

Our Constitution as Federal Treaty: A New Theory of United States Constitutional Construction Based on an Originalist Understanding for Addressing a New World

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This Article argues that the Constitution is a federal treaty based on an originalist understanding. As a treaty, the Constitution must be construed in conformity with the United States' customary international legal obligations, according to the international law governing treaties. Furthermore, these customary international legal norms often will take primacy over the major general principles of constitutional construction (viz., the principles of federalism, separation of powers, and the "living Constitution") because these international legal norms often are more determinate and less judicially-constructed than general principles of constitutional construction yet these norms can still accommodate these general principles. Furthermore, unlike other theories of constitutional interpretation, this approach provides a mandatory theory of constitutional construction that is deduced from the Constitution's "text" – in both senses of "language" and "legal instrument." This theory of constitutional construction will be called "International Legal Constructionism." By construing the Constitution in accordance with customary international law, the Constitution can meet the challenges of globalization and secure fundamental rights for the American people.

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Introduction

In the face of growing globalization, can our Constitution adequately address the forces of globalization that have been created by a host of recent technological and geopolitical developments? The effective erosion of national frontiers, the increasing interdependence of states, and the multiplication of multilateral approaches to global problems demand a construction of the Constitution that can respond to these new challenges – this New World. Our Constitution should be up to the task. After all, it originally was designed for a New World, albeit an earlier and somewhat different one.

Fortunately, the Constitution often is cast in general language that allows adaptability to new circumstances.¹ However, such general language requires further definition, and properly construing the Constitution is of paramount importance for ensuring the Constitution's vitality when confronted with novel situations. In our present New World, construing the Constitution in conformity with international law would appear to enable the Constitution to meet the test of globalization because international law generally provides a uniformity of norms across frontiers.² Also, because it has embedded values common to the global community, international law enables multilateral, integrated approaches to conflicts, catastrophes, and other challenges. However, most constitutional construction by the courts has been textually and nationally insular. Such a hermeneutic

1. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816) ("constitution unavoidably deals in general language" in order to adapt to new circumstances).

2. In the field of international human rights law, this uniformity is unremarkable because different treaties contain similar if not identical language and because international law must be construed in conformity with other international law. *Compare, e.g.*, the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter *ICCPR*], with the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Feb. 3, 1953) [hereinafter *ECHR*], and the American Convention on Human Rights, Pact of San Jose, Costa Rica, Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into force July 17, 1978) [hereinafter *ACHR*]; *see also* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 31 (Advisory Opinion, June 22, 1971) ("international instrument was to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation").

There are only a very few areas in which international human rights norms arguably conflict. *Contrast, e.g.*, *Bankovic and Others v. Belgium and Others*, Application No. 52207/99 (2001) (refusing to recognize extraterritorial application of the right to life), *with* *Alejandro et al. v. Cuba*, Case 11.589, Report No. 86/99, OEA/Ser.L/V/II.106 Doc. 3 rev. at 586 (1999) (recognizing extraterritorial application of right to life); *Saldías de López v. Uruguay*, Comm. No. 52/1979, U.N. Doc. CCPR/C/OP/1 (1985) (views adopted July 29, 1981) (same).

approach has hermetically sealed the Constitution from international law and mystified the Constitution's meaning.

To meet the challenges of this New World, I will propose a new paradigm of constitutional construction based on an originalist understanding of the Constitution.³ This Article will argue that the Constitution is a federal treaty.⁴ As a treaty, the Constitution must⁵ be construed in conformity with the United States law of nations⁶

3. By "an originalist understanding," I mean the public understanding of the Constitution's meaning around the time of its ratification as garnered from, *e.g.*, the proceedings of the Continental Congress, Constitutional Convention, and state constitutional conventions; writings by the Founding Fathers (including the *Federalist* and *Anti-Federalist Papers*); speeches, resolutions, and laws from the early Congress; statements by the early Executive Branch; and early judicial opinions. *See* KEITH WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* (2001) (discussing originalist theories). However, it is important to note that this Article departs from originalism when it fails to accept the Constitution's status as a treaty and its consequent legal implications as a treaty.

