

## International Law and the Constitution

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### ABSTRACT

The relationship between international law and the Constitution remains mysterious despite two centuries of Supreme Court decisions touching on the subject. Neither treaties nor foreign legal systems have had a particularly mysterious relationship with the Constitution. International agreements are made under Article II and, if they have treaty status, are subject to ratification under Article I and declared law of the land under the Supremacy Clause. However, the Court has long held that some treaties are not law without an implementing act of Congress. Some recent constitutional opinions cite foreign law, but they make no claim that it is binding United States law. The real mystery involves customary international law, which the Court has consistently held is binding United States law made by the international community of states. The Court has never adequately explained how or why the world makes United States law.

This Article reviews more than two centuries of Supreme Court decisions on customary international law to seek that explanation. It focuses on Supreme Court cases that apply the law of nations in three areas: federalism, statutory interpretation and individual rights. It concludes that, contrary to the unanimous consensus of contemporary American opinion which assumes that the Constitution is supreme over international law, the Court has long applied customary international law as supreme law over the Constitution in order to check the domestic and not just the foreign powers of the federal government.

This Article explains that the Court has done so, in part, to give effect to its vision of the Constitution as a federal compact among the states. The Court has explicitly declared and enforced the law of nations as the foundation of American federalism on issues of sovereign immunity, interstate compacts and disputes between states. The Court has also long held, in cases not involving the states, that acts of Congress must be construed in accord with the law of nations. It has held, in addition, that

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customary international law is a source of individual rights enforceable against constitutionally unchallenged government actions.

The Court has not applied international law as a tool of constitutional interpretation, a means to enforce the separation of powers or, except under the Alien Tort Statute, common law. Rather, it has enforced international law as the governing law of the Constitution, conceived as an agreement among sovereigns including the people and the states, in a manner consistent with the view that the powers delegated through the Constitution to the federal government are derived from and thus limited by customary international law. In this manner the supremacy that the Court has accorded to international law limits the sovereignty of the United States at home and abroad, helps to secure liberty and favors limited government. Far from offending the Constitution, the Court has long found that the supremacy of international law is constitutionally necessary.

*Medellin v. Texas*<sup>1</sup> illustrates how inadequate understanding of customary international law as United States law is having a practical impact in Federal Courts. What might be called the international law establishment, as amici curiae, argued that Texas was treaty-bound to follow a judgment of the International Court of Justice (hereinafter “ICJ”), which decided that Texas had deprived a Mexican citizen on death row of rights to consular notification and assistance. Medellin did not argue that customary international law is the body of domestic law from which Texas’s sovereign powers derive, or that consular notification has long been a norm under customary international law that the Vienna Convention on Consular Relations confirms. Instead, he asked the Court to make the United States the only nation that treats ICJ judgments as binding in domestic courts. The Court decided that Medellin rather than the ICJ treaties may be executed, and he was.

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<sup>1</sup> 128 S. Ct. 1346 (2008).

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## I. INTRODUCTION

International law has always been part of United States law. Attorney General Edmund Randolph opined in George Washington’s first administration that “[t]he law of nations, although not specially adopted by the constitution or any municipal act, is essentially a part of the law of the land.”<sup>2</sup> Chief Justice John Marshall wrote in *The Nereide* that “the court is bound by the law of nations, which is a part of the law of the land.”<sup>3</sup> The Court reaffirmed the same principle more recently in *Sosa v. Alvarez-Machain*.<sup>4</sup> Only the discredited *Dred Scott v. Sandford* appears to hold that “no laws or usages of other nations, or reasoning of statesmen or jurists upon the relations of master and slave, can enlarge the powers of the Government or take from the citizens the rights they have reserved.”<sup>5</sup> The Court has never adequately explained, however, how or why international law not adopted by the Constitution, statute, or treaty is law of the land.

The kind of international law to which this Article refers is what the Court calls the law of nations or customary international law. The RESTATEMENT identifies three types of international law: “Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation[,]”<sup>6</sup> as distinguished from “[i]nternational agreements” and “[g]eneral principles common to the major legal systems . . . .”<sup>7</sup> Those international agreements that are treaties in the

<sup>2</sup> 1 Op. Att’y Gen. 26, 27 (1792).

<sup>3</sup> 13 U.S. (9 Cranch) 388, 423 (1815) (Marshall, C.J.); see Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819 (1989).

<sup>4</sup> 542 U.S. 692, 729-30 (2004).

<sup>5</sup> 60 U.S. (19 How.) 393, 451 (1856).

<sup>6</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) (hereinafter RESTATEMENT). The norms that the community of European states and their colonies accepted as law in the late eighteenth century were traditionally divided into admiralty or maritime law, the law merchant or *lex mercatoria*, and the law of states. See Edwin Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26, 26-28 (1952) (hereafter Dickinson). The question whether the law of merchants survived nation-states’ expansion of their commercial regulations is beyond the scope of this Article.

<sup>7</sup> RESTATEMENT at § 102(3)-(4); see *Sosa*, 542 U.S. at 737 (citing the RESTATEMENT § 102).

constitutional sense<sup>8</sup> share with acts of Congress the status of “supreme Law of the Land[.]”<sup>9</sup> but even so, treaties are presumed to create no individual rights and many lack the force of law.<sup>10</sup> This Article is not concerned with international agreements, nor does it deal with whether the Constitution should be construed in accord with “major legal systems . . . .” It deals with the Court’s longstanding enforcement of customary international law as self-executing domestic law, despite the lack of any constitutional basis for doing so beyond Congress’s power to define offenses against the law of nations and the judiciary’s admiralty jurisdiction.<sup>11</sup>

The revival in *Filartiga v. Pena-Irala*<sup>12</sup> of the long-dormant Alien Tort Statute (“ATS”)<sup>13</sup> of 1789 set off a debate over whether the law of nations is a kind of federal common law, since the ATS refers to a violation of the law of nations as a tort.<sup>14</sup> Former Yale Law School Dean Harold Hongju Koh, now Legal Advisor to the United States Department of State, has championed the notion that the law of nations is federal common law<sup>15</sup> and met stiff resistance.<sup>16</sup> The controversy grew when the Court cited foreign law while reversing two state capital sentences,<sup>17</sup> which triggered

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<sup>8</sup> The term “treaty” has “a far more restrictive meaning” under the Constitution than in international practice, where it refers to any international agreement. See *Weinberger v. Rossi*, 456 U.S. 25, 29 (1982).

<sup>9</sup> U.S. CONST. art. VI, cl. 2.

<sup>10</sup> *Medellin v. Texas*, 128 S. Ct. 1346, 1356 (2008) (treaties “are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be ‘self-executing’ and is ratified on these terms”) (quoting *Igartua-De La Rosa v. United States*, 417 F.3d 145, 150 (1st Cir. 2005) (en banc) (Boudin, C.J.)); see *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833), *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314-15 (1829), *overruled on other grounds*; Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L L. 695 (1995). State-to-state agreements are presumed not to create individual rights. See *Medellin*, 128 S. Ct. at 1357 n.3.

<sup>11</sup> See U.S. CONST. art. I, § 8, cl. 10 (“The Congress shall have Power . . . To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations”); *id.* art. III, § 2, cl. 3 (“all Cases of admiralty and maritime Jurisdiction”). Despite those provisions, the Court has long held, as discussed below, that Congress is not master of, but rather subject to, the law of nations and that the latter is made internationally rather than by Article III courts.

<sup>12</sup> 630 F.2d 876 (2d Cir. 1980).

<sup>13</sup> 28 U.S.C. § 1350 (2006).

<sup>14</sup> The ATS consists of certain provisions of the Judiciary Act of 1789, which extend federal subject matter jurisdiction “to any civil action by an alien for a tort only committed in violation of the law of nations or a treaty of the United States.” *Id.*

<sup>15</sup> Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2366 (1991).

<sup>16</sup> See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998); Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260 (1998); see also Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT’L L. 43, 56 (2004).

<sup>17</sup> See *Roper v. Simmons*, 543 U.S. 551, 575-77 (2005); *Lawrence v. Texas*, 539 U.S. 558, 568-74 (2003).

congressional resolutions,<sup>18</sup> proposed “Constitution Restoration Act[s],”<sup>19</sup> hearings,<sup>20</sup> and a debate between Justices Scalia and Stephen Breyer.<sup>21</sup> Confusion and controversy persist; Justice Sonia Sotomayor was asked at her confirmation hearings to explain how applying “foreign” law is consistent with the judicial oath of office.<sup>22</sup>

A key premise for both sides has been that the Constitution is the highest source of United States law. Common law proponents accept the supremacy of the Constitution insofar as they place the power to make the law of nations in the hands of Article III judges, while opponents favor a pristine Constitution unsoiled by foreign influence. In this setting some commentators have attempted to make a synthesis by arguing that courts should apply the law of nations to discern constitutional intent on the separation of powers and foreign affairs,<sup>23</sup> while asserting that only acts of Congress are laws of the United States.<sup>24</sup> Likewise, Justice Ruth Bader Ginsburg defends citations to foreign law as useful tools, albeit in a broader

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<sup>18</sup> See H.R. Res. 97, 109th Cong. (2005); H.R. Res. 568, 108th Cong. (2004).

<sup>19</sup> See Constitution Restoration Act of 2004, S. 2323, 108th Cong. (2004); Constitutional Restoration Act of 2004, S. 2082, 108th Cong. (2004); Constitutional Restoration Act of 2004, H.R. 3799, 108th Cong. (2004).

<sup>20</sup> See, e.g., *House Resolution on the Appropriate Role of Foreign Judgments in the Interpretation of the Constitution of the United States: Hearing on H.R. Res. 97 Before the Subcommittee on the Constitution of the House Committee on the Judiciary*, 109th Cong. (2005); *Appropriate Role of Foreign Judgments in the Interpretation of American Law: Hearing on H.R.-Res. 568 Before the Subcommittee on the Constitution of the House Committee on the Judiciary*, 108th Cong. (2004).

<sup>21</sup> See Stephen Breyer & Antonin Scalia, Assoc. Justices, U.S. Supreme Court, Debate at American University: Constitutional Relevance of Foreign Court Decisions (Jan. 13, 2005) (available at <http://www.freerepublic.com/focus/f-news/1352357/posts>). The author thanks Nicholas Rosenkranz for compiling responses to *Roper* and *Lawrence*. See Nicholas Quinn Rosenkranz, *Condorcet and the Constitution: A Response to The Law of Other States*, 59 STAN. L. REV. 1281, 1282 (2007).

<sup>22</sup> Senator Tom Coburn asked the nominee whether “there is no authority for a Supreme Court justice to utilize foreign law in terms of making decisions based on the Constitution or statutes?” Justice Sotomayor answered: “[M]y speech . . . repeatedly underscored that foreign law could not be used as a holding, as precedent, or to interpret the Constitution or the statutes.” (Available at <http://latimesblogs.latimes.com/washington/2009/07/sotomayor-hearings-complete-transcript-day-3-part-2.html>). Justice Sotomayor’s answer is correct; the Court has long regarded customary international law and some treaties as domestic, not foreign, law. *But See* Paul Finkelman, *Foreign Law and American Constitutional Interpretation: A Long and Venerable Tradition*, 63 N.Y.U. Ann. Surv. Am. L. 29 (2007) (reviewing cases that rely on the law of nations to argue that citations to foreign law are nothing new).

<sup>23</sup> Anthony J. Bellia, Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1 (2009).

<sup>24</sup> *Id.* at 34-35 (whether the “customary law of nations” is part of “the supreme Law of the Land” hinges on whether it is part of the “Laws of the United States” in the Arising Under Clause of Article III, and “[t]he framing and ratification of these clauses lend support to the argument that ‘Laws’ meant acts of Congress, not forms of customary law, including the customary law of nations”).

way.<sup>25</sup> Thus, there are differences over what the law of nations is and how to use it, but the tacit consensus of responsible American opinion appears to be that there is no law higher than the Constitution.

The purpose of this Article is to show that the principle of constitutional supremacy over international law—whatever its normative merit—is a radical departure from the Court’s precedents. The Court decided long ago that the law of nations is not judge-made natural law or otherwise made under the Constitution. Rather it has built virtually all of American federalism, much of its statutory interpretation doctrine and a small though important component of its private rights jurisprudence on the premise that the law of nations is not only extra-constitutional in origin, as Attorney General Randolph suggested, but also supra-constitutional in its effect. Any concept of constitutional supremacy over international law calls for a radical uprooting of much of American law and does not take seriously what the Court has long done.

As shown below, the Court has specifically held that the states are immune from federal jurisdiction under international law despite the literal provisions of Article III and of federal legislation admittedly authorized by the Commerce Clause, that interstate compacts may be enforced under international law when not approved by Congress as the Compacts Clause requires, and that disputes between the states may be resolved by applying international law. On statutory construction it has repeatedly reaffirmed, without any limitation as to types of cases, the Marshall Court’s decisions which held that Congress may not exercise its constitutionally valid powers under Article I in violation of the law of nations. Likewise, the Court has enforced international human rights for the benefit of both Americans and foreigners where the constitutionality of executive actions that infringe them is unchallenged. It has long done so without recourse to the ATS, and has reaffirmed those cases for ATS purposes in *Sosa*. In all those areas the Court has enforced international law despite constitutional provisions that it has found to be ambiguous, unambiguous, indifferent, silent or contrary to its decisions, such that it could not be said that the Court has used the law of nations only as a tool of construction.

Rather than a foreign threat to American liberty, the supremacy of international law is, in the Court’s traditional jurisprudence, a constraint on what the Constitution plainly allows the federal government to do, thus safeguarding liberty by limiting the sovereignty of the United States in ways that the Constitution does not do. The cases show that limits on

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<sup>25</sup> Ruth Bader Ginsburg, “A Decent Respect to the Opinions of [Human]kind”: The Value of a Comparative Perspective in Constitutional Adjudication, speech to the Constitutional Court of South Africa (Feb. 7, 2006) ([http://www.supremecourt.gov/publicinfo/speeches/view speeches.aspx?Filename=sp\\_02-07b-06.html](http://www.supremecourt.gov/publicinfo/speeches/view speeches.aspx?Filename=sp_02-07b-06.html), last visited on Dec. 17, 2010).

United States sovereignty, which might offend Americans when asserted abroad, form the jurisprudential basis of conservative notions of limited government at home. To say that there is no United States law higher than the Constitution is to argue for an unprecedented expansion of federal power.

What is missing is the explanation that the Court has been reticent to articulate but which is clear in its decisions. As to how the law of nations is United States law, this Article explains that the Court has treated the law of nations as the source and limit of the powers and privileges that the people and the states delegate to the United States in the Constitution. Thus, international law has functioned like the governing law of a constitutional agreement among sovereigns. As to why the Court has enforced the law of nations in that manner, this Article shows that the Court's recurring view of the Constitution as an agreement among sovereigns implies a higher law from which these sovereigns derive powers and the ability to negotiate them.

This article explains, in addition, that the ATS offers misleading guidance on whether the law of nations is judge-made common law. The ATS uniquely preserves, like a 1789 time capsule, a congressional view of the law of nations as common law that the Justices also held in *Chisholm v. Georgia*.<sup>26</sup> This Article discusses how the prevailing view in England at the time of the framing was that the law of nations and the common law are closely related, and it has long been shown that the Framers accepted that English heritage.<sup>27</sup> But after the country reacted to *Chisholm* with profound shock and overruled it in the Eleventh Amendment, the Court began to think of the country as a community of sovereigns formed by an agreement governed by international law. The revival of the ATS in recent decades has let the Federalist genie of constitutional supremacy out of a long-buried bottle, thus inviting reversal of two hundred years of anti-Federalist jurisprudence in areas that encompass federalism but extend well beyond it.

This article begins by showing that adopting the principle of constitutional supremacy over international law would require a reconsideration of the premises of American federalism. It goes on to consider and explain the role the Court has given to the law of nations in federal statutory construction, including the difficulties the Court has encountered in doing so. It then examines how the First Congress's Federalist misconceptions about the supremacy of the federal government

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<sup>26</sup> 2 U.S. (2 Dall.) 419 (1793).

<sup>27</sup> See Dickinson, *supra* note 6, at 55-56 (showing the framers intended that the law of nations would be administered by the Supreme Court and any inferior federal courts as part of the "heritage of English law").

continue to create confusion today, unlike the Federalist Justices' errors on the states' residual sovereignty, because of the ATS's revival. It then concludes with a discussion of how the prevalent misunderstanding of the place of customary international law in United States law is affecting advocacy before the Court.

