution flatly prohibited application of this rule to detain citizens in the U.S. as enemy combatants absent a suspension of habeas corpus by Congress. Scalia based his analysis on constitutional text (the Treason and Suspension Clauses), historical practice, original understanding, and doctrine (particularly the decision in *Ex parte Milligan* that a citizen charged with aiding Confederate forces could not be subjected to military law when the ordinary courts were open).

At the other end of the spectrum, Justice Thomas concluded that the President was acting properly pursuant to his Commander-in-Chief powers in exercising authority granted by Congress, and found that nothing in the Constitution limited the exercise of that power.

By contrast, the O'Connor plurality (joined by Souter and Ginsburg) found that the Constitution qualified, but did not bar, application of the international law norms. The President possessed the power to detain citizens as enemy combatants under the laws of war, but that power was limited by basic principles of due process. For detention of an enemy citizen, such due process required notice of the factual and legal justification for the detention, an obligation on the government to adduce evidence in support of this justification, and an opportunity for the detainee to confront the evidence against him and introduce evidence of his own before a neutral decision maker. The majority also recognized the right of a citizen to file a habeas petition absent suspension of the writ and to have the assistance of counsel in connection with the habeas proceeding.

The plurality opinion also comports with the guideline proposed above by implicitly acknowledging that constitutional due process should not fall below the protections afforded by international law. In addition to holding that Hamdi was entitled to basic due process principles of notice, confrontation and a right to counsel, Justice O'Connor's opinion continued (in a discussion not joined by Souter and Ginsburg) to observe that due process might be satisfied by a military proceeding like that afforded by U.S. military regulations to comply with Article 5 of the Third Geneva Convention. Thus, the O'Connor plurality looked to minimum international standards to inform the meaning of constitutional due process. In oral argument in *Rasul v. Bush*, Justice Breyer likewise had suggested 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.<sup>423</sup>

This is a fairly minimal standard of protection from a traditional due process perspective, and it is possible to read her opinion as looking to the international law minimum to dilute due process protections. Some might argue that the Constitution imposes even more

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<sup>423</sup> *Rasul v. Bush*, Nos. 03-334 and 03-343, 2004 WL 943637 (U.S.) (Apr. 20, 2004) at \* 14.

robust protections on citizen detainees (as Justices Scalia and Stevens contended).<sup>424</sup> Certainly, if *Ex parte Milligan* clearly had been the controlling constitutional rule, the opinions of O'Connor and Thomas, both of which allowed the detention of citizen enemy combatants without a criminal prosecution in an Article III court, would have been rights-diluting. *Ex parte Quirin*, however, had reduced the Constitution's wartime protections for citizens who had admittedly raised arms against the United States. But *Quirin* also was not directly on point because Hamdi contested his designation as an enemy combatant. And the *Quirin* holding was of questionable legitimacy for a variety of reasons.<sup>425</sup> So the operative constitutional baseline was unclear.

Furthermore, the United States' position was that Hamdi and the Guantanamo detainees were not entitled to *any* due process protection. The government contended that Hamdi's right of confrontation was limited to his ability to object to his interrogators that he was improperly detained,<sup>426</sup> and that constitutional due process protections did not reach the Guantanamo detainees at all. Justice Thomas accepted this position, which would certainly have been rights diluting, given that Hamdi (unlike Hans Haupt, the U.S. citizen saboteur in *Quirin*) contested his status as an enemy combatant and had not been afforded *any* type of process, even before a military tribunal. The position of the United States and Justice Thomas would have lowered the level of due process protection below even that afforded in *Quirin*.

In light of the government's position, the suggestion of Justices O'Connor and Breyer in the detention cases that due process could incorporate the Geneva Convention's procedural requirements looks like an appropriate resort to international law to establish a minimum floor of constitutional protection. O'Connor's approach recognized that constitutional due process should not be construed to provide *less* protection than the minimum allowable under a widely accepted principle of international law. The plurality's analysis at least rejected the government's position that due process did not constrain the power to detain enemy combatants *at all*, recognized the limitations on the detention power imposed by international law, and concluded that constitutional due process should not fall below that minimum. On the other hand, O'Connor did not clearly hold that international law imposed a ceiling on the due process protections to which Hamdi was constitutionally entitled. In upholding rights to habeas and counsel, Justice O'Connor's opinion recognized greater protections for Hamdi than those required by Article 5 of the Geneva Convention. Her opinion, in short, looked to international law as the benchmark for the minimum, but not necessarily the maximum, level of constitutional protection that must be afforded enemy combatants in wartime.

## B. Norm Universality

*Hamdi* posed the question of the extent to which the Court should look to the international laws of war, as established by both treaties and custom, in construing the U.S. government's constitutional authority to detain a citizen as an enemy combatant. No member

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<sup>424</sup> Hamdi, 124 U.S. at 2672 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.").

<sup>425</sup> Hamdi, 123 U.S. at 2669 (Scalia, J., dissenting).