4. During the Constitution's framing and ratification period, it was not controversial that the Constitution was a treaty. Only later during the 19th century nullification debate did a controversy emerge over whether the Constitution was a treaty. *See infra* Part 1.3. There are writings among early nineteenth century states' rights advocates and a modern foreign international jurist explicitly arguing that the Constitution was a "treaty." *See, e.g.*, Congressional Resolution introduced by Pennsylvania (11 Jan. 1811) (drafted by Roane) (declaring Constitution "to all intents and purposes" was "a treaty among sovereign states"), *in* JOHN MARSHALL'S *DEFENSE OF MCCULLOCH V. MARYLAND* 150 (Gerald Gunther ed., 1969); Torkel Opsahl, *An "International Constitutional Law"?* 10 *INT'L. & COMP. L.Q.* 760, 771 (1961) (Constitution was a treaty). However, there appears to be no literature explicitly referring to the Constitution as a "federal treaty." Furthermore, the writings of these early states rights advocates reflect incorrect conceptions of both the Constitution and the international law governing treaties. Most recently, a political scientist has argued that in view of the political circumstances facing the Founders, the Constitution could be viewed as a treaty-like arrangement. *See* DAVID C. HENDRICKSON, *PEACE PACT: THE LOST WORLD OF THE AMERICAN FOUNDING* (2003).

5. There is no academic literature arguing for a *mandatory* construction of the Constitution's text according to the law of nations. The literature only argues that the Constitution *should* be construed in conformity with customary international law. *See infra* note 9. However, as discussed below, Randolph, Madison, and others during the Virginia Constitutional Convention argued that the Constitution was to be construed in conformity with the law of nations. *See infra* text accompanying note 74 and Part 1.2.1.

6. As a preface, I should make clear that when I use the phrase "law of nations," I am referring mainly to those international legal norms that the United States itself has explicitly or effectively recognized as binding through the Article II treaty ratification process *and/or* the Article I "define and punish" legislative process for international law that is constituted primarily by treaty and customary international law. U.S. CONST. art. II, § 2, cl. 2 (President "shall have Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur"); U.S. CONST. art. I, § 8 ("Congress shall have Power . . . to define and punish . . . Offenses against the Law of Nations"); *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812) (United States recognition of law of nations norm necessary for norm to be binding on United States); *see* *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825) (state

obligations – specifically those constituting customary international law.⁷ I will call this new theory “International Legal Constructionism

acceptance of law of nations norm required for state to be bound by it). The above emphasis of “and/or” is meant to point out that customary international legal norms can become binding on the United States through both the Constitution’s Article I customary international legal defining process and Article II treaty ratification process – especially for multilateral treaties that often codify customary international law.