## II. FEDERALISM AND CUSTOMARY INTERNATIONAL LAW

American federalism is not often thought of as a branch of international law, but the Supreme Court held in *Beers v. Arkansas*<sup>28</sup> that the states' sovereign immunity is prescribed by international law, and it made that conclusion the well-considered centerpiece of its reasoning in *Alden v. Maine*.<sup>29</sup> The Court's decisions on the states' sovereign immunity, the power of the states to enter into compacts without Congress's approval, and the resolution of state disputes in the Court's original jurisdiction explain that the Constitution is a compact among sovereigns which receive and dispose of their powers and privileges in accordance with international law.

It was the country's rejection of *Chisholm* in the Eleventh Amendment that led the Court, through a series of cases culminating in *Alden*, to conclude that customary international law provides a foundation for federalism that is neither derived from nor limited by the Eleventh Amendment.

### A. *Chisholm*: Unitary Sovereignty

The starting point on *Chisholm* should be that the Constitution, in creating a federal government, omitted any reference to sovereignty or immunity, either alone or in combination. Article III, Section 2, defines the extent of federal judicial power expansively:

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public ministers and consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another state;—between Citizens of different states;—between Citizens of the same State claiming Lands under Grants of

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<sup>28</sup> 61 U.S. (20 How.) 527 (1857).

<sup>29</sup> 527 U.S. 706 (1999).

different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects. . . .<sup>30</sup>

Thus, Article III provides for judicial power extending to “all” cases “arising under” the laws of the United States without excluding the states as defendants,<sup>31</sup> as well as cases “between a State and Citizens of another State” and “between a State . . . and foreign States, Citizens or Subjects.”

The Eleventh Amendment repealed the provision that extended judicial power to cases “between a State and Citizens of another State,” as well as between a state and citizens of a foreign state, by providing thus: “The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Sovereign State.”<sup>32</sup> Accordingly the Eleventh Amendment, still never mentioning sovereignty or immunity, leaves in place Article III’s extension of the judicial power to “all” cases “arising under” the “laws of the United States” as well as “between a state . . . and foreign states . . . .”

In *Chisholm*, Georgia had failed to pay its debts to Robert Farquhar for supplies during the American Revolutionary War.<sup>33</sup> The executor of Farquhar’s estate, Alexander Chisholm, brought an assumpsit action against Georgia in federal court to collect payment.<sup>34</sup> Georgia refused to appear in the case on the grounds that as a sovereign it was immune from having to do so.<sup>35</sup> Justices John Blair, James Wilson, William Cushing, and Chief Justice John Jay held in favor of Chisholm, while Justice James Iredell dissented.<sup>36</sup>

The common thread of the four prevailing opinions may be called a *sola scriptura* theory of the Constitution, meaning a belief that all federal law must rest on the words of the Constitution and, therefore, Georgia is subject to federal jurisdiction under the terms of Article III, Section 2. Justice Iredell, on the other hand, opined that there *can* be law not specifically provided for by the Constitution, by which he was referring to the common law, and that when Congress enacted the Judiciary Act of 1789

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<sup>30</sup> U.S. CONST. art. III, § 2.

<sup>31</sup> As Article III was seen to set the limit of jurisdiction that Congress may provide federal courts, rather than as providing such jurisdiction directly, federal courts did not exercise “arising under” jurisdiction until Congress enacted it in 1875. See Anthony J. Bellia, Jr., *The Origins of Article III “Arising Under” Jurisdiction*, 57 DUKE L.J. 263 (2007).

<sup>32</sup> U.S. CONST. amend. XI.

<sup>33</sup> *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 444-45 (1793).

<sup>34</sup> *Id.* at 430.

<sup>35</sup> *Id.* at 419.

<sup>36</sup> *Id.* at 419-29.

to implement Article III, it did not intend to set aside the principle of the crown's immunity under the received English common law.

The *sola scriptura* theory of the Constitution is explicit in the majority opinions. Justice Wilson made clear, first, that the great issue was whether the United States is one nation:

This is a case of uncommon magnitude. One of the parties to it is a State—certainly respectable, claiming to be sovereign. The question to be determined is whether this State, so respectable, and whose claim soars so high, is amenable to the jurisdiction of the Supreme Court of the United States? This question, important in itself, will depend on others more important still, and, may, perhaps, be ultimately resolved into one, no less radical than this—“do the people of the United States form a Nation?”<sup>37</sup>

Justice Wilson, a delegate at the Constitutional Convention, further opined that these questions should be resolved in reference solely to the words of the Constitution. He wrote that “[t]o the Constitution of the United States, the term SOVEREIGN, is totally unknown[,]”<sup>38</sup> and added that

[I]n my opinion, this doctrine [of Georgia's sovereignty] rests not upon the legitimate result of fair and conclusive deduction from the Constitution: It is confirmed, beyond all doubt, by the *direct* and *explicit declaration* of the Constitution itself. “The judicial power of the *United States* shall extend, to controversies between *two States*.”<sup>39</sup>

Justice Blair concurred that sovereign immunity can only arise from the Constitution. He excluded any possibility that international law or European practices might affect the question:

In considering this important case, I have thought it best to pass over all the strictures which have been made on the various european [sic] confederations; because, as, on the one hand, their likeness to our own is not sufficiently close to justify any analogical application; so, on the other, they are utterly destitute of any binding authority here. The Constitution of the United States is the *only fountain* from which I shall draw; the *only authority* to which I shall appeal.<sup>40</sup>

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<sup>37</sup> *Chisholm*, 2 U.S. at 453.

<sup>38</sup> *Id.* at 454.

<sup>39</sup> *Id.* at 466 (emphasis added).

<sup>40</sup> *Id.* at 450 (emphasis added). Justice Blair's “only authority” approach is reminiscent of the theological doctrine of *sola scriptura* in that the Constitution, like the scriptures, contains no claim to be an exclusive authority.

Like Justice Wilson, Justice Blair found that Article III clearly provides federal jurisdiction to enter default judgment against Georgia for failure to answer the federal judicial summons.

Justice Cushing agreed, rejecting the applicability of the common law of England or of any law prescribed outside the United States. He rested solely on Article III, Section 2:

The point turns not upon the law or practice of England, although perhaps it may be in some measure elucidated thereby, *nor upon the law of any other country whatever*; but upon *the Constitution* established by the people of the United States; and particularly upon the extent of powers given to the Federal Judicial in the second section of the third article of the Constitution.<sup>41</sup>

For his part, Chief Justice Jay also decided in favor of the plaintiff, underscoring like Justice Wilson, and quite logically so, that to acknowledge Georgia's sovereignty would be to reduce the sovereignty of the United States:

The exception contended for would contradict and do violence to the great and leading principles of a free and equal national government, one of the great objects of which is to ensure justice to all: to the few against the many, as well as to the many against the few.<sup>42</sup>

In lone disagreement, Justice Iredell suggested that there is something called "the law" which is distinct from the Constitution, finding that "this Court is to be (as I consider it) the organ of the Constitution and the law, *not of the Constitution only*, in respect to the manner of its proceeding."<sup>43</sup> He alluded to the part of the common law of England that "prescribes remedies against the Crown" and was not modified by statute.<sup>44</sup> Justice Iredell reasoned that the Judiciary Act intended to implement Article III as a transfer of jurisdiction only, without creating judicial power "to provide laws for the decision of all possible controversies in which a State may be involved with an individual, without regard to any prior exemption . . . ."<sup>45</sup> Thus, the dissent believed the common law immunized Georgia despite Article III and that, under the principle of legislative supremacy over the common law, Congress could amend the Judiciary Act to abrogate the states' immunity but had not done so. It bears emphasis that even Justice

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<sup>41</sup> *Id.* at 466 (emphasis added).

<sup>42</sup> *Id.* at 477.

<sup>43</sup> *Id.* at 433 (emphasis added).

<sup>44</sup> *Id.* at 435.

<sup>45</sup> *Id.* at 436.

Iredell did not conceive of any law that could prevent Congress from abrogating the states' immunity.

*Chisholm*, therefore, comes down to this: one Justice thought that the common law immunized Georgia despite Article III, all subscribed to principles of constitutional and hence federal legislative supremacy, and none embraced any role for international law. As shown below, the Court, step-by-step, disowned both the *sola scriptura* theory of the Constitution and, ultimately, Justice Iredell's assumption that the states' sovereign immunity rests on common law subject to legislative abrogation, finding instead that the Constitution is a compact among sovereigns made under a higher body of law prescribed by the international community of states.

### B. *Article III Yields to International Law*

Discussing the historical background at length, the Court observed in *Alden* that the *Chisholm* decision “fell upon the country with a profound shock.”<sup>46</sup> The initial proposal to amend the Constitution, introduced in the House of Representatives the day after *Chisholm* was announced, became the Eleventh Amendment.<sup>47</sup> As quoted above, however, the Eleventh Amendment does not introduce sovereignty or immunity into the constitutional text, does not refer to whether a particular state may withdraw its consent to be sued if previously given, and only excludes federal jurisdiction of cases brought by citizens of another state or of a foreign state. By leaving the states' sovereign immunity out of the Eleventh Amendment, the Federalists in Congress cured the Justices' misstep while safekeeping the Federalist notion of unitary sovereignty; as Justice Wilson put it, “the people of the United States form a Nation[.]”<sup>48</sup>

The Court has dealt with that situation by doing something of which the first Justices did not conceive; namely, it has rooted the states' sovereignty in the law of nations and elevated it above constitutional and legislative supremacy in order to protect the states' sovereignty against abrogation by Congress. It is unclear whether the Court has remained purposefully reticent over the years about the implications of those notions or, more likely, has only discovered those implications over time and acknowledged them with caution. But it has held that the plain words of Article III must yield to the states' sovereign immunity derived not from the Eleventh Amendment but from expressly extra-constitutional international law.

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<sup>46</sup> *Alden v. Maine*, 527 U.S. 706, 720 (quoting 1 C. Warren, *THE SUPREME COURT IN UNITED STATES HISTORY* 96 (rev. ed. 1926)); see *Hans v. Louisiana*, 134 U.S. at 11; *Monaco v. Mississippi*, 292 U.S. 313, 325 (1934); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 69 (1996).

<sup>47</sup> *Alden*, 527 U.S. at 721.

<sup>48</sup> *Chisholm*, 2 U.S. at 453.

The Court's journey down that path was steady, slow, and well-considered. After *Chisholm* was overruled by amendment, the first issues that arose dealt with state consent to federal jurisdiction (or waiver of sovereign immunity). In *Curran v. Arkansas*<sup>49</sup> and in *Clark v. Barnard*,<sup>50</sup> the Court allowed federal actions to proceed against states without objection, notwithstanding the Eleventh Amendment. Although the Eleventh Amendment does not make federal jurisdiction optional or contingent on state consent, *Curran* and *Clark* imply that the states have the privilege to opt into federal subject matter jurisdiction at their pleasure.

The Court expressly confirmed that implication in *Beers v. Arkansas*, where it held, per Chief Justice Roger Taney, that a state may repeal a statute in which it had previously consented to actions against the state in federal court, thus abrogating federal subject matter jurisdiction to which the state had previously consented.<sup>51</sup> For what appears to have been the first time, the Court grounded state sovereign immunity, as well as the right to consent and to withdraw consent, in the "jurisprudence [of] all civilized nations" rather than the Constitution:

It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another state. And, as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it. . . . [T]he prior law was not a contract. It was an ordinary act of legislation . . .<sup>52</sup>

Thus, *Beers* held that a state may waive and reassert its sovereign immunity at will in order to extinguish, or not extinguish, the jurisdiction of federal courts, despite a plaintiff's commercial reliance on the state's waiver while it lasts, because other sovereigns in the world community believe generally that sovereigns may do so. To the Court's credit in *Beers*, it did not look away from the apparent anomaly that a state may dispose of constitutional provisions at will and explained, albeit tersely, that sovereignty is "an established principle of jurisprudence in all civilized

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<sup>49</sup> 56 U.S. (15 How.) 304, 309 (1853).

<sup>50</sup> 108 U.S. 436, 447 (1883).

<sup>51</sup> *Beers v. Arkansas*, 61 U.S. 527, 530 (1858).

<sup>52</sup> *Id.* at 529 (emphasis added).

nations . . . .”<sup>53</sup> *Beers*, however, elides any notion of extra-constitutional law.<sup>54</sup>

The Court also had to decide whether the states are immune from federal suits in cases not brought by persons mentioned in the Eleventh Amendment. In *Hans v. Louisiana*,<sup>55</sup> a citizen of Louisiana brought suit against that state in federal court seeking to recover the amount of certain state bond coupons, a contractual obligation which the plaintiff claimed the state had impaired in violation of the Contracts Clause of the Constitution.<sup>56</sup> The issue before the Court was whether the federal court’s jurisdiction over cases arising from violations of the Constitution extended to a state as a defendant, particularly as the wording of the Eleventh Amendment does not prohibit federal suits against a state by its own citizen.

The *Hans* Court resolved the case in favor of Louisiana. It criticized *Chisholm*, lauded Justice Iredell’s dissent, and quoted Alexander Hamilton to make clear that the international law alluded to in *Beers* is customary law:

It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is *the general sense and the general practice of mankind*[;] and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States[,] and the danger intimated must be merely ideal.<sup>57</sup>

As for the Constitution, the Court admitted that the “mere letter” of Article III, Section 2 “might” extend federal jurisdiction over the states, but it held instead that Hamilton’s and Justice Iredell’s contrary “views . . . were clearly right, as the people of the United States in their sovereign capacity subsequently decided.”<sup>58</sup>

Conversely, the Court has approved federal jurisdiction against an objecting state where the Constitution does not prescribe it, thus

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<sup>53</sup> *Id.*

<sup>54</sup> The Court took the *Beers* principles quite far. It held in two post-Civil War cases that two Southern states may simultaneously yield and retain their sovereign immunity, in such a way that federal courts become auditors without power of enforcement. See *R.R. Co. v. Tennessee*, 101 U.S. 337, 339-40 (1879) (state statutory consent to enter a judgment on a debt is to a judicial audit and not to enforcement of judgment); *R.R. Co. v. Alabama*, 101 U.S. 832, 834 (1879) (as in *R.R. Co. v. Tennessee*, “the courts are made little else than auditing boards”).

<sup>55</sup> 134 U.S. 1 (1890).

<sup>56</sup> See U.S. CONST. art. I, § 10. cl. 1 (“No State shall . . . pass any . . . Law impairing the Obligation of Contracts”).

<sup>57</sup> *Hans*, 134 U.S. at 12-13 (quoting *The Federalist No. 81*, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added)).

<sup>58</sup> 134 U.S. at 13-14. The Court was referring to Justice Iredell’s vote rather than his reasoning that Georgia’s sovereign immunity is based on the common law.

underscoring in another way how sovereignty operates independently of the Constitution. In *United States v. Texas*, the Court held that it has original jurisdiction of an action by the United States against one of the states to resolve a boundary dispute, despite the lack of any constitutional provision for such jurisdiction, because the general language of Article III is a sufficient indication of the states' sovereign consent to be sued by the United States in federal court.<sup>59</sup> Its key rationale was that "the permanence of the union might be endangered if to some tribunal was not entrusted the power to determine [disputes between the states and the United States] according to the recognized principles of law. And to what tribunal could a trust so momentous be more appropriately committed than [the Supreme Court]?"<sup>60</sup> Here, the Court conceived of itself, again, as a tribunal among sovereigns, but accorded to peace among sovereigns a higher value than to their dignity.

*Principality of Monaco v. Mississippi*<sup>61</sup> explains that *United States v. Texas*, and other cases upholding jurisdiction of suits by the United States against a member state, do not stand alone in using peace among sovereigns as a jurisdictional guidepost. *Monaco* explains that both the Court's original jurisdiction in disputes between the states, and between the United States and a state, rests upon the "similar basis" of the "peace of the Union[.]"<sup>62</sup> while all other suits, including in this case one by a foreign state, are absolutely barred.<sup>63</sup> It is particularly notable that, considering as a whole the different types of cases against the states discussed in *Monaco*, the presence or absence of a constitutional provision creating jurisdiction is in no sense determinative or even helpful as a means of predicting or explaining the Court's rulings.

### C. *The Commerce Clauses Yield to International Law*

*Seminole Tribe of Florida v. Florida*<sup>64</sup> takes the foregoing premises further by explaining that the states' sovereign immunity results from

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<sup>58</sup> 143 U.S. 621, 646 (1892).

<sup>60</sup> *Id.* at 645.

<sup>61</sup> 292 U.S. 313, 328-30 (1934).