<sup>426</sup> *Hamdi*, 123 U.S. at 2653 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (noting with concern the government's position "that so long as a prisoner could challenge his enemy combatant designation when responding to interrogation during incommunicado detention he was accorded sufficient process to support his designation as an enemy combatant").

of the Court paid close attention to the question of how clearly defined and widely accepted the applicable rules of war were. Justice O'Connor's plurality opinion simply referred to "longstanding" principles of the laws of war, and to specific treaties and domestic and international decisions and other authorities. The Court nevertheless was on secure ground here. The laws of war are among the oldest rules of customary international law. The relevant Hague and Geneva Conventions are widely accepted, and some principles of those treaties themselves are recognized as establishing principles of customary international law.<sup>427</sup> The international rule recognizing the right to detain lawful and unlawful belligerents and civilian security risks until the end of active hostilities thus enjoys widespread acceptance as a principle of international law, not merely state practice. So the rule enjoyed the greatest level of persuasiveness under the principle of norm universality.

### C. Acceptance by the United States

The second principle, acceptance by the United States, also supported the persuasiveness of the international rule in *Hamdi*. It was undisputed in *Hamdi* that the United States was bound by the applicable laws of war as a matter of international law. The United States is a party to the 1949 Geneva Conventions, had not entered any relevant reservations limiting the Conventions' application, and had not set forth any persistent objection to the customary laws of war at issue in the case. To the contrary, at least until the Afghan conflict, the United States had consistently recognized the Geneva Conventions as fundamental principles governing U.S. conduct in wartime. In particular, the government had recognized the Third Geneva Convention's requirements regarding the treatment of enemy belligerents as binding obligations in all prior wars, including providing thousands of Article 5 tribunal proceedings to determine the status of detainees during Vietnam and the 1991 Gulf War.

Some lower courts have found the Geneva Conventions to be non-self-executing,<sup>428</sup> however, and the United States government aggressively asserted this view before the Court in all three detention cases to the extent that the detainees sought protection under the Third Geneva Convention.<sup>429</sup> As argued above, however, the non-self-executing nature of a treaty should not bar judicial consideration of a treaty in the process of constitutional analysis, either to construe powers claimed by the government or individual rights protections. The plurality's approach in *Hamdi* was consistent with this view. Although the Convention's alleged non-self-executing character was addressed at oral argument in the detention cases,<sup>430</sup> neither the plurality opinion nor any of the dissenting justices raised the question of self-execution.

The plurality's willingness to invoke the Third Geneva Convention could reflect a number of possible views on the question of non-self-execution. In addition to the views offered in discussing the second principle, above, the plurality could have concluded that the non-self-executing status of the Geneva Convention had not been definitively established, since

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<sup>427</sup> E.g., Common Art. 3.

<sup>428</sup> Compare *Hamdi v. Rumsfeld*, 316 F.3d 450 (4<sup>th</sup> Cir. 2003) (Geneva conventions not self-executing); *United States v. Noriega*, 808 F. Supp. 791 (S.D. Fla. 1992) (holding that General Noriega was entitled to the protection of the Geneva Convention); *with Hamdan v. Rumsfeld*, 344 F.Supp. 2d 152 (D.D.C. 2004) (Third Geneva Convention is self-executing).

<sup>429</sup> Brief for the Respondents, *Hamdi v. Rumsfeld*, No. 03-6696, 2004 WL 724020 (Mar 29, 2004), at 23; Brief for the Respondents, *Rasul v. Bush*, Nos. 03-334, 03-343, 2004 WL 425739 (Mar. 3, 2004), at 38; Brief for the Petitioner, *Padilla v. Rumsfeld*, No. 03-1027.

<sup>430</sup> *Rasul v. Bush*, 124 S.Ct. 2686 (2004).

the Supreme Court has not ruled on the issue. The Justices may have viewed the aspects of the Geneva Convention under consideration—regarding the detention of enemy combatants and their entitlement to an Article 5 tribunal proceeding—as reflecting broader customary international norms with legal force independent of the treaty. Or the Justices may have found the government’s contention that the Convention was not self-executing irrelevant, since the government sought to derive authority from that Convention, and Hamdi was not clearly asserting rights under it. At any rate, Justice O’Connor apparently did not view the potentially non-self-executing nature of the treaty as a characteristic requiring judicial deference in the context of constitutional analysis. U.S. acceptance of the customary and treaty norms at issue in *Hamdi* thus supported the persuasiveness of the international norms, the potential non-self-execution of the Geneva Convention notwithstanding.

#### D. International Law Limits Accompany International Powers

Both the O’Connor plurality and Justice Souter’s concurrence in the judgment adopted an evolutionary approach to the relationship between international law and the Constitution. In construing the government’s authority to detain combatants under the laws of war, both O’Connor and Souter also recognized that this power was defined, and *limited*, by the modern laws of war. In other words, the President’s constitutional authority was modified by the adoption of the 1949 Geneva Conventions and accompanying developments in the customary laws of armed conflict.

Justice Souter’s opinion would have gone the farthest in enforcing international law limits on any power to detain combatants derived from international law. Justice Souter, joined by Justice Ginsburg, objected to the administration’s desire to claim powers recognized by the international law of armed conflict (to detain enemy combatants), 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).<sup>431</sup> The opinion is particularly interesting because it not only recognized the restraints imposed by international law, but contended that the United States could not enjoy powers derived from international law unless it also comported with those limits.