When the United States ratifies a multilateral treaty, such a treaty often is clarifying extant or emerging customary international legal norms through their codification in a treaty. See ANTHONY D’AMATO, *INTERNATIONAL LAW: PROSPECT AND PROCESS* 123-47 (1987); CLIVE PARRY, *THE SOURCE AND EVIDENCE OF INTERNATIONAL LAW* 62-67 (1965); Richard R. Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 *BRIT. Y.B. INT’L L.* 275 (1965-66). If the multilateral treaty is clarifying emerging customary international legal norms, the United States’ signature to the treaty also signals its acceptance of these norms – unless the United States objected to the norm during the treaty’s drafting. A state that clearly and expressly objects to a customary international law norm during the norm’s emergence is not bound by the norm. This rule is known as the “persistent objector rule.” See *Fisheries Case (U.K. v. Norway)*, 1951 *I.C.J.* 116, 131 (Dec. 18, 1951) (recognizing persistent objector rule); *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* § 102 cmt b (1987) (recognizing persistent objector rule) [hereinafter *RESTATEMENT*]; EMMERICH DE Vattel, *THE LAW OF NATIONS OR PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGN*, *Preliminaries* § 26 (1758) (Joseph Chitty ed., 1883) (state must expressly object to customary international legal norm to not be bound by it) [hereinafter, *VATTEL*]; but see Jonathan I. Charney, *Universal International Law*, 87 *AM. J. INT’L L.* 529, 540 (1993) (“state practice and other evidence do not support the existence of the persistent objector rule”). However, if the United States signs or ratifies the treaty without a reservation to the norm, the United States’ signature/ratification signals its acceptance of the norm as a customary international legal norm (assuming a sufficient number of states also have accepted the norm through signature, accession, or ratification without objection to the norm). *United States v. Smith*, 5 *U.S. (Wheat.)* 153, 159 (1820) (“common consent of nations” to public code as establishing law of nations). If a state merely signs – but does not ratify – the treaty reflecting emerging customary international legal norms, the state still has signaled its acceptance of the emerging customary international legal norms because signatory states may not defeat the object and purpose of the treaty. *Vienna Convention on the Law of Treaties*, May 23, 1969, art. 18, 1155 *U.N.T.S.* 331 (entered into force Jan. 27, 1980) (“A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) It has signed the treaty . . . until it shall have made its intention clear not to become a party to the treaty . . .”) [hereinafter *Vienna Convention*]. Of course, once a state has signed a treaty reflecting customary international legal norms, it cannot withdraw its acceptance of these customary international legal norms because it has bound itself to other states *vis-a-vis* these norms. Only another widely adopted multilateral treaty between the same states-parties can void the earlier customary international law norms reflected in the earlier treaty.

7. Customary international law constitutes a substantial part of the “law of nations,” the phrase used by the Constitution. Evidence of a norm having customary international legal status can be found in treaties, the customs and usages of nations. *Commonwealth v. Kosloff*, 5 *Serg. & Rawle* 545 (Pa. 1816). Modern customary international law is primarily made by the political branches through the treaty process. However, before the adoption of hundreds of multilateral treaties codifying customary international law in the twentieth century, the law of nations primarily was “ascertained by consulting the works of jurists,

[ILC].”

Although the Supreme Court has held that Congress is assumed to legislate in conformity with its international legal obligations and that ambiguous federal statutes must be construed in conformity with such obligations,⁸ few jurists have argued that the Constitution *should* be construed in conformity with the law of nations,⁹ and the United States Supreme Court also has cited international legal authorities in construing the Constitution.¹⁰ Even fewer have argued that the

writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognising (sic.) and enforcing that law.” *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820). Accordingly, this Article mostly will cite the works of pre-19th century international jurists (such as Grotius, Vattel, Burlamaqui, Wolff, Wilson, and Pufendorf), and 18th and 19th century treaties and case law for evidence of the law of nations as it existed at the time of the United States Constitution’s framing. For modern statements of the law of nations, this Article mostly will cite widely adopted multilateral treaties and judicial decisions.

8. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch.) 64, 118 (1804) (this rule of construction is known as the “*Charming Betsy Rule*”).