<sup>62</sup> *Id.* at 328-29. The Court reasoned, *id.* at 330, that *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), does not support suits by foreign states against members of the Union, even though Chief Justice Marshall's opinion suggested, in accord with the literal words of Article III and the Eleventh Amendment, that the Cherokee Nation might have been able to sue Georgia, over objection, if the Cherokee Nation had been a "foreign state" in the constitutional sense. *Monaco* explains that *Cherokee Nation* found no federal jurisdiction because it held that the tribe was not a foreign state.

<sup>63</sup> *Id.* at 329-30.

<sup>64</sup> 517 U.S. 44, 47 (1996).

international law that is *not* common law and is *not* subject to legislative abrogation.

The Seminole Tribe sued in federal court to require Florida to negotiate a gambling compact in good faith. The parties, the lower courts, and the Justices agreed that Congress's clear and undisputed intent in the Indian Gaming Regulatory Act<sup>65</sup> was to abrogate the states' immunity, through an exercise of congressional authority<sup>66</sup> under the Indian Commerce Clause, in order to require Florida to negotiate in good faith.<sup>67</sup> Congress had enacted the statute pursuant to the Indian Commerce Clause, which provides that "[t]he Congress shall have power . . . To regulate commerce . . . with the Indian Tribes[,]"<sup>68</sup> as well as the Necessary and Proper Clause.<sup>69</sup> The Court imposed an exacting standard of sovereign consent to be sued, found that the Indian Commerce Clause's expansive language did not measure up to that standard, read the statute as clearly intending to abrogate the state's sovereign immunity, and declined to enforce the statute as contrary to the general practice of the international community of states.<sup>70</sup>

Justice Souter's dissent prompted the majority to decide specifically whether customary international law is common law. Joined by Justices Ginsburg and Breyer, Justice Souter wrote that *Hans* and its progeny should be read as "assessing the contents of federal common law" rather than any principle that Congress may not override by statute.<sup>71</sup> While Justice Scalia opined in *Sosa* that customary international law is common law and in *Seminole Tribe* that it is not, Justice Souter read it as common law in both, pointing out in *Seminole Tribe* that if it is common law then Congress may abrogate the residual sovereignty of the states.

The *Seminole Tribe* majority decided that Congress may not abrogate what Hamilton called "the general sense and the general practice of mankind" because it is not common law:

The dissent mischaracterizes the *Hans* opinion. That decision found its roots not solely in the common law of England, but in the much more fundamental "jurisprudence in all civilized nations." *Hans*, 134 U.S. at 17 (quoting *Beers v. Arkansas*, 20 How. 527, 529, 15 L.

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<sup>65</sup> 25 U.S.C. § 2710(d)(7) (2006).

<sup>66</sup> See *Seminole Tribe*, 517 U.S. at 47; 25 U.S.C. §§ 2710(d)(3), (d)(7) (2006). This provision purported to allow Indian tribes to sue states in federal court to enforce a duty, also prescribed by the Act, to negotiate in good faith gambling compacts with Indian tribes.

<sup>67</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>68</sup> *Id.*

<sup>69</sup> U.S. CONST. art. I, § 8, cl. 18 ("The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.")

<sup>70</sup> See *Seminole Tribe*, 517 U.S. at 57-76.

<sup>71</sup> *Id.* at 127 (Souter, J., dissenting).

Ed. 991 (1858); see also *The Federalist* No. 81, p. 487 (C. Rossiter ed. 1961) (A. Hamilton) (sovereign immunity “is the general sense and the general practice of mankind”). The dissent's proposition that the common law of England, where adopted by the States, was open to change by the Legislature is wholly unexceptionable and largely beside the point: that common law provided the substantive rules of law rather than jurisdiction.<sup>72</sup>

The majority's formulation omits any recognition of the existence of any *federal* common law, instead referring to the common law “where adopted by the States,” and excludes the possibility that the states' substantive common law might determine federal jurisdiction.<sup>73</sup>

Regarding whether the Indian Commerce Clause gives Congress legislative supremacy over *Hans*'s “jurisprudence in all civilized nations[,]” the Court explained that “our inquiry into whether Congress has the power to abrogate unilaterally the States' immunity from suit is narrowly focused on one question: Was the Act in question passed pursuant to a constitutional provision granting Congress the power to abrogate?”<sup>74</sup> The Court did not find any constitutional provision wherein the states consented that Congress may abrogate their internationally prescribed sovereign immunity. It explained that *Fitzpatrick v. Bitzer* recognized congressional power to abrogate state sovereign immunity under Section 5 of the Fourteenth Amendment.<sup>75</sup> It also explained that the plurality opinion in *Pennsylvania v. Union Gas Co.*<sup>76</sup> recognized Congress's power to abrogate state sovereign immunity under the Interstate Commerce Clause,<sup>77</sup> but noted that it had not upheld such power to abrogate in any other instance.<sup>78</sup> In the end, the Court distinguished and limited *Fitzpatrick* as uniquely based on the alteration of the federal-state balance in the post-Civil War Fourteenth Amendment<sup>79</sup> and overruled *Union Gas*.<sup>80</sup>

<sup>72</sup> *Id.* at 69 (citing *Monaco*, 292 U.S. at 323).

<sup>73</sup> The majority's distinction between substantive and jurisdictional rules suggests an argument that substantive (*i.e.* human rights) rules in the law of nations were abrogated as federal common law by *Erie*, while jurisdictional (*i.e.* immunity) rules in the law of nations may not be abrogated as federal common law by statute. *Seminole Tribe* precludes that distinction by holding that the states' sovereign immunity is not common law under *Hans*. All that *Seminole Tribe* says is that common law is state substantive law and, as such, does not circumscribe federal courts' power.

<sup>74</sup> *Seminole Tribe*, 517 U.S. at 59 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452-456 (1976)).

<sup>75</sup> *Id.* (citing U.S. CONST., amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”)).

<sup>76</sup> 491 U.S. 1, 19-20 (1989).

<sup>77</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>78</sup> *Seminole Tribe*, 517 U.S. at 59.

<sup>79</sup> *Id.* at 65-66.

<sup>80</sup> *Id.* at 66. The Court observed that Justice Byron White added the fifth vote for the result in *Union Gas* but “[did] not agree with much of [the plurality's] reasoning.” *Id.* at 59-60 (quoting

According to *Seminole Tribe*, “Justice Brennan’s opinion [in *Union Gas*] finds Congress’[s] power to abrogate under the Interstate Commerce Clause from the States’ cession of their sovereignty when they gave Congress plenary power to regulate interstate commerce.”<sup>81</sup> But *Seminole Tribe* overrules *Union Gas* because a cession of sovereign power to regulate is not enough; the states’ internationally prescribed immunity required not only a showing that they ceded regulatory power to Congress, but also a showing that meets a standard of specificity for waivers of sovereign immunity.<sup>82</sup> Congress acted unconstitutionally by exceeding its constitutional powers, but that occurred because the Constitution fell short of evidencing the states’ waiver of sovereign immunity prescribed for them by the international community. That implies that the Constitution, and all American law inferior to it, is subject to international law.

The Court made that implication explicit in *Alden v. Maine*.<sup>83</sup> In that case, Justice Anthony Kennedy’s majority opinion held that Maine is immune, *in its own courts*, from a suit filed by its probation officer employees under overtime provisions of the Fair Labor Standards Act of 1938.<sup>84</sup> The probation officers had first filed their lawsuit in the United States District Court for the District of Maine, but that court dismissed the action under the Eleventh Amendment in light of *Seminole Tribe*, and the Court of Appeals affirmed.<sup>85</sup> The probation officers then filed the same action in state court,<sup>86</sup> thus seeking to avoid the Eleventh Amendment. The state trial court dismissed the action on grounds of immunity and the state’s highest court affirmed.<sup>87</sup>

The Supreme Court granted certiorari and affirmed on the grounds that Maine’s sovereignty is not derived from or limited by the Eleventh Amendment, or even by the Constitution, because it arose before ratification and must be upheld in Maine’s own courts:

We have . . . sometimes referred to the States’ immunity from suit as “*Eleventh Amendment immunity*.” The phrase is convenient

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*Union Gas*, 491 U.S. at 57 (White, J., concurring in judgment in part and dissenting in part)). The *Seminole Tribe* Court therefore wanted to make clear its rejection of the *Union Gas* plurality opinion, regardless of whether the latter was an opinion for the Court.

<sup>81</sup> *Id.* at 61 (citing *Union Gas*, 491 U.S. at 17 (Brennan, J.) (“The important point . . . is that the provision both expands federal power and contracts state power”)). As the *Seminole Tribe* Court found the Indian Commerce Clause at least as broad as the Interstate Commerce Clause, this Article refers to both as the Commerce Clauses.

<sup>82</sup> *See id.* at 62. The expansiveness of Congress’s regulatory powers was not the relevant issue: “If anything, the *Indian Commerce Clause* accomplishes a greater transfer of power from the States to the Federal Government than does the *Interstate Commerce Clause*.” *Id.*

<sup>83</sup> 527 U.S. 706 (1999).

<sup>84</sup> 29 U.S.C. § 201 *et seq.*

<sup>85</sup> *Mills v. Maine*, 118 F.3d 37 (1st Cir. 1997).

<sup>86</sup> *Alden*, 527 U.S. at 712.

<sup>87</sup> *Alden v. State*, 715 A.2d 172 (Me. 1998).

shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the *Eleventh Amendment*. Rather, as the Constitution's structure, and its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments.<sup>88</sup>

*Alden* thus explains that the “Constitution’s structure, its history, and the authoritative interpretations by this Court” imply the continuing vitality of pre-constitutional law on the states’ sovereignty, and that this is the point that eluded the *Chisholm* majority.<sup>89</sup> The phrase “except as altered by the plan of the Convention or certain constitutional Amendments” alludes to the states’ privilege to cede their immunity in the original Constitution or in its Amendments.

While those points are explicit in *Alden*, there are two other points *Alden* makes implicitly. The first is that the Constitution does not occupy the field of legal relations between the states and the United States, as the states have immunity that is retained, but not derived from or limited by, the Constitution. As such that immunity applies in the states’ own courts, and the Supreme Court decided to enforce it there. The second is that the law of nations does not permit states to be separated from the privileges they receive under it except by consent, which may be given or retained by the terms of a constitutional agreement. *Alden* implies that since the structure, history, and interpretation of the Constitution indicate no intent by the states to cede their immunity, Article III powers are limited by the pre-existing, and retained, law of nations. Thus the role of the Constitution is to evidence an international legal transaction among states.

Read together, *Beers*, *Hans*, *Monaco*, *Seminole Tribe*, and *Alden* explain that the states enjoy sovereign immunity as a result of the established jurisprudence in all civilized nations resulting from a general sense and practice; that a principle of such jurisprudence is that sovereign immunity may be conditionally or partially waived by agreement; that Congress may not abrogate that jurisprudence as if it were common law without the states’ explicit consent in the Constitution; and that such jurisprudence does not arise from the Constitution, is not limited by it, and

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<sup>88</sup> *Alden*, 527 U.S. at 713.

<sup>89</sup> *Id.* at 719-26 (concluding upon detailed historical sources that the *Chisholm* majority misread the Constitution).

was already in effect when the first Justices failed to see it in *Chisholm*. In this manner international law is not only the source of the states' sovereign immunity but also the regulator and limit of it, in the sense that the law of nations requires a showing of sovereign consent to waive sovereign immunity. In short, the Court's sovereign immunity cases have used international law not only to discern what the Constitution means but also to enforce binding law originating outside the Constitution.

D. *The Compacts Clause Yields to International Law*

The Supreme Court's decisions on interstate compacts, which touch on a wide range of matters involving boundaries, natural resources, taxation, and other concerns, are also based on the principle of international law supremacy. In *Virginia v. Tennessee*<sup>90</sup> the Court considered a case brought by Virginia for a judicial decree of its true boundary with Tennessee. Virginia based its claim on royal charter, which Tennessee disputed on the basis that the two states agreed in 1801 to appoint boundary commissioners and in 1802 to approve the boundary they drew.<sup>91</sup> Virginia asked that the two agreements "be declared null and void as having been entered into between the states without the consent of Congress"<sup>92</sup> as required by the Compacts Clause of the Constitution: "No State shall, without the consent of Congress . . . Enter into any agreement or Compact with another State or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."<sup>93</sup> Congress was not involved in the 1801 agreement to appoint the commissioners, but Tennessee argued that Congress had implicitly approved the 1802 boundary agreement in judicial, revenue, and election statutes.<sup>94</sup>

The Court held that "[t]here are many matters upon which different states may agree that can in no respect concern the United States."<sup>95</sup> It reasoned that "the prohibition [in the Compacts Clause] is directed to the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States."<sup>96</sup> It concluded that the 1801 agreement to appoint commissioners could not have been reviewed by Congress until the

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<sup>90</sup> 148 U.S. 503 (1893).

<sup>91</sup> *Id.* at 504-05.

<sup>92</sup> *Id.* at 517.

<sup>93</sup> U.S. CONST. art. I, § 10, cl. 3.

<sup>94</sup> *Virginia v. Tennessee*, 148 U.S. at 516.

<sup>95</sup> *Id.* at 518.

<sup>96</sup> *Id.* at 519.

commissioners finished, and that Congress's approval of the 1802 boundary agreement was "fairly implied."<sup>97</sup>

The Court then went on to approve the commissioners' boundary on the basis of customary international law, "[i]ndependently of any effect due to the compact as such."<sup>98</sup> It held, "it is a principle of public law, universally recognized, that long acquiescence in the possession of territory, and in the exercise of dominion and sovereignty over [it], is conclusive of the nation's title and rightful authority."<sup>99</sup> The Court relied on Emmerich de Vattel for the principle that "[b]etween nations . . . it becomes necessary to admit prescription founded on length of time as a valid and incontestable title[.]"<sup>100</sup> and on Henry Wheaton's statement of boundary prescription under international law.<sup>101</sup> The Court took no step to determine what the framers of the Constitution may have intended at ratification, or what the law of nations may have provided then. Rather, the Court sought to give effect to the status of international custom at the time of its decision, suggesting that the United States, as a limited sovereign created for certain purposes, should be indifferent to combinations among the states for other purposes.

*Virginia v. Tennessee* is therefore a response to any contention that *Beers, Hans*, and their progeny give effect to the law of nations to effectuate a constitutional design. While the latter is certainly true, *Virginia v. Tennessee* gives effect to the law of nations, despite the Constitution's literal requirement of congressional approval, because doing so *is of no concern whatsoever to the Constitution*. It thereby confirms the most natural reading of the state sovereign immunity cases; namely, the states' residual sovereignty is prescribed not by the Constitution for the achievement of its own ends, but by the international community of states for reasons about which the Constitution can be vitally interested or, in this instance, wholly indifferent. The Court does not enforce customary international law only because or to the extent the Constitution needs it to do so; for the Court customary international law has been self-justifying and not just self-executing.

The Court in *Virginia v. Tennessee* saw the United States as multiple sovereigns and itself as a kind of international tribunal. As Justice Stephen Field wrote, *Virginia v. Tennessee*

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<sup>97</sup> *Id.* at 522.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 523 (citing *Indiana v. Kentucky*, 136 U.S. 479, 516 (1890)).

<sup>100</sup> *Id.* (quoting Vattel, 2 THE LAW OF NATIONS ch. 11 § 149).

<sup>101</sup> *Id.* at 524 (citing HENRY WHEATON, 2 INTERNATIONAL LAW, ch. 4 § 164).

[E]mbraces a controversy of which this Court has original jurisdiction, and in this respect the judicial department of our government is distinguished from the judicial department of any other country, drawing to itself by the ordinary modes of peaceful procedure the settlement of questions as to boundaries and consequent rights of soil and jurisdiction between states, possessed, for purposes of internal government, of the powers of independent communities, which otherwise might be the fruitful cause of prolonged and harassing conflicts.<sup>102</sup>

Thus, the Court regarded the United States as a community of sovereigns, each of which had “the powers of independent communities” including the power to enter into agreements, and itself as an international tribunal in a manner that is exceptional among nations.<sup>103</sup>

*Virginia v. Tennessee*’s conclusion that the Compacts Clause’s literal requirement of congressional approval could not be followed was *obiter dictum*, as it held that Congress’s consent to the 1802 boundary agreement was fairly implied. After incorporating that *dictum* in the holding of *New Hampshire v. Maine*,<sup>104</sup> the Court reaffirmed and expanded both cases in *U.S. Steel Corp. v. Multistate Tax Commission*.<sup>105</sup> There it held that the states may form a multistate tax audit agency without congressional approval.<sup>106</sup>

The Multistate Tax Commission’s (“MTC”) history dates from 1959, when “this Court held that net income from the interstate operations of a foreign corporation may be subjected to state taxation, provided that the levy is nondiscriminatory and is fairly apportioned to local activities that form a sufficient nexus to support the exercise of the taxing power.”<sup>107</sup> Congress responded by enacting a prohibition on “the imposition of a tax on a foreign corporation’s net income derived from activities within a State, if those activities are limited to the solicitation of orders that are approved, filled, and shipped from a point outside the State” and ordered a study.<sup>108</sup> The study was published, but Congress had not “enacted any legislation dealing with the subject.”<sup>109</sup> Then, “[w]hile Congress was wrestling with the problem, the Multistate Tax Compact was drafted” and several states joined.<sup>110</sup> United States Steel Corporation and other taxpayers, threatened

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<sup>102</sup> *Id.* at 504.