O’Connor’s opinion likewise recognized that contemporary international law imposed limits on the President’s power to capture and detain enemy combatants. 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.<sup>432</sup> 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. O’Connor pointedly noted that international law limited the power to detain to the purpose of preventing return to the battlefield, and relied on the Geneva Convention for the proposition that combatants could be detained only until the end of active

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<sup>431</sup> *Id.* at 2658 (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.”).

<sup>432</sup> *Id.* at 2639 (“[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.”).

hostilities.<sup>433</sup> Furthermore, she observed that the laws of war did not authorize detention for purposes of punishment, revenge, or interrogation.<sup>434</sup> O'Connor accordingly took a principled approach to international law, by recognizing the limits that international law imposed on the powers being invoked. Justice Thomas apparently also interpreted O'Connor's opinion as limiting executive power by constraints imposed by international law, since he criticized the plurality for relying on the Geneva Convention to limit the President's Commander in Chief authority.<sup>435</sup>

O'Connor's possible divergence on this point was her failure to require explicitly that Hamdi be afforded an Article 5 tribunal to determine his status as a POW under the Third Geneva Convention, since Hamdi's claims placed his status "in doubt."<sup>436</sup> This was Justice Souter's approach to the President's claim of international law authority. By upholding the power to detain "enemy combatants," but not holding that such combatants were entitled to have their status *as POWs* determined, as required by the Third Geneva Convention,<sup>437</sup> O'Connor's opinion could be interpreted as diverging from international law rules by declining to impose constraints on the detention power recognized under international law. It appears more likely, however, that O'Connor's opinion did not reach the question whether Hamdi was entitled to POW status because Hamdi did not raise this issue before the Supreme Court. Hamdi simply raised the Geneva Convention process to demonstrate that under international law, he would have been afforded an opportunity "to assert that he was not a combatant at all."<sup>438</sup> Thus, the question presented to the Court was whether the government could constitutionally detain citizens as combatants, without any process. More detailed questions regarding Hamdi's status and the conditions under which he might therefore be detained were left for another day.

Although Justice Souter would have gone further in applying constraints imposed by international law, O'Connor's opinion likewise recognized that the powers granted by the laws of war were limited by law of war principles. To the extent that the President enjoyed powers derived from international law, the Court held he must take the bitter with the sweet.

In short, the plurality's approach to constitutional analysis in *Hamdi* applied the most persuasive form of international norms—international legal obligations that were both widely accepted and binding on the United States. The decision respected the limits inhering in the international laws of war and construed war powers provisions regarding which resort to international law was already doctrinally supported. The difficult question for the *Hamdi* Court accordingly lay in reconciling the international rule with the Constitution's express individual rights protections. Although that question reasonably could have been resolved differently, as Justice Scalia's opinion suggests, O'Connor's suggestion that due process protections should

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<sup>433</sup> *Id.* at 2641.

<sup>434</sup> See *id.* at 2640.

<sup>435</sup> *Id.* at 2679 (Thomas, J., dissenting) ("I do not believe that we may diminish the Federal Government's war powers by reference to a treaty.").

<sup>436</sup> Third Geneva Convention, *supra* note 28, at art. 5.

<sup>437</sup> 124 S. Ct. at 2649 n.2 ("Because we hold that Hamdi is constitutionally entitled to the process described above, we need not address at this time whether any treaty guarantees him similar access to a tribunal for a determination of his status.").

<sup>438</sup> Brief for Petitioner, *Hamdi v. Rumsfeld*, No. 03-6696, at 17-18; author conversation with counsel for Hamdi, Nov. 1, 2004.

not fall below the floor set forth in the Geneva Conventions was an appropriate, and principled, approach.

## VII. CONCLUSION

The current debate over international law in constitutional analysis has grossly oversimplified and overgeneralized the issue, has confused the distinct questions of reliance on international law and foreign sources, and has taken an uninformed and ahistorical approach to the question. This article has argued that the Supreme Court historically has relied on international law as an important and legitimate source of constitutional meaning. The cases examined reflect a constitutional law tradition that is significantly more receptive to international law norms than is understood in the current scholarly and judicial debate. They indicate that our constitutional system may invite consideration of international law for a wide range of reasons, including respect for comity and to avoid placing the United States in violation of its international obligations, as an analogy for state power in our federal system, and as a measure of fundamental values. When applied in a principled manner, any of these approaches offers a legitimate use of international law in substantive constitutional analysis. This dialogue between international and constitutional norms, however, has been largely lost to modern constitutional jurisprudence, and an accurate historical understanding suggests that U.S. constitutional doctrines should be applied with greater sensitivity for international law. Justice Scalia has argued that it is “a Constitution for the United States of America that we are expounding.”<sup>439</sup> The cases demonstrate, however, that international law has been a part of U.S. constitutional interpretation from the beginning, and that a principled resort to international law is fully part of the American tradition.

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<sup>439</sup> Thompson, 487 U.S. at 869 n. 4 (Scalia, J., dissenting).