9. See, e.g., FRANCISCO FORREST MARTIN, CHALLENGING HUMAN RIGHTS VIOLATIONS: USING INTERNATIONAL LAW IN U.S. COURTS 134 (2001) [hereinafter MARTIN, CHALLENGING]; Gordon Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analysis*, 52 U. CIN. L. REV. 3 (1983); Joan Fitzpatrick, *The Significance of Customary International Human Rights Law: The Relevance of Customary International Norms to the Death Penalty in the United States*, 25 GA. J. INT’L & COMP. L. 165, 179-80 (1995-96); Joan F. Hartman, *Unusual Punishment: The Domestic Effect of International Norms Restricting the Application of the Death Penalty*, 52 U. CIN. L. REV. 655 (1983); Ann I. Park, Comment, *Human Rights and Basic Needs: Using International Human Rights Norms to Inform Constitutional Interpretation*, 34 UCLA L. REV. 1195 (1987); Andrew L. Strauss, *A Global Paradigm Shattered: The Jurisdictional Nihilism of the Supreme Court’s Abduction Decision in Alvarez-Machain*, 67 TEMP. L. REV. 1209, 1236 n.72 (1994); Nadine Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis*, 41 HASTINGS L.J. 805 (1990); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 244 (1996) (arguing that Constitution’s war declaration clause should be interpreted consistently with international law because “[t]he Framers turned to international law to define [such] phrases”); Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39, 45 (1994) (“International law can and should inform the interpretation of various clauses of the Constitution, notably the Due Process Clause and the Eighth Amendment prohibition against cruel and unusual punishments.”).

10. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 573 (2003) (citing European Court of Human Rights case law); *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003) (Ginsburg, J., concurring) (citing International Convention on the Elimination of All Forms of Racial Discrimination for construing 14th Amendment’s equal protection guarantee in support of affirmative action program); *Atkins v. Virginia*, 536 U.S. 304, n.21 (2002) (citing amicus brief from European Union in *McCarver v. North Carolina*); *Thompson v. Oklahoma*, 487 U.S. 815, n.34 (1988) (citing ICCPR for construing 8th Amendment’s prohibition of cruel and unusual punishment in prohibiting execution of persons under the age of 16 committing capital crimes); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 161 n.16 (1963) (citing Universal Declaration of Human Rights for construing 5th and 6th Amendment in

Constitution *must* be construed in conformity with the law of nations.¹¹ None have provided a justification based on the Constitution's text for why the Constitution must be construed in conformity with the law of nations.

ILC has the advantage of providing a unique prescriptive methodology of constitutional construction that is derived inherently from the kind of legal instrument that the Constitution is (*viz.*, a federal treaty) and in whose text the Constitution is indicated as such.¹² ILC is truly "textualist" in both senses of the word. First, ILC is textualist in that it relies upon what the Constitution's text expressly *states*. Second, ILC is textualist in that it relies on what the Constitution as a text *is*.

It is this last sense of "textualist" that provides the prescriptive nexus between the Constitution and the use of extra-constitutional authorities for construing it that often is lacking in other theories of constitutional construction. When some theories do address the issue of what the Constitution is, such theories cannot show where in the Constitution's text that the Constitution says it is such. For example, Judge Bork (a textualist) has referred to the Constitution as a "social compact," but the Constitution never refers to itself as such.¹³ Of course, theories based on the "living Constitution" principle do rely upon the Constitution's text denoting it as a constitution,¹⁴ but such theories merely beg the question because such theories merely point out that the Constitution *qua* constitution must be construed in a fashion that constitutes the government of the United States.¹⁵ Such theories cannot show how the use of particular extra-constitutional authorities are required by the nature of the Constitution as a constitution and cannot show any text in the Constitution requiring the use of such authorities.

Clearly, the Constitution's text is often ambiguous requiring – practically speaking – the use of extra-constitutional sources for its construction.¹⁶ Constitutional jurists must construe the Constitution

citizenship revocation case).

11. See *infra* discussion accompanying note 74 (statement by Randolph and Lobel article).

12. See U.S. CONST. art. VII ("Constitution between the States").

13. See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 19 (1991).

14. U.S. CONST. pmbl. (denoting Constitution as constitution).

15. See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) ("we must never forget, that it is a constitution we are expounding.") (emphasis removed).