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

<sup>104</sup> 426 U.S. 363, 369-70 (1976).

<sup>105</sup> 434 U.S. 452, 459-78 (1978).

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

<sup>107</sup> *Id.* at 455 (citing *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 452 (1959)).

<sup>108</sup> *Id.* at 455 n.2 (citing Title I of Pub. L. No. 86-272, codified as 15 U.S.C. §§ 381-384).

<sup>109</sup> *Id.* at 456.

<sup>110</sup> *Id.*

with MTC audits, sued MTC in 1972 to declare the compact unconstitutional under the Compacts Clause for lack of congressional approval, as well as under the Commerce Clause and the Fourteenth Amendment.<sup>111</sup>

Reaffirming its prior Compacts Clause decisions, the Court rejected the taxpayers' argument that only certain bilateral interstate agreements may dispense with congressional approval. It had no difficulty with a multilateral administrative body because "the number of parties to an agreement is irrelevant if it does not impermissibly enhance state power at the expense of federal supremacy."<sup>112</sup> It approved the MTC in particular, observing: "[t]his pact does not purport to authorize the member States to exercise any powers they could not exercise in its absence. Nor is there any delegation of sovereign power to the Commission; each State retains complete freedom to adopt or reject the rules and regulations of the Commission."<sup>113</sup> Likewise the Justices rejected the argument that the MTC is an affront to the sovereignty of non-member states.<sup>114</sup> They discerned no Commerce Clause or Fourteenth Amendment infirmity for the fundamental reason that "it is only the individual State, not the Commission, that has the power to issue an assessment—whether arbitrary or not. If the assessment violates state law, we must assume that state remedies are available."<sup>115</sup>

*U.S. Steel* does not prohibit the states from creating new multistate agencies that operate as new sovereigns, but it may require that such agencies obtain congressional approval. It does not suggest, moreover, that Congress's approval transforms interstate agencies into arms of the United States government. Thus, several interstate agencies currently operate outside the federal government under compacts approved by Congress, including the Education Commission of the States,<sup>116</sup> the Emergency Management Assistance Compact,<sup>117</sup> and the Atlantic States Marine Fisheries Commission.<sup>118</sup> *U.S. Steel* shows that such multistate agencies created by compact are neither unconstitutional nor constitutional; they are

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<sup>111</sup> *Id.* at 458.

<sup>112</sup> *Id.* at 472.

<sup>113</sup> *Id.* at 473.

<sup>114</sup> *Id.* at 477-78.

<sup>115</sup> *Id.* at 479.

<sup>116</sup> Education Commission of the States, <http://www.ECS.org> (last visited Nov. 1, 2010). The commission arose from the Compact of Education that was endorsed by Congress in 1965. See Herman L. Orentlicher, *The Compact for Education: A Proposal for Shaping Nationwide Education Policy*, 51 AAUP BULL. 457 (1965).

<sup>117</sup> Emergency Management Assistance Compact, <http://www.emacweb.org> (last visited Nov. 1, 2010); Pub. L. No. 104-321 110 Stat. 3877 (1996) (Joint Resolution approving the Compact).

<sup>118</sup> Atlantic States Marine Fisheries Commission, <http://www.asmfc.org> (last visited Nov. 1, 2010); Act of May 4, 1942, 56 Stat. 267 (1942) (Granting consent and approval of the interstate compact relating to fisheries on the Atlantic seaboard and creating the Commission).

extra-constitutional. Like *Alden*, *U.S. Steel* suggests that the Constitution does not occupy the field of relations among American sovereigns.

E. *The States Yield to International Law*

The states' extra-constitutional relationships are not limited to compacts. In addition to customary international law's role in state sovereign immunity and interstate compact cases, the Court also applies it to resolve interstate disputes not involving the Constitution or any other interstate act.<sup>119</sup> Thus, in *Virginia v. Tennessee*, as discussed above, the Court stated that the commissioners' boundary would be binding on the states, by force of international law, even if there were no compact. This shows in another way that international law is more than the governing law helping to effectuate agreements among the states, whether constitutional or indifferent to the Constitution; it is also a freestanding set of extra-constitutional American laws.

In the first case of the long-running Arkansas River dispute between Kansas and Colorado, Chief Justice Melville Fuller wrote for the Court that it was "[s]itting, as it were, as an international, as well as a domestic, tribunal," such that "we apply Federal law, state law, and international law, as the exigencies of the particular case may demand . . . ."<sup>120</sup> In the second case between the same states, the Court explained:

In a qualified sense and to a limited extent, the separate states are sovereign and independent, and the relations between them partake something of the nature of international law. This court in appropriate cases enforces the principles of that law, and in addition, by its decisions of controversies between two or more States, is constructing what may not improperly be called a body of interstate law.<sup>121</sup>

The Court thus articulated in 1902 and 1907 how a hypothetical federal supreme court of the European Union might describe itself in the future,<sup>122</sup> and went on to apply international law to resolve resource and boundary differences among the states.

It is important to point out that the states' consent to be bound by the law of nations may operate at different levels. At a general level, states consent to a sense of legal obligation to follow certain general and

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<sup>119</sup> U.S. CONST. art. III. expressly provides that the Judicial Power extends to controversies among the states. A state may thereby become an unwilling defendant summoned by another state.

<sup>120</sup> *Kansas v. Colorado*, 185 U.S. 125, 146-47 (1902).

<sup>121</sup> *Kansas v. Colorado*, 206 U.S. 46 (1907) (proposition not stated by the Court, but in Syllabus of U.S. Reporter)

<sup>122</sup> This is not to suggest that the Constitution's federal design is like the European Union, but rather that a court of a federal union sits like an international tribunal among the member states.

consistent practices, but at a specific level they may not consent to have a particular set of rights—e.g. boundary or natural resource rights—settled in accordance with such norms. *Kansas v. Colorado* illustrates how the Court will enforce the states' general consent to be bound by customary international law in the absence of the type of specific consent found in the Constitution or in an interstate compact.

#### F. *The Tenth Amendment: Sovereignty Flows from the People*

The Court's anti-commandeering jurisprudence explains that the sovereignty of the states and that of the federal government flow from the people, meaning that the juridical status of the American people as a sovereign in international law is the origin of government power.

In *Printz v. United States*,<sup>123</sup> the Court expanded upon its holding in *New York v. United States*<sup>124</sup> to foreclose the possibility that the federal government may commandeer the mechanisms of state government to carry out federal policy. Both cases rely on the Tenth Amendment which provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>125</sup> Debates about whether the Tenth Amendment is a truism or about the merits of federalism miss a key point; namely, as applied by the Court the Tenth Amendment identifies the people as the link between international law and American governmental power. *Printz* approves James Madison's explanation:

In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.<sup>126</sup>

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<sup>123</sup> 521 U.S. 898 (1997) (holding that Congress may not by statute command state and local law enforcement officers to conduct background checks on prospective purchasers of handguns or to perform certain related tasks).

<sup>124</sup> 505 U.S. 144 (1992) (finding state legislatures are not subject to federal direction).

<sup>125</sup> U.S. CONST. amend. X. The Court did not repudiate its statement in *United States v. Darby*, 312 U.S. 100, 124 (1941), that the Tenth Amendment “states but a truism that all is retained which has not been surrendered[,]” nor its prior statement in *United States v. Sprague*, 282 U.S. 716, 733 (1931), that it “added nothing to the instrument as originally ratified” but found it necessary to reaffirm the concept of divided sovereignty.

<sup>126</sup> 521 U.S. at 922 (quoting THE FEDERALIST No. 51, at 323 (James Madison)). Popular sovereignty remains a vibrant principle, serving as a foundation of democracy, freedom of speech and election law. See *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 898 (2010) (“In

The division to which *Printz* refers may be called “the separation of the two spheres[,]” which the Court explains is one of “the Constitution’s structural protections of liberty.”<sup>127</sup> Again in Madison’s words, “[t]he local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere.”<sup>128</sup>

The anti-commandeering cases, when considered alongside the state sovereign immunity, interstate compact, and original jurisdiction cases suggest that the sovereignty which the states receive from international law was first received by the people. The people, having attained sovereignty in international law, divided and apportioned it among the states and the United States, reserving residual sovereignty to themselves and to the states. This sovereignty is law made by the community of all nations and cannot be set aside except by consent, such that if such consent is not given in the Constitution then no power created by the Constitution can touch it. All of this is supra-constitutional international law, in the sense that the Constitution is not the source or the limit of sovereignty that the people and the states retain, but the Constitution is not offended thereby. On the contrary, the design of the Constitution—“the compound republic of America”—is that of a community of sovereigns which could not function if there were no international law to govern the agreement that they made in the Constitution.

For these reasons, suggestions that “[t]here is no freestanding federalism apart from the particular implementing provisions[,]”<sup>129</sup> and that federalism is rooted in a “theory of constitutional positivism” based on original meaning or constitutional structure,<sup>130</sup> miss the mark. The Court’s federalism jurisprudence indicates that the Constitution does not implement federalism; rather customary international law implements both federalism and the Constitution by providing the legal foundation of sovereign power. For that foundation to hold, the Court has decided that customary international law is not federal or state common law, but rather internationally prescribed extra-constitutional law. It is supreme in the qualified but real sense that it limits the scope of some of the most expansive provisions of the Constitution, not only where it might help construe the Constitution, but also where it is of no concern to the

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a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential.”) (quoting *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976)).

<sup>127</sup> *Printz*, 521 U.S. at 921.

<sup>128</sup> *Id.* at 920-21 (quoting THE FEDERALIST No. 39, at 245 (James Madison)).

<sup>129</sup> John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2066 (2009).

<sup>130</sup> Ernest A. Young, *Alden v. Maine and the Jurisprudence of Structure*, 41 WM. & MARY L. REV. 1601, 1620 (2000).

Constitution. The Court thus enforces international law as self-executing and self-justifying.

### III. FEDERAL STATUTES AND CUSTOMARY INTERNATIONAL LAW

As discussed above, *Seminole Tribe* holds an act of Congress null because it clearly intended to abrogate “the jurisprudence [of] all civilized nations” on the states’ sovereign immunity.<sup>131</sup> In cases not involving the states or their sovereignty, the Court has long followed the same reasoning to hold that acts of Congress may not violate the law of nations and therefore should not be construed to do so. This section examines those cases.

#### A. *The Marshall Court’s “Never” Rule*

*Talbot v. Seeman*<sup>132</sup> and *Murray v. Schooner Charming Betsy*<sup>133</sup> hold that a conflict between an act of Congress and the law of nations must be resolved in favor of the law of nations. Choosing *Charming Betsy* as the leading decision, the Court has gradually expanded it to conform federal statutes to international agreements and the Constitution. While avoiding terms like supreme or higher law, the Court has used *Charming Betsy* to elevate customary international law over acts of Congress.

Both cases arose during the quasi-war at sea between the United States and France from 1798 to 1800, and involve seizures of foreign flag vessels by American warships pursuant to acts of Congress. *Talbot* holds that an act of Congress providing for salvage of half the value of a captured enemy vessel may not be given literal effect against a vessel previously seized by France from a neutral, where the law of nations exempts neutrals from paying salvage, despite the Constitution’s grant to Congress of the power to “make rules concerning Captures on . . . Water.”<sup>134</sup> The Court decided that an act of Congress in general must be construed in a manner that “will *never* violate those principles which we believe, and which it is our duty to believe, the legislature of the United States will always hold sacred.”<sup>135</sup> The Court made clear that it was seeking to resolve a conflict between an act of Congress and “the common principles and usages of

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<sup>131</sup> See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 69 (1996) (citing *Hans v. Louisiana*, 134 U.S. 1, 17 (1890)).

<sup>132</sup> 5 U.S. (1 Cranch) 1 (1801).

<sup>133</sup> 6 U.S. (2 Cranch) 64 (1804).

<sup>134</sup> U.S. CONST. art. I, § 8, cl. 11. The constitutionality of the statute was not challenged.

<sup>135</sup> *Talbot*, 5 U.S. (1 Cranch) at 44 (emphasis added).

nations” providing that “a neutral [vessel] is generally to be restored without salvage.”<sup>136</sup>

*Charming Betsy* involved a seizure of a vessel owned by a native citizen of the United States who, as an American, would be subject to capture under an act of Congress as a penalty for trading with the French. He had taken domicile in a Danish island, however, and swore allegiance to Denmark as a neutral. The Court declined to decide whether he had a right to expatriation for all purposes under the law of nations or otherwise, but construed the applicable statute so that he was not an American for its purposes.<sup>137</sup> It held, in accord with *Talbot*, that

[A]n act of Congress ought *never* to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.<sup>138</sup>

While the Court has said that canons of statutory construction are “not rules of law, but merely axioms of experience[.]”<sup>139</sup> *Charming Betsy* and *Talbot* state more than a canon; they use a canon to implement a rule of law. The first part of the block quote (e.g., “if any other possible construction remains”) may be called the *Charming Betsy* canon, but the second clause (e.g. “and consequently can never be construed”) is the holding that should be called the *Charming Betsy* rule.<sup>140</sup> The rule makes the canon necessary. Combined, the rule and the canon constitute a kind of judicial review according to which customary international law, as the source of sovereign authority including Congress’s power to legislate,<sup>141</sup> nullifies enactments that violate it.<sup>142</sup>

In practice the Court has followed the *Charming Betsy* rule while preferring to acknowledge only the *Charming Betsy* canon. Research does not identify any case in which the Court has concluded that an act of

<sup>136</sup> *Id.* at 43-44.

<sup>137</sup> *Charming Betsy*, 6 U.S. (2 Cranch) at 120.

<sup>138</sup> *Id.* at 118 (emphasis added).

<sup>139</sup> See *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221 (1952).

<sup>140</sup> See, e.g., Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 56 GEO. L.J. 479 (1997). (Professor Bradley points out that *Talbot* precedes *Charming Betsy*, *id.* at 485-86, but his attempt to ground the *Charming Betsy* rule in separation of powers principles is unpersuasive. As this article shows, the Court gives the law of nations primacy whether the Constitution is in conflict, interested, indifferent, or inapplicable.)

<sup>141</sup> Cf. Hans Kelsen, *The Principle of Sovereign Equality of States as a Basis for International Organization*, 53 YALE L.J. 207, 208 (1944) (“Sovereignty of the States, as subjects of international law, is the legal authority of the States under the authority of international law.”).

<sup>142</sup> Chief Justice Marshall may have followed *Heathfield v. Chilton*, 4 Burr. at 2016, where Lord Mansfield said that “the Act of Parliament of 7 Ann. c. 12, did not intend to alter, *nor can alter* the law of nations” (emphasis added).

Congress violates the law of nations *and* enforced the statute. By regularly acknowledging the canon and not the rule, however, the Court has found itself overextending *Charming Betsy* in ways that cause several difficulties. As discussed below, these include blurring the line between politics and law, opening a back door for the enforcement of non-self-executing treaties, calling upon Congress to enact statutes twice, and justifying one statutory interpretation for aliens and a different one for Americans. The cases suggest that this over-extension of the canon is the result of cutting it loose from the rule it is supposed to serve.

B. *A Loose Canon on the Ship of State*

Without citing *Charming Betsy* in 1884, and while citing it in 1984, the Court has held that federal statutes should not be construed to abrogate self-executing treaties. In *Chew Heong v. United States*,<sup>143</sup> the Court decided that a Chinese resident alien had a judicially enforceable right under a ratified treaty between the United States and China to reenter the United States, despite a subsequent immigration statute requiring documentation that he lacked, and despite the fact that the Supremacy Clause<sup>144</sup> places treaties and federal statutes at the same level. The Court recognized Congress's broad constitutional powers to control aliens' entry, but was unwilling to believe that Congress would dishonor a treaty.

A century later in *Trans World Airlines, Inc. v. Franklin Mint Corp.*,<sup>145</sup> the Court was willing to believe that Congress might abrogate a treaty, but required a showing of clear statutory intent to do so. In that case, the Civil Aeronautics Board continued to use the last official price of gold as a conversion factor for the Warsaw Convention's<sup>146</sup> limit of 250 gold French francs per kilogram of lost cargo, despite Congress's repeal of the last version of the statute that had set an official gold price in the United States.<sup>147</sup> The Court declared the Warsaw Convention a self-executing treaty, and held that "the erosion of the international gold standard and the

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<sup>143</sup> 112 U.S. 536, 539-40 (1884).

<sup>144</sup> U.S. CONST. art. VI, cl. 2.

<sup>145</sup> 466 U.S. 243 (1984).

<sup>146</sup> Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), reprinted in note following 49 U.S.C. § 40105 (Article 18 makes air carriers presumptively liable for lost cargo, while Article 22 limits their liability while adding that "[t]hese sums may be converted into any national currency in round figures").

<sup>147</sup> See Bretton Woods Agreements Act of 1976, Pub. L. No. 94-564, § 6, 90 Stat. 2660 (repealing with effect on April 1, 1978, the Par Value Modification Act, Pub. L. No. 93-110, § 1, 87 Stat. 352 (1973)); Second Amendment of Articles of Agreement of the International Monetary Fund, Apr. 30, 1976, [1976-1977] 29 U.S.T. 2203, T.I.A.S. No. 8937.

1978 repeal of the Par Value Modification Act cannot be construed as terminating or repudiating the United States' duty to abide by the Convention's cargo liability limit."<sup>148</sup> Congress may repeal a treaty, but "[a] treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed."<sup>149</sup>

When contrasted with *Chew Heong, Trans World* shows that the *Charming Betsy* canon can be useful when it is loosened from the *Charming Betsy* rule in order to apply it to treaties. Such usefulness stems from the fact that the *Charming Betsy* canon is merely a tool that could be made to serve purposes other than the *Charming Betsy* rule, such as a desire not to presume lightly that Congress means to cause international discord by abrogating a treaty. Difficulties quickly follow, however, beginning with the question why the canon, if its purpose is to prevent discord in foreign relations, should not also apply to executive agreements<sup>150</sup> and non-self-executing treaties. The Federal Circuit stated in *Allegheny Ludlum Corp. v. United States* that *Charming Betsy* enables World Trade Organization decisions to "shed light on whether an agency's practices and policies are in accordance with United States international obligations[.]"<sup>151</sup> but found that it had to retract that suggestion in *Corus Staal B.V. v. Department of Commerce*,<sup>152</sup> as the WTO treaties are not self-executing.<sup>153</sup> The problem with loosening the *Charming Betsy* canon from the rule that Congress may never violate the law of nations is that the distinction between politics and law matters; indeed, that distinction sums up the practical difference between non-self-executing and self-executing treaties.

More to the point of this Article, the politics/law distinction is also important to customary international law, as illustrated by *McCulloch v. Sociedad Nacional de Marineros de Honduras*.<sup>154</sup> In that case, the United States National Labor Relations Board had authorized a representation election on a Honduran registered vessel, but a labor union and a corporation from Honduras sued the Board to enjoin it. The Board argued that the literal wording of the National Labor Relations Act did not distinguish between United States and foreign vessels in United States waters, while the plaintiffs contended that the union had exclusive representation rights under Honduran law and the law of the sea.

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<sup>148</sup> *Trans World*, 466 U.S. at 253.

<sup>149</sup> *Id.* at 252 (quoting *Cook v. United States*, 288 U.S. 102, 120 (1933)).

<sup>150</sup> See *Weinberger v. Rossi*, 456 U.S. 25 (1982) (Americans may not invoke a discrimination statute when replaced by foreign nationals at a foreign base under an executive agreement).

<sup>151</sup> 367 F.3d 1339, 1348 (Fed. Cir. 2004).

<sup>152</sup> 395 F.3d 1343, 1347-49 (Fed. Cir. 2005).

<sup>153</sup> See *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 966 F.2d 660, 667-68 (Fed. Cir. 1992) (WTO treaties make WTO decisions dependent for effect on congressional action).

<sup>154</sup> 372 U.S. 10 (1963).

The Court, per Justice Thomas Clark, correctly saw that the Act was at least in tension if not in conflict with international law: “[O]ur attention is called to the well-established rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship.”<sup>155</sup> Beginning there, however, the Court undertook not a legal but a political analysis:

The possibility of international discord cannot therefore be gainsaid. Especially is this true on account of the concurrent application of the Act and the Honduran Labor Code that would result with our approval of jurisdiction. Sociedad, currently the exclusive bargaining agent of Empresa under Honduran law, would have a head-on collision with N.M.U. should it become the exclusive bargaining agent under the Act. This would be aggravated by the fact that under Honduran law N.M.U. is prohibited from representing the seamen on Honduran-flag ships even in the absence of a recognized bargaining agent. Thus even though Sociedad withdrew from such an intramural labor fight--a highly unlikely circumstance--questions of such international import would remain as to invite retaliatory action from other nations as well as Honduras.<sup>156</sup>

Thus, the Court predicted the likely actions of a Honduran labor union, and apprehended retaliation against the United States from Honduras and unnamed others. In this way it treated *Charming Betsy* as a rule of construction designed to protect international relations:

The presence of such highly charged international circumstances brings to mind the admonition of Mr. Chief Justice Marshall in *The Charming Betsy*, 2 Cranch 64, 118, 2 L.Ed. 208 (1804), that “an act of congress ought never to be construed to violate the law of nations if any other possible construction remains . . . .” We therefore conclude . . . that for us to sanction the exercise of local sovereignty under such conditions in this “delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed.” Since neither we nor the parties are able to find any such clear expression, we hold that the Board was without jurisdiction to order the election. This is not to imply, however, “any impairment of our own sovereignty, or limitation of the power of Congress” in this field. In fact, just as we directed the parties in *Benz* to the Congress, which “alone has the facilities necessary to make

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<sup>155</sup> *Id.* at 21; *See also* Wildenhuis’s Case, 120 U.S. 1, 12 (1887); JOHN COLOMBOS, *THE INTERNATIONAL LAW OF THE SEA* 222-23 (3d rev. ed. 1954).

<sup>156</sup> *Id.*

fairly such an important policy decision,” we conclude here that the arguments should be directed to the Congress rather than to us.<sup>157</sup>

*McCulloch*'s effort to predict international political behavior is unconvincing. It apprehends that a Honduran labor union, and Honduras itself, might retaliate against the United States, but it does not identify any factual or expert evidence establishing a basis for such apprehension, nor does it hazard any specifics on what retaliation might entail or how the United States might respond. By comparison, the Marshall Court in *Talbot* and *Charming Betsy* probably feared future retaliation or belligerency by neutrals, but it conceived of its role in international relations as a duty to uphold international law, leaving political factors to others.

As discussed further below, loosening the *Charming Betsy* canon from the *Charming Betsy* rule makes statutory construction harder, and also makes it harder for the Court to justify its holdings in other areas—like federalism—where it treats international law as truly binding.

### C. Loose Canon Damage to Statutory Interpretation

*McCulloch* and *Benz* raise three questions: (1) whether the Court has continued to require that Congress enact statutes twice in order to give a sufficiently clear statement of its intent to derogate from international law; (2) whether a statute can be given inconsistent meanings in order to avoid conflicts with international law; and (3) whether *Charming Betsy* is analogous to the so-called *Ashwander* rule providing that a statute should be construed if possible in accord with the Constitution because it might otherwise be held invalid.<sup>158</sup> Examining these questions shows that the Court has overused the *Charming Betsy* canon by losing sight of the rule of law that the canon is meant to serve.

In *Spector v. Norwegian Cruise Lines*,<sup>159</sup> Justice Kennedy's plurality opinion characterized *McCulloch* and *Benz* as adopting a “clear statement” rule: “Our cases hold that a clear statement of congressional intent is necessary before a general statutory requirement can interfere with matters that concern a foreign-flag vessel's internal affairs and operations, as

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<sup>157</sup> *Id.* at 21-22 (citations omitted). The Court followed its earlier decision in *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957) (holding that federal labor statute does not apply to picketing of a foreign vessel by a foreign crew under foreign articles temporarily in an American port because “[f]or us to run interference in such a delicate field of international relations, there must be present the affirmative intention of the Congress clearly expressed”).

<sup>158</sup> *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) (“When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided”) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)); see RESTATEMENT OF FOREIGN RELATIONS § 114 n.2 (*Charming Betsy* canon is restated using Justice Brandeis' s *Ashwander* language).

<sup>159</sup> 545 U.S. 119 (2005).

contrasted with statutory requirements that concern the security and well-being of United States citizens or territory.”<sup>160</sup>

The plurality further narrowed *Benz* and *McCulloch* to cases involving the application of “general statutes to foreign vessels’ internal affairs . . . .”<sup>161</sup> It sought to reaffirm “[t]his narrow clear statement rule”<sup>162</sup> by concluding that a clear statement was not needed on the scope of Title III of the Americans with Disabilities Act because the statute already exempted foreign flag cruise ships where their compliance would conflict with an international convention. Thus, the plurality wanted *obiter dictum* to reaffirm the narrowest possible “clear statement” rule.

Justice Ginsburg, joined by Justice Breyer, declined to reaffirm the plain statement rule of *Benz* and *McCulloch* even on that narrow and potentially inconsequential basis. Justice Ginsburg concurred that the ADEA’s flexible language accommodates international law, but considered it unnecessary to suggest that a clear statement of Congress’s intent might be needed in other cases. The failure of the “clear statement rule” to garner a majority in *Spector* is a good reason to surmise that *Benz* and *McCulloch* may be limited to their facts.

The issue of inconsistent statutory meanings resulting from international law has also occasioned disagreement among the Justices. An example of how this issue arises in a *constitutional* setting is set forth in *Clark v. Martinez*,<sup>163</sup> where the Court considered whether the Immigration and Nationality Act, 8 U.S.C. § 1231(a)(6), permits the Secretary of Homeland Security to detain for more than 90 days aliens inadmissible under 8 U.S.C. § 1182, even though the Court had held in *Zadvydas v. Davis*<sup>164</sup> that the same statute, in order to avoid constitutional concerns about indefinite detention, should be construed not to permit detention of more than 90 days for aliens removable under 8 U.S.C. § 1227. The Court, per Justice Scalia, held in *Clark* that since the detention statute cannot be construed to prohibit and to permit indefinite detention at the same time, the “lowest common denominator, as it were, must govern” by giving the statute the *Zadvydas* construction as to both types of aliens.<sup>165</sup>

The same problem of disparate impact can occur when a statute is construed to avoid a conflict with international law. That is what happened in *Spector*. In its effort to reaffirm the clear statement rule, the *Spector* plurality distinguished *Clark* as “simply a rule of consistent interpretation

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<sup>160</sup> *Id.* at 125.

<sup>161</sup> *Id.* at 131.

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

<sup>163</sup> 543 U.S. 371 (2005).

<sup>164</sup> 533 U.S. 678 (2001).

<sup>165</sup> *Clark*, 543 U.S. at 380.

of the statutory words, with no bearing on the implementation of a clear statement rule addressed to particular statutory applications.”<sup>166</sup> It reasoned that since “[t]he internal affairs clear statement rule is an implied limitation rule, not a principle for resolving textual ambiguity[,]” the Court’s cases “do not compel or permit the conclusion that if any one application of Title III might interfere with a foreign-flag ship’s internal affairs, Title III is inapplicable to foreign ships in every other instance.”<sup>167</sup>

That argument proved unpersuasive for Justice Clarence Thomas, who dissented in part on the grounds that *Clark*’s “lowest common denominator” rule applied and should be overruled.<sup>168</sup> Justice Thomas explained that “the lowest common denominator principle requires courts to search out a single hypothetical constitutionally doubtful case to limit a statute’s terms in the wholly different case actually before the court, lest the court fail to adopt a reading of the statute that reflects the lowest common denominator.”<sup>169</sup> Justice Thomas’ criticism is powerful and has not been adequately answered.

The basic problem with the “lowest common denominator” rule is that it treats the Constitution and the law of nations, as the case may be, too much like tools of statutory construction and too little like limits on Congress’s power. If Congress’s power were the touchstone in *Clark*, then discrimination between inadmissible and removable aliens would not be the result of Congress having intended contrary results in the same statute. Rather, it would be the result of a constitutional bar against the indefinite detention of one type but not the other type of alien. The Constitution itself would justify the distinction, permitting the statute to authorize the indefinite detention of certain persons while rendering unenforceable Congress’s completely consistent intent to authorize the indefinite detention of others. Difficulty only arises when the Court presumes that Congress, rather than the Constitution, intended a disparate result in order to avoid having to decide what the Constitution requires.

The third issue *Benz* and *McCulloch* raise—the extent to which *Charming Betsy* is analogous to an *Ashwander* rule—has been resolved by the Court in favor of the analogy. In *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*,<sup>170</sup> the Court considered its policy of construing statutes to avoid constitutional issues. It held that “[t]his cardinal principle has its roots in Chief Justice Marshall’s opinion for the Court in *Murray v. Schooner Charming Betsy* and has for so long been applied by this Court that it is beyond debate.”<sup>171</sup> Again in

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<sup>166</sup> 545 U.S. at 119, 140 (2005).

<sup>167</sup> *Id.* at 141.

<sup>168</sup> See *Spector*, 545 U.S. 119, 146-47 (Thomas, J., dissenting).

<sup>169</sup> *Id.* at 148 (citing *Clark*, 543 U.S. at 400 (Thomas, J., dissenting)).

<sup>170</sup> 485 U.S. 568 (1988).

<sup>171</sup> *Id.* at 575 (citations omitted).

*National Labor Relations Board v. Catholic Bishop of Chicago*<sup>172</sup> and *United Steel Corp. v. Citizens for a Better Environment*<sup>173</sup> the Court affirmed the same point.

Those cases illustrate how cutting loose the *Charming Betsy* canon from the *Charming Betsy* rule has led to a facile analogy between the law of nations and the Constitution. Putting aside the complex relationship between those two kinds of law, Congress's understanding of Article I may be entitled to some degree of deference from the Judicial Power as a coordinate branch of the United States government, but neither *Charming Betsy* nor other decisions have considered Congress to be better able than the Court to discern the law of nations. Should Congress's reasonable understanding of the Commerce Clause be sufficient to set aside the law of nations on the states' sovereign immunity? Such questions suggest that an analogy between *Charming Betsy* and the *Ashwander* rule is cogent only at a level too general to be truly useful.

#### D. Loose Canon Damage to International Law

That point brings this discussion to *F. Hoffman-La Roche Ltd. v. Empagran S.A.*<sup>174</sup> There the Court considered an antitrust class action brought by domestic and foreign consumers of vitamins alleging international price-fixing. The Court held that the Foreign Trade Antitrust Improvements Act and the Sherman Act did not permit plaintiffs to proceed with a claim based on alleged foreign effects independent of domestic effects. The Court may well have been justified to hold, in part, that the *Charming Betsy* rule limits the reach of that legislation to cases seeking to remedy the domestic effects of antitrust violations,<sup>175</sup> but one of its proffered reasons risks reducing international law to judge-made prudential judgments.

Citing *Charming Betsy*, *McCulloch* and other authorities, the *Hoffman-LaRoche* Court explained that “this Court ordinarily construes ambiguous statutes to avoid *unreasonable interference with the sovereign authority of other nations*[,]” and that “[t]his rule of construction *reflects principles of customary international law*—law that (we must assume) Congress ordinarily seeks to follow.”<sup>176</sup> The majority added, without further citation, that this “rule of statutory construction cautions courts to assume that legislators take account of the legitimate sovereign interests of

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<sup>172</sup> 440 U.S. 490, 500 (1979) (citing *Charming Betsy*).

<sup>173</sup> 523 U.S. 83, 133 (1998) (citing *Edward J. DeBartolo Co.*, 485 U.S. at 575).

<sup>174</sup> 542 U.S. 155 (2004).

<sup>175</sup> *Id.* at 164-65.