16. Such extra-constitutional sources constitute a potentially enormous corpus,

not only from the inside out, but also from the outside in. We have to do so because the Constitution *per se* does not provide any explicit comprehensive or coherent methodology of interpretation or construction. The Constitution does not even say that its terms must be construed in accordance with its other terms or its structure – a traditional textualist approach. With three exceptions, the Constitution never addresses how it must be interpreted or construed. However, the first two exceptions are nearly empty of content. Article IV only says that “nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.”¹⁷ The Ninth Amendment only says that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”¹⁸ On the other hand, the third exception, the Seventeenth Amendment, does have content, but its content has few applications: “This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.”¹⁹

How does a jurist successfully argue that the use of certain extra-constitutional authorities are mandatory for construing the Constitution when the Constitution does not explicitly require that it must be construed in conformity with them? As demonstrated below, the answer is that one needs to recognize the Constitution *is* a treaty constituting a nation, and as such a treaty by definition and law, it must be construed in conformity with the law of nations.

Accordingly, this Article will argue that construing the Constitution in conformity with the law of nations takes primacy over other general principles (and their elaborative theories) of constitutional construction because ILC (unlike these other principles and theories) provides a justification of its prescriptive methodology of constitutional construction that is intrinsically linked to the Constitution’s language and – most importantly – the Constitution as a treaty. ILC also acquires primacy over these other principles or

including, *e.g.*, the Declaration of Independence; Articles of Confederation; the proceedings of the Continental Congress, Constitutional Convention, and state constitutional conventions; writings by the Founding Fathers (including the Federalist and Anti-Federalist Papers); Congressional speeches, resolutions, and laws; Executive Branch statements and orders; federal and state judicial opinions; history; and social science theories.

17. U.S. CONST. art. IV, § 3, cl. 2.

18. U.S. CONST. amend. IX.

19. U.S. CONST. amend. XVII.

theories because it requires the use of the enormous corpus of specific, contemporary, conventional customary international law that often not only accommodates these principles but also often defines these plastic principles and ensures greater political accountability.²⁰ As illustrations of ILC's advantages, this Article will examine the three major, general principles of constitutional construction: the principles of federalism, separation of powers, and a "living Constitution."

Through the ILC approach, we also will be able to do an "end-run" around some recent arguments against the enforceability of customary international law and treaties as well as address problematic issues concerning the substantive content of the Ninth Amendment and the proper reach of the State Commerce Clause that results from the use of these principles of traditional constitutional construction.²¹

1. The Formation of the United States and Eventual Establishment of the Constitution within the Context of an International Legal Process

To properly understand the formation of the United States and the eventual establishment of the Constitution, it is necessary to place them in the context of an international legal process that began with the Declaration of Independence. The Declaration of Independence (1776), Articles of Confederation (1778), and the Constitution (1788) are three different kinds of international legal instruments building upon the previous one in order to ensure the political and legal viability of the United States.

20. I use the word "primacy" to indicate only that ILC has prescriptive priority over other principles and theories because of ILC's incorporation of the Constitution as a treaty concept unlike these other principles and theories. Nevertheless, these other principles and theories are often very helpful and even necessary for socially responsible constitutional construction – especially when customary international law does not provide material for construing the Constitution.

21. See, e.g., 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) [hereinafter, Bradley & Goldsmith, *Federal Common Law*] (customary international law is unenforceable in United States courts); John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999) [hereinafter, Yoo, *Globalism*]; John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218 (1999) [hereinafter Yoo, *Rejoinder*] (treaties are unenforceable in United States courts without implementing legislation or without express declaration of enforceability made by President or Senate).