<sup>176</sup> *Id.* at 164 (emphasis added).

other nations when they write American laws. It thereby helps the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today's highly interdependent commercial world.”<sup>177</sup> *Hoffman-La Roche* does not identify the “principles of customary international law” that are ostensibly “reflect[ed]” in a canon that avoids “unreasonable interference with the sovereign authority of other nations.”<sup>178</sup>

The Court's imprecise reasoning raises multiple questions that the precedents do not answer: What are those unidentified “principles of customary international law”? What does “unreasonable” mean? If those principles and that standard are not grounded in the general and consistent practices of the international community of states, will the United States be the only state whose highest Court prohibits its legislature from being “unreasonable” towards other sovereigns? No less important, is such an amorphous, sweeping, and discretionary concept of customary international law consistent with the precise, narrow, and rare concept of the law of nations that *Sosa* cautions lower courts to follow under the ATS, as discussed below? And in federalism cases, will federal statutes that interfere with the states' residual sovereignty be upheld if reasonable? *Hoffman-LaRoche's* treatment of *Charming Betsy* too easily steps into the void without considering those questions, thus suggesting that the Court's reticence about explaining the precise role of customary international law is having a toll on the Justices' ability to deal with it as binding law rather than as a set of prudential considerations.

#### E. *Status of the Charming Betsy Canon and Rule*

In summary, the cases show that the Court has long conformed federal statutes to customary international law and continues to do so. While the Court has not criticized, overruled or departed from the *Charming Betsy* rule that Congress may never violate customary international law, the Court has preferred to articulate in its decisions the *Charming Betsy* canon that statutes should be construed if possible to avoid such violations. Loosening the canon from the rule has led to overuse of the canon and several difficulties, the common thread of which is a blurring of the line between prudence and law. The Court can harmonize its federalism and statutory interpretation decisions by observing that *Charming Betsy* and *Seminole Tribe* uphold the same rule. This should be the basis for precise, narrow and circumspect use of the *Charming Betsy* canon as a means to uphold a longstanding extra-constitutional limit on Congress's power.

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<sup>177</sup> *Id.* at 164-65.

<sup>178</sup> *Id.* at 164.

#### IV. PRIVATE RIGHTS AND CUSTOMARY INTERNATIONAL LAW

The Judiciary Act of 1789 included provisions later called the “Alien Tort Statute” (hereinafter “ATS”) which appear to create federal subject matter jurisdiction over certain claims based on the law of nations. The ATS lay practically unused until 1980, when the Second Circuit rediscovered it in *Filartiga*.<sup>179</sup> From 1789 to 1980, however, the Supreme Court was already enforcing, under other grants of original jurisdiction, individual or private rights that have come to be called human rights. This Part examines the Court’s ATS and non-ATS cases to shed further light on the relationship between international law and the Constitution. These decisions show in another way how international law has checked constitutionally unchallenged federal power.

##### A. *The Limits of Sosa*

Justice David Souter’s 2004 opinion for the Court in *Sosa* reaffirms that customary international law is part of United States law. In that case Humberto Alvarez Machaín, a Mexican national, claimed that United States Drug Enforcement Administration (“DEA”) agents, former Mexican policemen and Mexican civilians were liable in damages for allegedly abducting him in Mexico and transporting him for prosecution in the United States. After an American jury acquitted him on charges of murdering a DEA agent, he sued United States agents based in part on the ATS. Alvarez claimed that the defendants violated his customary international right to be free of “arbitrary detention.”<sup>180</sup> Considering whether he was

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<sup>179</sup> From 1789 to 1980, there appear to have been 21 cases in which a plaintiff invoked the ATS, see Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT’L L. & POL. 1, 4-5 (1985), of which two upheld ATS jurisdiction. See *Bolchos v. Darrell*, 3 F. Cas. 810 (D.S.C. 1795); *Adra v. Clift*, 195 F. Supp. 857 (D.Md. 1961). It has been suggested that if the law of nations were deemed federal common law, federal question jurisdiction would have rendered the ATS obsolete in those courts holding that cases arising under federal common law lie within federal question jurisdiction. See *Sosa*, 542 U.S. at 739-40 (Scalia, J., concurring) (opining that law of nations was federal common law but outside federal question jurisdiction); Randall, *supra*, at 17-18 (citing split authority on federal question jurisdiction for federal common law cases); Jennifer K. Elsea, *The Alien Tort Statute: Legislative History and Executive Branch Views*, in CRS Report for Congress 1 (Cong. Research Serv., CRS Report RL32118, 2003), available at [www.policyarchive.org/handle/10207/bitstreams/1864.pdf](http://www.policyarchive.org/handle/10207/bitstreams/1864.pdf) (last visited on Dec. 17, 2010). Whatever may have been the reason for the dormancy of the ATS, Congress codified the essence of *Filartiga* in the Torture Victim Protection Act, 28 U.S.C. § 1350 (2006).

<sup>180</sup> *Sosa*, 542 U.S. at 736.

entitled to a remedy under the Federal Tort Claims Act (“FTCA”)<sup>181</sup> or the ATS, the Court held Alvarez was entitled to neither.

The Court unanimously agreed that Alvarez may sue federal agents under the ATS for violations of the law of nations, while underscoring that the ATS is only jurisdictional and does not prescribe any substantive rights.<sup>182</sup> The unanimity of that limited holding is significant. Treating Alvarez’s FTCA and ATS claims as distinct, the Court did not regard his ATS claim as dependent on any alleged violation of constitutionally protected rights. Thus, Alvarez sought damages for United States actions presumably permitted by the Constitution but prohibited by the law of nations. In that context no Justice disagreed with the notion that what the Constitution permits, the law of nations might render a tort actionable by an alien in a federal court.<sup>183</sup>

The Court also decided by six votes to three, albeit with caution, that the law of nations is not frozen in time as it stood in 1789.<sup>184</sup> Rejecting the idea that the ATS was stillborn, six Justices agreed that the customary international norms under which an alien may invoke ATS subject matter jurisdiction evolve over time to include new rights;<sup>185</sup> specifically that a claim “must be gauged against the current state of international law.”<sup>186</sup> Thus, *Sosa* stands for the proposition not only that the law of nations may countermand what the Constitution permits, but also that the community of nations prescribing customary international law will decide whether the constitutional powers of the United States will be subject to new restraints in the future.

The Court parted ways with Alvarez, however, on the issue of whether the law of nations had come to include a norm against arbitrary arrest that was as broad and amorphous as it believed Alvarez was asserting.<sup>187</sup> It therefore held that Alvarez had no substantive right under the law of nations to sue the United States for allegedly detaining him arbitrarily in Mexico.

Justice Scalia’s partial concurrence in *Sosa* persuasively showed that the demise of natural law and the abrogation of federal common law in *Erie Railroad Co. v. Tompkins* foreclosed any discretion for federal judges to use common law powers to create new torts under the law of nations.<sup>188</sup>

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<sup>181</sup> 28 U.S.C. §§ 1346(b)(1), 2671- 2680 (2006).

<sup>182</sup> *Sosa*, 542 U.S. at 712-24.

<sup>183</sup> *Talbot* and *Charming Betsy* follow a similar notion; namely, what the Constitution permits Congress to do, the law of nations may prohibit.

<sup>184</sup> *Sosa* 542 U.S. at 725 (although “Congress has not in any relevant way amended § 1350 or limited civil common law power by another statute . . . there are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind”).

<sup>185</sup> *Id.* at 724-31.

<sup>186</sup> *Id.* at 733.

<sup>187</sup> *Id.* at 731-38.

<sup>188</sup> *Id.* at 728-29.

That is not to say that Justice Scalia has been consistent on this point. In *Hartford Fire Insurance Co. v. California*, Justice Scalia, joined by Justices O'Connor, Kennedy, and Thomas, dissented on the grounds that federal statutes should be construed in accordance with customary international law,<sup>189</sup> which logically presupposes that it survived *Erie*. The only way that both his *Sosa* and *Hartford* opinions can be correct is if *Erie* abrogated the common law but the law of nations is common law only for ATS purposes; that is, because Congress intended it once.

The majority responded by reaffirming the status of customary international law as United States law: "For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations."<sup>190</sup> In support, the Court cited the dictum in *Banco Nacional de Cuba v. Sabbatino* that "United States courts apply international law as a part of our own in appropriate circumstances[;]"<sup>191</sup> its holding in *The Paquete Habana* that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction[;]"<sup>192</sup> its holding in *The Nereide* that "the Court is bound by the law of nations which is a part of the law of the land[;]"<sup>193</sup> and its dictum in *Texas Industries, Inc. v. Radcliff Materials, Inc.* that "international disputes implicating . . . our relations with foreign nations" are one of the "narrow areas" in which "federal common law" subsists.<sup>194</sup> On this basis the Court reasoned, with doubtful cogency and no explanation, that customary international law must be an exceptional kind of federal common law that *Erie* does not abrogate.

A look at those cases, however, shows that they do not respond to Justice Scalia's point, as they do not stand for the proposition that the law of nations is common law. The quotation from *Texas Industries* is dictum about interstate water disputes,<sup>195</sup> and *Paquete Habana* and *The Nereide* do not prescribe international law by reasoning from precedent or from principles of natural law, but rather discern it in the customary acts of nations. The *Sosa* Court acknowledged that "*Sabbatino* itself did not

<sup>189</sup> *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting) ("the law of nations, or customary international law, includes limitations on a nation's exercise of its jurisdiction to prescribe") (citing RESTATEMENT at §§ 401-416).

<sup>190</sup> *Sosa*, 542 U.S. at 729.

<sup>191</sup> *Banco Nacional De Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964).

<sup>192</sup> *The Paquete Habana*, 175 U.S. 677, 700 (1900).

<sup>193</sup> *The Nereide*, 13 U.S. (9 Cranch) at 423.

<sup>194</sup> *Texas Indus., Inc. v. Radcliff Materials*, 451 U.S. 630, 641 (1981).

<sup>195</sup> In *Texas Indus.*, the Court was referring to an area of subsisting federal common law that is, indeed, narrow and not particularly concerned with foreign relations; specifically, "interstate water disputes" such as *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938), a case which the *Texas Industries* Court observed was decided "the same day as *Erie* . . ." *Texas Indus.*, 451 U.S. at 641 n.13.

directly apply international law;<sup>196</sup> nor—it may be added—does *Sabbatino* apply common law. The problem is that the *Sosa* Court was effectuating Congress’s intent in the ATS and, while it found that the first Congress probably thought that the law of nations is common law, that notion is at odds with the manner in which the Court has applied the law of nations since *Chisholm*, and not just in federalism cases.

The *Sosa* Court described the law of nations as “a body of judge-made law” and quoted *Paquete Habana* as noting that such law “grew from ‘ancient usage among civilized nations . . . .’”<sup>197</sup> The opaque verb “grew” elides the fact that the *Paquete Habana* Court did not see itself as making any law but as following the practices of nations discussed in that opinion, most of which are not common law jurisdictions. The American commander’s actions, moreover, were not challenged in light of constitutional precedent, but in light of the works of foreign civil law jurists. Is common law prescribed by the world, discerned by civil law scholars, and able to deny an American theater commander war powers given by the Constitution? Whatever the common law might be thought to be, it has never been that.

Accordingly, it was indispensable for *Sosa* to distinguish between the law of nations and the common law and the *Sosa* Court did so in the end by imposing two requirements. First, it required that Alvarez show that the law of nations includes the substantive right against arbitrary detention that he was asserting; and, second, that he persuade the Court, as a residual common law court, that it should create a right of action to enforce any such substantive right.<sup>198</sup>

Analyzing whether Alvarez met its first requirement, the Court did not actually perform that analysis by reasoning as a common law court. Rather, to decide whether there is or is not a norm of customary international law against arbitrary detention, the Court considered two treaties: the Universal Declaration of Human Rights<sup>199</sup> and the International Covenant on Civil and Political Rights.<sup>200</sup> It decided that these two treaties did not support Alvarez’s claim because, not being self-executing, they require implementing statutes.<sup>201</sup> Thus, the Court’s ostensible common law analysis consisted of applying the foreign relations law on self-executing treaties to two international conventions. As to whether Alvarez met its second requirement, the Court required him to show the existence of a

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<sup>196</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 730 n. 18 (2004).

<sup>197</sup> *Id.* at 715 (quoting *Paquete Habana*, 175 U.S. at 686).

<sup>198</sup> *Id.* at 694-95.

<sup>199</sup> G.A. Res. 217A (III), U.N. Doc. A/810 (1948).

<sup>200</sup> Dec. 16, 1966, 999 U.N.T.S. 171.

<sup>201</sup> *Sosa*, 542 U.S. at 734-35.

substantive international right to the degree of specificity that the first Congress probably intended, based on Blackstone.<sup>202</sup>

To conclude that Alvarez met neither of its two requirements, the Court relied on RESTATEMENT §§ 102(2) and 702 as its guide to the law of nations, and on Blackstone as its guide on whether the first Congress intended in the ATS a tort as broad as Alvarez asserted:

Although the Restatement does not explain its requirements of a “state policy” and of “prolonged” detention, the implication is clear. Any credible invocation of a principle against arbitrary detention that the civilized world accepts as binding customary international law requires a factual basis beyond relatively brief detention in excess of positive authority. Even the Restatement's limits are only the beginning of the enquiry, because although it is easy to say that some policies of prolonged arbitrary detentions are so bad that those who enforce them become enemies of the human race, it may be harder to say which policies cross that line with the certainty afforded by Blackstone's three common law offenses . . . .

Whatever may be said for the broad principle Alvarez advances, in the present, imperfect world, it expresses an aspiration that exceeds any binding customary rule having the specificity we require.<sup>203</sup>

Thus, the Court construed the ATS as (a) a grant of jurisdiction (b) premised on federal common law power to create private rights of action (c) to remedy violations of evolving individual rights under the law of nations. What is judge-made about an international human rights norm under *Sosa* is the common law private right of action, not customary international law. In effect *Sosa* treats customary international law as non-self-executing for ATS purposes, in the sense of needing *judicial* implementation, even though *Paquete Habana*, which *Sosa* reaffirmed, treated the law of nations as self-executing by recognizing private rights of action automatically. The best explanation is that *Sosa* was implementing Congress's intent in its ATS grant of jurisdiction, which the Court held included an expectation that torts subject to ATS jurisdiction would be the kinds of torts Blackstone defined, while *Paquete Habana* exercised non-ATS (*i.e.* admiralty) jurisdiction to award damages for a tort against the rights of fishing vessels in a war zone that Blackstone did not mention. Thus, *Sosa*'s need for a common law private right of action stems from the ATS's assumption that the law of nations is common law.

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<sup>202</sup> *Id.* at 735.

<sup>203</sup> *Id.* at 737-38.

### B. *Going Where Sosa Does Not Go*

*Sosa* traces to Blackstone the first Congress's assumption that the law of nations is part of the common law, but does not closely examine the English cases on which he relied. In fact, Blackstone was counsel in one of the three leading English eighteenth century cases that concluded that the law of nations is part of the common law.<sup>204</sup> Examining those cases and early American decisions suggests that the law of nations was deemed adopted by or part of the common law, but was itself common law in name only. Like the first Justices' assumption in *Chisholm* that the law of nations was common law that could not limit Article III vis-à-vis the states, the first Congress's assumption in the ATS that the law of nations is common law is a Federalist misunderstanding that survives only in the ATS. This accounts for the difference between *Sosa* and *Paquete Habana*.

Twelve years before the Declaration of Independence, Lord Mansfield decided in *Triquet v. Bath* that a foreign minister's servant is immune from arrest in England by operation of the law of nations as part of the common law.<sup>205</sup> Mansfield said he recalled being counsel in *Buvot v. Barbut* where Lord Talbot had found that a foreign minister was immune from suit because, on the authority of eminent foreign authors, such immunity was part of the law of nations.<sup>206</sup> Having been counsel in *Triquet*, Blackstone wrote in his 1769 edition that "the law of nations . . . is here *adopted* in it's [sic] full extent by the common law, and is held to be a *part of the law of the land*."<sup>207</sup> Blackstone did not say that the law of nations is common law or even part of the common law; rather he wrote that it is "adopted" fully by the common law and that it is "part of the law of the land." Mansfield glossed over some of that subtlety in *Heathfield v. Chilton*, where he said that "[t]he privileges of public ministers and their retinue depend upon the law of nations; which is part of the common law of England."<sup>208</sup> Nonetheless Blackstone cautiously retained the phrase "adopted by."

The idea that the law of nations was adopted by the common law, as Blackstone wrote, was relatively novel at the time of the founding.<sup>209</sup> The

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<sup>204</sup> See *Triquet v. Bath*, (1764) 97 Eng. Rep. 936 (K.B.) (naming Blackstone for the plaintiff).

<sup>205</sup> *Id.* at 938. (Mansfield wrote that "[t]his privilege of foreign ministers and their domestic servants depends upon the law of nations" and "[t]he Act of Parliament of 7 Ann. c. 12, is declaratory of it").

<sup>206</sup> *Id.* at 938-39 (citing *Buvot v. Barbut*, (1736) 25 Eng.Rep. 777, 4 Burr. 2016 (upholding law of nations immunity for ambassadors and their retinue as part of the common law of England)).

<sup>207</sup> WILLIAM BLACKSTONE, COMMENTARIES \*67 (emphasis added).

<sup>208</sup> 98 Eng. Rep. 50, 51, 4 Burr. 2015, 2016 (1767) (K.B.) (declining law of nations immunity on account of insufficient proof of the defendant's diplomatic status).

<sup>209</sup> Justice Iredell was *au courant* when he charged a South Carolina grand jury on May 12, 1794, that "[t]he Common Law of England, from which our own is derived, fully recognizes the principles of the Law of Nations, and applies them in all cases falling under its jurisdiction, where

seed of trouble lies in Talbot's decision in *Buvait*, expanded by Mansfield, to make the law of nations "part of the common law of England" as *Heathfield* puts it, without clarifying what that meant. Talbot discerned the law of nations in the writings of Hugo Grotius and other civil law continental authors, citing no English common law case or English commentator, while Mansfield said that an act of parliament cannot "alter the law of nations,"<sup>210</sup> and that the crown may not favor one ambassador's immunity over another. As such, law is not derived from English cases or authors, may be confirmed but not altered by parliament, and constrains a sovereign's diplomacy. It could be called "part of the common law of England," at best in a qualified sense, perhaps because no better English classification was constitutionally available.

Mansfield's opaque, or rather missing, explication could tax all but the brightest American mind, as shown by two early federal cases. In addition to *Triquet* and *Heathfield*, Mansfield had decided in *Somerset's Case* that, as slavery violates the natural law, it could not be lawful in England unless permitted by English positive law.<sup>211</sup> In *La Jeune Eugenie*,<sup>212</sup> Justice Joseph Story, riding circuit, misread the suggestion that the law of nations is part of the common law to mean that the law of nations must be part of the natural law, and thus held that the international slave trade, being plainly repugnant to natural law, violates the law of nations.

Chief Justice Marshall did not make the same jump. He wrote for the Supreme Court in *The Antelope* that the slave trade was indeed contrary to the natural law, but most regrettably permitted then by the law of nations, because for the jurist "the test of international law" is found "in those principles of action which are sanctioned by the usages, the national acts, and the general assent, of that portion of the world of which he considers himself a part, and to whose law the appeal is made."<sup>213</sup> Whatever Turbot, Mansfield and Blackstone meant, *The Antelope* dispels the notion that the law of nations was part of a bygone age of American natural law made by judges. The Court enforced it as United States law prescribed positively by

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the nature of the subject requires it." See Jay, *supra* note 3, at 825. He avoided saying that the law of nations is common law, saying instead that the latter "recognizes" its "Principles."

<sup>210</sup> *Heathfield v. Chilton*, 98 Eng. Rep. at 50 ("The privileges of public ministers and their retinue depend upon the law of nations; which is part of the common law of England. And the Act of Parliament of 7 Ann. c. 12, did not intend to alter, nor can alter the law of nations.").

<sup>211</sup> *Somerset v. Stewart*, (1772) 98 Eng. Rep. 499, 510 (K.B.).

<sup>212</sup> 26 F. Cas. 832, 846 (C.C.D. Mass. 1822) (No. 15, 551).

<sup>213</sup> 23 U.S. 6,120-21 (1825) ("That [the slave trade] is contrary to the law of nature will scarcely be denied. . . . But . . . the usage of all, could not be pronounced repugnant to the law of nations, which is certainly to be tried by the test of general usage.").

“action[.]” “usages[.]” “acts[.]” and positive “assent” of the international community of states.

When positivism triumphed in American law, the Court had no difficulty enforcing customary international law as a set of positive, self-executing, private and public rights prescribed by the world as United States municipal law. *Hilton v. Guyot*<sup>214</sup> holds exactly so:

International law, in its widest and most comprehensive sense,—including not only questions of right between nations, governed by what has been appropriately called the “law of nations” but also questions arising under what is usually called “private international law,” or the “conflict of laws” . . . —is part of our law, and must be ascertained and administered by the courts of justice as often as such questions are presented in litigation *between man and man*, duly submitted to their determination.<sup>215</sup>

Neither *Hilton* nor *Paquete Habana* require any private right of action created at common law.

*Triquet, Heathfield, The Antelope, Hilton, and Paquete Habana* answer Justice Scalia’s point in *Sosa* that *Erie* abrogated the federal common law and hence the law of nations. These cases demonstrate that labels can be misleading for something as difficult to comprehend as law made by the world for the United States. Whatever it might be called, the American heritage of English law excluded the law of nations from the principle of parliamentary supremacy characteristic of the common law, and the Court has not applied it as judge-made natural law, but rather as law prescribed by the acts of the international community of states which, without necessary recourse to the ATS, restrain the constitutionally unchallenged sovereign powers of the United States vis-à-vis public and private persons. The terms “federal common law of nations” and “Eleventh Amendment immunity” are misnomers for the same reason; namely, the Constitution is neither the source nor the limit of the law of nations.

That point is especially relevant because Justice Souter’s majority opinion in *Sosa* is in accord with his dissent in *Seminole Tribe* that the international practices giving rise to the states’ sovereign immunity are common law that Congress may abrogate. *Sosa*’s conclusion that the law of nations is common law for ATS purposes, and *Seminole Tribe*’s conclusion that Congress may not abrogate international law on sovereign immunity, are consistent because the law of nations, however labeled, has never been made at will by judges or legislators.

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<sup>214</sup> 159 U.S. 113 (1895).

<sup>215</sup> *Id.* at 163 (emphasis added).

C. *Beyond the Constitution's Prescriptive Jurisdiction.*

A different kind of case shows how the Court has treated international law as independent of, rather than derived from, the Constitution. These are cases in which the Court has had to decide private rights issues on territories subject to United States military occupation. *Downes v. Bidwell*<sup>216</sup> sets out at length how most of the continental United States was at one time occupied territory subject to military government, and how the Court sometimes held that the Constitution did not follow the flag. In effect the national government has been both a federal creature subject to the Constitution, as well as a sovereign power subject to international law, such that where the Constitution does not extend it is international law that accompanies the flag.

In numerous cases spanning the period from the acquisition of Florida<sup>217</sup> to the so-called insular cases like *Downes* and more recently,<sup>218</sup> the Supreme Court has gradually accorded to persons found on territory governed by the United States, who are not citizens of one of the states, an increasing range of constitutional protections. A premise of this gradual evolution is that the law of nations governs rights of conquest;<sup>219</sup> that title over occupied land is acquired by war and treaty under the law of nations;<sup>220</sup> and that, except as protected by treaty, the inhabitants remain exposed to an inherent sovereignty, doubtfully restrained by the Constitution, that the United States exercises on occupied territory under the law of nations.<sup>221</sup> The question in such cases is not whether the federal government is free of the Constitution, but rather the extent to which specific substantive provisions of the Constitution apply outside the states of the Union. Thus, the Court has had to decide private claims not covered by constitutional protections.

*In re Ross*<sup>222</sup> held that a *British* subject serving as an American seaman, whom a United States consul tried and sentenced to death for shipboard murder in Japan and whose sentence the President commuted to prison, was not entitled to constitutional protections. Justice Black's

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<sup>216</sup> 182 U.S. 244 (1901).

<sup>217</sup> *American Ins. Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 543 (1828) (Marshall, C.J.) (Article III's judicial life tenure provision does not prevent Congress from creating courts for the Florida territory without life tenure, "[w]hichever may be the source whence the power is derived" to govern occupied territory).

<sup>218</sup> *Torres v. Puerto Rico*, 442 U.S. 465 (1979) (applying in Puerto Rico the Fourth Amendment guarantee against *unreasonable searches and seizures*).

<sup>219</sup> See *Worcester v. Georgia*, 31 U.S. 515 (1832).

<sup>220</sup> *Fleming v. Page*, 50 U.S. 603, 608-09 (1850).

<sup>221</sup> *Id.*

<sup>222</sup> 140 U.S. 453 (1891).

plurality opinion in *Reid v. Covert* states that “[t]he *Ross* approach that the Constitution has no applicability abroad has long since been directly repudiated by numerous cases[.]” and added that “the United States Government . . . has no power except that granted by the Constitution[.]”<sup>223</sup> Rejecting the *Reid* plurality’s sweeping language, the Court held in *United States v. Verdugo-Urquidez*<sup>224</sup> that a nonresident alien may not invoke Fourth Amendment protections against United States agents searching his home in Mexico. The cases Justice Black cited “establish only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country.”<sup>225</sup>

The Court accordingly recognizes that the United States exercises attributes of sovereignty vis-à-vis the world that neither derive from, nor are limited by, the Constitution. That is analogous to the sovereign attributes enjoyed by the states, as explained in *Alden*, which are neither derived from, nor limited by, the Eleventh Amendment and pre-date the Constitution. As *Downes* explains in regards to the conquest and governance of new territories (e.g. the Louisiana Purchase), the law from which sovereignty derives is the law of nations.

Consistent with that position, the Court also recognizes that customary international law imposes constraints on the United States as an occupying military force, and that a United States citizen deprived of constitutional protection by martial law still has rights under the law of war. In *Dow v. Johnson*,<sup>226</sup> the Court considered a default judgment entered by a court of the parish of New Orleans against Neal Dow, a brigadier general in command of United States Army forces occupying Louisiana during the Civil War, for damages sustained by a citizen of New York to his Louisiana plantation. The Court held that the parish court lacked subject-matter jurisdiction over General Dow. It reasoned that the Union and the Confederacy were enemies at war, that the law governing an occupying army’s treatment of persons found on enemy territory is the customary international law of war (the same source of substantive law later applied in *Paquete Habana*), and that it would be absurd to contend that the law of war gave Louisiana courts jurisdiction over an occupying army.<sup>227</sup> The Court recognized, however, that in the event of abuses in violation of the law of war, the New York citizen might have a claim against the United States or against General Dow in United States court.

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<sup>223</sup> 354 U.S. 1, 12 (1957) (citations omitted).

<sup>224</sup> 494 U.S. 259 (1990).

<sup>225</sup> *Id.* at 270-71.

<sup>226</sup> 100 U.S. 158, 158-59 (1879).

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

In two other cases, *Municipality of Ponce v. Roman Catholic Apostolic Church in Porto Rico*<sup>228</sup> and *Santos v. Roman Catholic Church*<sup>229</sup>, the Supreme Court accorded the Catholic Church juridical personality and property rights in United States territories not admitted as states based on customary international law, not the Constitution or any treaty or act of Congress. In *Ponce* the Court considered the contention that:

[T]he Roman Catholic Church of Porto Rico [sic] has not the legal capacity to sue, for the reason that it is not a judicial person, nor a legal entity, and is without legal incorporation . . . . If it is a corporation or association, we submit to the court that it is necessary for the Roman Catholic Church to specifically allege its incorporation, where incorporated, and by virtue of what authority or law it was incorporated; and, if a foreign corporation, show that it has filed its articles of incorporation or association in the proper office of the government, in accordance with the laws of Porto Rico [sic].<sup>230</sup>

This case was a suit by the Roman Catholic Church in Puerto Rico against the municipality of Ponce in which the plaintiff claimed longstanding lawful and peaceful possession, physical improvement, and, thus, ownership of places of worship that the defendant claimed as municipal property, including a church in Playa.<sup>231</sup> The Puerto Rico legislature had enacted a statute that specifically consented to such lawsuits against its political subdivisions in the Supreme Court of Puerto Rico.<sup>232</sup> Having lost in the Supreme Court of Puerto Rico, the municipality appealed to the Supreme Court of the United States.<sup>233</sup> The case thus pitted the Church's property and corporate status claims not against the United States, but against a third party consisting of an alien public entity under United States military occupation.

The Court, per Chief Justice Fuller, affirmed, adopting verbatim as the Court's opinion the Church's summary of its position on its juridical status and property rights, as follows:

The Roman Catholic Church has been recognized as possessing legal personality by the treaty of Paris, and its property rights solemnly safeguarded. In so doing *the treaty has merely followed the recognized rule of international law* which would have protected the

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<sup>228</sup> 210 U.S. 296 (1908).

<sup>229</sup> 212 U.S. 463 (1909).

<sup>230</sup> *Ponce*, 210 U.S. at 308-09.

<sup>231</sup> *Id.* at 297.

<sup>232</sup> *Id.* at 303-04.

<sup>233</sup> *Id.* at 300.

property of the church in Porto Rico subsequent to the cession. This juristic personality and the church's ownership of property has been recognized in the most formal way by the *concordats* between Spain and the papacy, and by the Spanish laws from the beginning of settlement of the Indies. Such recognition has also been accorded the church by all systems of European law from the fourth century of the Christian era.

. . . The fact that the municipality may have furnished some of the funds for building or repairing the churches cannot affect the title of the Roman Catholic Church, to whom such funds were thus irrevocably donated, and by whom these temples were erected and dedicated to religious uses.<sup>234</sup>

Thus, the treaty "merely followed" classical, medieval, and early modern practices, and served to avoid any potential dispute among the parties about their continuation.

In *Santos*, the Court, per Justice Holmes, reaffirmed that "the legal personality of the Roman Church, and its capacity to hold property in our insular possessions, is recognized; and the fact that such property was acquired from gifts, even of public funds, is held not to affect the absoluteness of its right."<sup>235</sup> *Santos* and *Ponce* are, therefore, instances where the Court enforced customary international law as universal law against sovereigns not bound by the Constitution.

From *Ross* to *Santos*, the Court exercised applicative jurisdiction derived from Article III of the Constitution, where it believed that the Constitution did not prescribe substantive norms of decision; thus, the Constitution's applicative jurisdiction reached farther than its prescriptive jurisdiction. Thus, where that occurs, the Court may be asked to exercise applicative jurisdiction in a way that could violate the Constitution's substantive provisions if they were applicable. Accordingly, the Court in *Ponce* and *Santos* did not deem applicable the Religion Clauses of the First Amendment, but it called upon customary international law to extricate itself as much as possible from having to judge religious matters. In other

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<sup>234</sup> *Id.* at 323-24 (emphasis added). It is not surprising, given the fourth century vintage of the Catholic Church's personhood in international law, that the common law included legal persons consisting of religious corporations sole in perpetuity. See WILLIAM BLACKSTONE, 1 COMMENTARIES \*458 ("The law, therefore, has wisely ordained, that the parson *quatenus* parson, shall never die, any more than the king; by making him and his successors a corporation"); BLACK'S LAW DICTIONARY 366 (8th ed. 1999) ("Every diocesan bishop, every rector of a parish, is a corporation sole, and can acquire and hold land (and now also personal property) even during the vacancy of the see or living, for the benefit of his successors, and can bind his successors by his lawful conveyances and contracts") (quoting Edward Jenks, THE BOOK OF ENGLISH LAW 118-19 (P.B. Fairsted ed., 6th ed. 1967)). In *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 45-46 (1815), the Court recognized the parish corporation sole.

<sup>235</sup> 212 U.S. 463, 465 (1909).

cases, such as *Watson v. Jones*<sup>236</sup> and *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*,<sup>237</sup> the Court has called upon another kind of extra-constitutional law—ecclesiastical law—to discharge the Court’s applicative jurisdiction without prescribing substantive norms of decision. *Watson* explains that:

[T]he rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority is, that, whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.<sup>238</sup>

The Court’s willingness to enforce customary international law beyond the prescriptive jurisdiction of the Constitution, within (*Dow*) and outside (*Ponce* and *Santos*) the Union, shows that the Court has viewed the law of nations as a rights guarantee, domestically and abroad, where constitutional guarantees may fall short. Once again the Court uses international law to limit sovereign power where the Constitution does not.

## V. THE IMPACT ON ADVOCACY

Advocates and *amici curiae* are arguing international law in a way that pays inadequate attention to the Court’s traditional jurisprudence, sometimes with disastrous results. The basic problem is that international law is most often thought of and argued as treaty law, perhaps because treaties have greatly proliferated since 1939<sup>239</sup> and, unlike customary

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<sup>236</sup> 80 U.S. (13 Wall.) 679 (1871) (enforcing automatically a decision of the Presbyterian General Assembly in a dispute between pro-slavery and anti-slavery parish factions).

<sup>237</sup> 344 U.S. 94 (1952) (deferring to the Russian Orthodox Church under Joseph Stalin’s rule to decide a dispute between Russian Orthodox in the United States and in the Soviet Union).

<sup>238</sup> *Watson*, 80 U.S. at 727. It is interesting that the Court, as *Medellin v. Texas* indicates, has been more willing to be bound automatically by the decisions of ecclesiastical courts than by those of the International Court of Justice.

<sup>239</sup> A study by the Congressional Research Service reported that “after 1945, the number of international agreements concluded annually escalated rapidly.” See S. COMM. ON FOREIGN RELATIONS, 106TH CONG., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 38 (Comm. Print 2001). The number of treaties and other international agreements concluded by the United States was 87 from 1789 to 1839, 453 from 1839 to 1889, 1441 from 1889 to 1939, and 12,400 from 1939 to 1989. *Id.* at 39 (Table II-1). It would be unconvincing to suggest that an explosion of international consensus and an alignment of state practices occurred from the outbreak of the Second World War to approximately the end

international law, have constitutional standing. One way to look at the proliferation of treaties, consistent with the Court's reluctance to assume that they have the force of law, is that too many seek to change rather than to confirm international practice. The Court's cases show, since at least *The Antelope*, that the actual practices of states, not what states formally agree or politically aspire to do, are the touchstone of international law. *Medellin v. Texas*<sup>240</sup> demonstrates those points.

In that case Mexican national José Medellín challenged his conviction for participation in the gang rape and murder of two teenage girls in Texas. He argued that Texas denied him a right under Article 36(1)(b) of the Vienna Convention on Consular Relations to contact the Mexican consulate upon being detained. Article 36(1)(b) provides that "competent authorities of the receiving state . . . shall inform the person concerned without delay of his rights under this subparagraph[,]">which include requesting that Texas inform the Mexican consular post of the arrest and communicating with the Mexican consular post directly.

Medellín marshaled what appeared to be a powerful array of forces. In *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*,<sup>242</sup> the International Court of Justice had decided that the United States violated Article 36(1)(b) and (2) in regards to fifty-one Mexican nationals, and that the nationals were entitled to review and reconsideration of their convictions in state courts in the United States. In a memorandum, President George W. Bush stated that the United States would "discharge its international obligations" under the *Avena* decision "by having State courts give effect to the decision." In *Sanchez-Llamas v. Oregon*,<sup>243</sup> the Supreme Court had decided in regards to certain persons not named in the ICJ's *Avena* judgment that the Vienna Convention did not have the effect Medellín contended. The two questions presented were whether the ICJ's judgment is domestic law in Texas courts and whether the presidential memorandum independently required state compliance with *Avena*.

The Court decided both questions against Medellín in an opinion by Chief Justice Roberts joined by Justices Scalia, Kennedy, Thomas, and Alito, with Justice Stevens concurring in the judgment. It held that that the Optional Protocol provides for "compulsory jurisdiction" of the ICJ as distinct from enforcement of its judgments,<sup>244</sup> that Article 94 of the United Nations Charter declares a "commitment on the part of U.N. Members to

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of the Cold War. Rather, the proliferation of treaties suggests a desire to substitute promises for real, practical alignment among states.

<sup>240</sup> 128 S. Ct. 1346 (2008).

<sup>241</sup> Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 101.

<sup>242</sup> 2004 I.C.J. 12 (Mar. 31).

<sup>243</sup> 548 U.S. 331 (2006).

<sup>244</sup> 128 S. Ct. at 1354 (citing Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention, Apr. 24, 1963, 21 U.S.T. 325).

take *future* action through their political branches to comply with an ICJ decision[.]”<sup>245</sup> and that the ICJ Statute incorporated in the U.N. Charter provides for arbitration of disputes between national governments, thus excluding enforcement by an individual non-party.<sup>246</sup> Since the petitioner disclaimed reliance on any argument that the Vienna Convention on Consular Relations is self-executing,<sup>247</sup> the Court held that the Optional Protocol, Article 94, and the ICC Statute are not self-executing notwithstanding the Supremacy Clause of the Constitution.<sup>248</sup> The Chief Justice emphasized that “[o]ur Framers established a careful set of procedures that must be followed before federal law can be created under the Constitution—vesting that decision in the political branches, subject to checks and balances.”<sup>249</sup> The majority also drew additional support from the “postratification understanding[.]” particularly the fact that “neither Medellín nor his *amici* have identified a single nation that treats ICJ judgments as binding in domestic courts.”<sup>250</sup>

As for the President’s constitutional authority to conduct foreign relations, the Court rejected the contention that such authority preempts contrary state law in this case, noting that “unilaterally converting a non-self-executing treaty into a self-executing one is not among” the President’s “array of political and diplomatic means available to enforce international obligations[.]”<sup>251</sup> The Court deemed it a “wise concession” for the United States not to rely on the President’s duty to “take Care that the Laws be faithfully executed” as “[t]his authority allows the President to execute the laws, not make them.”<sup>252</sup> Thus, the *Medellin* Court did not use international law—in this instance purported treaty law—as a means to defer to the political branches on foreign affairs matters, any more than it did so in regard to customary law in *Charming Betsy*, *Hans, Dow, Guyot*, *Paquete Habana*, *Seminole Tribe*, *Alden*, or *Sosa*. As in those cases, the *Medellin* Court’s reasoning was not driven by any political analysis of the potential

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<sup>245</sup> *Id.* at 1358 (quoting Brief for the United States as *Amici Curiae* Supporting Petitioner at 34, *Medellin v. Texas*, 128 S. Ct. 1346 (2008) (No 04-5928) (emphasis in original)).

<sup>246</sup> *Id.* at 1360.

<sup>247</sup> *Id.* at 1357 n.4 (citing petitioner’s disclaimer of reliance on the Vienna Convention).

<sup>248</sup> *Id.* at 1356 (citing *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829) and *Whitney v. Robertson*, 124 U.S. 190, 194 (1888)).

<sup>249</sup> *Id.* at 1362 (citing U.S. CONST. art. I, § 7).

<sup>250</sup> *Id.* at 1363. The Court cited Moroccan and Belgian court decisions that decline to enforce judgments by the ICJ and its predecessor, the Permanent Court of International Justice, as binding municipal law. *Id.* at 1363 n. 10. The passage quoted in the text refers to the *amici* as friends of Alvarez (“his *amici*”) rather than as friends of the Court (*amici curiae*).

<sup>251</sup> *Id.* at 1368. There is no indication in the majority opinion that the Court intended by that language to overrule its precedents enforcing customary international law or preserving narrow areas of federal common law after *Erie*, none of which was at issue in this case.

<sup>252</sup> *Id.* at 1372.

international consequences of one or another decision, but rather by its discernment of what was binding law.

Justice Breyer's dissent, joined by Justices Ginsburg and Souter, also strove to be an exercise in law and *stare decisis*. The dissent relied on *Ware v. Hylton*,<sup>253</sup> where the Justices held that the 1783 Paris Peace Treaty had self-executing effect under the Supremacy Clause, and invalidated a Virginia statute enacted during the Revolutionary War that required debts to British creditors to be deposited in a state fund. Appendix A of Justice Breyer's opinion listed twenty-nine "[e]xamples of Supreme Court decisions considering a treaty provision to be self-executing"<sup>254</sup> and identified only two cases to the contrary: *Foster*, which was later overruled when the Court examined the Spanish-language version of the treaty, and *Cameron Septic Tank Co. v. Knoxville*.<sup>255</sup> According to the dissent, "the Court has held that the United States may be obligated by treaty to comply with the judgment of an international tribunal interpreting that treaty, despite the absence of any congressional enactment specifically requiring such compliance[.]"<sup>256</sup> citing *Comegys v. Vasse*.<sup>257</sup>

*Comegys* supports Justice Breyer's reasoning only partially and with difficulty,<sup>258</sup> but the majority opinion did not adequately refute Justice Breyer's Appendix A. The majority suggested that the dearth of Court cases declaring treaties non-self-executing means little because the Court of Appeals "has regularly done so[.]" and also emphasized that Congress "has not hesitated to pass" enabling legislation for some treaties.<sup>259</sup> Both points are unpersuasive. The majority's citation to a total of three Court of Appeals decisions since 2001 hardly refuted Justice Breyer's showing that the Court was more willing in the past than in *Medellin* to declare treaties

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<sup>253</sup> 3 U.S. (3 Dall.) 199 (1796).

<sup>254</sup> 128 S. Ct. at 1392-93.

<sup>255</sup> *Id.* at 1379 (Justice Breyer pointed out that *Cameron Septic Tank* involved "specific congressional actions [that] indicated that Congress thought further legislation necessary."); see *Cameron Septic Tank Co. v. Knoxville*, 227 U.S. 39 (1913).

<sup>256</sup> *Cameron*, 128 S. Ct. at 1380.

<sup>257</sup> 26 U.S. (1 Pet.) 193, 211-12 (1828).

<sup>258</sup> *Id.* at 211-12. *Comegys* involved a private dispute over assets whose resolution was committed to "commissioners" appointed under the 1819 treaty with Spain ceding sovereignty over Florida. The Court held that the commissioners' "award" was conclusive on the amount and validity of a claim, but "it does not necessarily or naturally follow that this authority, so delegated, includes the authority to adjust all conflicting rights of different citizens to the fund so awarded." 26 U.S. at 212. The Court cautioned that individual rights would "be left to the ordinary course." *Id.* Thus the commissioners' decision resembled an arbitration award that a court could enforce as conclusive in partial resolution of a commercial dispute. That is far from being a precedent for treating an ICJ judgment on criminal procedural in capital cases as United States municipal law.

<sup>259</sup> *Cameron*, 128 S. Ct. at 1366 n.12 (citing *Pierre v. Gonzalez*, 502 F.3d 109, 119-20 (2d Cir. 2007) (United Nations Covenant Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is non-self-executing); *Singh v. Ashcroft*, 398 F.3d 396, 404, n. 3 (6th Cir. 2005) (same); *Beazley v. Johnson*, 242 F.3d 249, 267 (5th Cir. 2001) (International Covenant on Civil and Political Rights is non-self-executing)).

self-executing. The fact that Congress knows how to implement a treaty does not discharge the Court's duty under the Supremacy Clause, whatever it may require in a given case. The Court has clearly become more reluctant than it was in the past to enforce treaties, but did not admit it.

A compelling explanation for such reluctance lay readily at hand. The failure of *Medellín* or *amici curiae* to identify any nation that automatically enforces ICJ judgments as municipal law was a damning omission. Stated plainly, it showed that the universal custom of states is *not* to enforce ICJ judgments *ex proprio vigore*. *Medellín's* advocates were trying to use the Court's readiness to enforce certain treaties as a means to change the general and consistent practice of states, starting with the United States, by presenting international law as consisting of treaties rather than custom *where the two were exactly contrary*. The Court pointed out that the general and consistent state practice was unanimously against automatic ICJ enforcement, calling that practice the "postratification understanding" of the relevant treaty provisions. However labeled, the Court was adhering to two centuries of precedent in which states are bound in accordance with what they actually do from a sense of legal obligation, not what they promise.

The Court should have taken the opportunity to clarify that, even if the relevant treaties had plainly stated that ICJ judgments shall be binding in municipal courts without need for national legislation, they would still not be self-executing if the words of the treaty are contradicted by states' conduct.<sup>260</sup> Parties may wrap a treaty in forms of law—signing a text stating that it is self-executing, ratifying it as such, and lending it executive support as law—in order to further a political program of some sort, but evidence of state practice may still pierce through such forms of law to show that the parties have not truly consented to the treaty as law. The primacy of deeds over words cuts both ways; namely, a treaty may confirm customs followed from a sense of legal obligation which bind non-parties to the treaty.

All of these points suggest a disconnect between the Court's jurisprudence and the way *Medellín* was argued. José *Medellín's* reliance on treaties failed to present squarely to the Court what might have been the best argument in his favor. Rather than disclaim reliance on an argument that the Vienna Convention on Consular Relations is self-executing, he could have shifted focus away from treaty law and towards customary law.

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<sup>260</sup> *Cf.* RESTATEMENT § 102(1)(b) (international agreements and other sources of international law are law where they are accepted as such by the international community of states).

He could have tried to show that the Vienna Convention on Consular Relations confirms customary international law.<sup>261</sup>

Thus, Medellín might have argued that notifying the consular post of the sending state when its national is detained is internationally considered binding custom. He could have added that the Court has long enforced custom without need for a tort cause of action under the ATS. Further, he could have bolstered those arguments by noting that Texas claims a residual sovereignty distinct from the United States for purposes of declining to follow treaties, that its sovereignty claim is based on customary international law, and that Texas must take the sweet with the sour. Texas should not have been allowed to invoke any sovereignty except as limited by customary international law, from which the Court has repeatedly held that the states' sovereignty arises.

Medellín could also have added credibility to his position by acknowledging that unanimous international custom denies the ICJ judgment any automatic effect and that the President does not make law, while pointing out that the ICJ judgment and the presidential memorandum summarize or confirm a longstanding custom of consular notification. Medellín could have traced the right of consular notification through history to the present in order to try to save his life, while reminding the Court of other times when its decisions have taken such a long view of customary law. What is remarkable is that advocates and *amici* deemed it more persuasive to urge the Court to make the United States the first country to give an ICJ judgment automatic effect, and to urge deference to President George W. Bush, than to argue for a customary international law of consular notification. Medellín was executed in August 2008.<sup>262</sup>

## VI. CONCLUSION

The Supreme Court has long enforced the law of nations as the source and limit of the sovereign powers that the Constitution allocates to the federal government, such that the Constitution can neither confer powers

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<sup>261</sup> The Legal Overview in the U.S. Department of State's Consular Notification and Access Manual 2010 concurs that "[t]he performance of consular functions was originally a subject of customary international law but not uniformly addressed in any treaty." (available at [http://travel.state.gov/pdf/cna/CNA\\_Manual\\_3d\\_Edition.pdf](http://travel.state.gov/pdf/cna/CNA_Manual_3d_Edition.pdf)). That reference to customary international law in the past tense, and the erroneous implication that treaties are the true measure of international law in the United States, is typical of American lawyers' prevailing misunderstanding that international law used to be customary but is now conventional. That view is wrong in the only sense that matters to a lawyer; namely, as a prediction of how the highest Court of the United States would approach a case of interest to a client. As this article shows, the Court is, on the contrary, increasingly skeptical of treaties but long reliant on custom.

<sup>262</sup> Texas executed José Medellín on August 5, 2008, after the Court denied a stay of execution. See *Medellin v. Texas*, 554 U.S. 759 (2008); James C. McKinley, Jr., *Texas Executes Mexican Despite Objections*, N.Y. TIMES, Aug. 5, 2008, at A19.

that international law does not supply nor authorize the federal government to violate customary international law. Thus, whether or not the principle of constitutional supremacy is normatively correct or desirable, it is at odds with two centuries of the Court's jurisprudence. The decision that awaits the Justices is whether to attempt to turn the country back to the federalist notion of unitary federal sovereignty by holding that, for purposes beyond ATS jurisdiction, customary international law is federal common law made by Article III judges. The Court's decision will have practical consequences for federalism, statutory interpretation, and private rights, where customary international law has had an important role that is both extra-constitutional and supra-constitutional.

Thus, the view that "deference to state sovereignty" makes international law a "voluntary system" and a "lesser species of law" because of a lack of a "super-state enforcement authority capable of coercing recalcitrant states to comply[,]"<sup>263</sup> is exactly wrong as a matter of United States law. The Court has treated international law as a higher species of binding law requiring no enforcer other than the Court itself, and has thus coerced sovereigns, including the United States, to obey the limits of sovereignty when they are acting constitutionally. That is no threat to American exceptionalism but rather one of its foundations, in the sense that the Court's cases treat the United States as both a sovereign and a federation under international law. The Court has done this not for the sake of international harmony or approval, with few exceptions, but rather as the ultimate guaranty of American liberty and a foundation for limited government.

All of this also makes plain that citing foreign law in opinions that involve constitutional law has never been controversial. The Court has normally considered foreign law to determine whether a practice is so generally followed from a sense of legal obligation that it forms part of international customary law and thus domestic law. The key point is that custom is restrictive and conservative, in the sense that the threshold of worldwide general acceptance by states is a high one. What has meager precedent, if any, is the use of foreign law to interpret the Constitution, without meeting the high threshold for customary law and for the purpose of constitutional interpretation. For the Court, foreign law has evidenced customs so universally followed that they do not merely inform but restrain the constitutionally valid exercise of sovereign power. This makes customary international law both supreme and rare.

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<sup>263</sup> Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1792-93 (2009); see generally JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005).