1.1 The Declaration of Independence and Articles of Confederation

The Declaration of Independence was an international declaration to other nation-states setting forth the thirteen colonies' complaints against the British Crown justifying their independence under international law, announcing their independence from Great Britain, and declaring their rights under international law "to levy War, conclude Peace, establish Commerce, and to do all other Acts and Things which Independent States of right may do."²² The Declaration of Independence complained of the British Crown's violation of colonists' rights even though in reality it was Parliament that had violated the colonists' rights.²³ Of course, given that the Declaration was an international legal instrument, it was appropriate that the complaints were attributed to the British Crown as head of state – the proper addressee for international legal matters – and not Parliament, which merely is the government. As a practical matter, an international declaration was needed in order that the thirteen colonies could be recognized as states by other foreign states. Under the law of nations, members of a state could dissolve their relations with their prince if the prince failed to protect them, and establish an independent state:

The state is obliged to defend and preserve all its members . . . ; and the prince owes the same assistance to his subjects. If, therefore, the state or the prince refuses or neglects to succour a body of people who are exposed to imminent danger, the latter, being thus abandoned, become perfectly free to provide for their own safety and preservation in whatever manner they find most convenient, without paying the least regard to those who, by abandoning them, have been the first to fail in their duty. The country of Zug, being attacked by the Swiss in 1352, sent for succour to the duke of Austria, its sovereign; but that prince, being engaged in discourse concerning his hawks, at the time when the deputies appeared before him, would scarcely condescend to hear them. Thus abandoned, the people of Zug entered into the Helvetic confederacy.²⁴

22. THE DECLARATION OF INDEPENDENCE paras. 5-32 (complaints against Crown), 34 (rights of independent states) (U.S. 1776); see David Armitage, *The Declaration of Independence and International Law*, 59 WM. & MARY Q. 1, 39 (2002) (Declaration of Independence recognized as international instrument in 18th century).

23. THE DECLARATION OF INDEPENDENCE para. 2 ("The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States.").

24. 1 VATTEL, *supra* note 6, § 202.

The British Crown repeatedly had failed to protect the colonies in a number of different ways; therefore, under the law of nations, the thirteen colonies could declare their independence and establish a confederacy. Indeed, a primary purpose of the Declaration was to seek alliances through treaties with other states, such as France, in order to fight the British in securing the colonies' independence, and this purpose could only be accomplished if other nation-states recognized the United States.²⁵ The Declaration of Independence served to give notice to other foreign states that the thirteen colonies were now independent states and provided the reasons for their independence.

Subsequently, the Articles of Confederation were adopted establishing a government. The Articles of Confederation was a regional, multilateral, federal, constitutional treaty between the thirteen – now sovereign – states.²⁶ It was a “regional” treaty in that it

25. See, e.g., Treaty of Alliance, Feb. 6, 1778, U.S.-Fr., 2 T.I.A.S. No. 35; Treaty of Amity and Commerce, Oct. 8, 1782, U.S.-Neth., 2 T.I.A.S. No. 59; Treaty of Amity and Commerce, Apr. 3, 1783, U.S.-Swed., T.I.A.S. No. 123; Treaty of Amity and Commerce, July 9, 1785, U.S.-Fr., 8 Bevans 78.

26. In *United States v. Curtiss-Wright Export Corp.*, the Supreme Court appeared to suggest that the thirteen independent states were not individually sovereign:

By the Declaration of Independence, “the Representatives of the United States of America” declared the United [not the several] Colonies to be free and independent states As a result of the separation from Great Britain by the colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America. . . . When, therefore, the external sovereignty of Great Britain in respect of the colonies ceased, it immediately passed to the Union.

299 U.S. 304, 316-17 (1936). However, the Court restricts its discussion to “external sovereignty” with foreign states. The individual states retained their “internal sovereignty” under the Declaration of Independence and the Articles of Confederation. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 187 (1824) (states sovereign and “completely independent” under Articles). This retention of sovereignty in federal republics was consistent with the law of nations. As Vattel stated:

several sovereign and independent states may unite themselves together by a perpetual confederacy, without ceasing to be, each individually, a perfect state. They will together constitute a federal republic: their joint deliberations will not impair the sovereignty of each member, though they may, in certain respects, put some restraint on the exercise of it, in virtue of voluntary engagements.

1 VATTEL, *supra* note 6, § 10. Therefore, the Declaration and Articles of Confederation still were international legal instruments – but internationally restricted mostly to relations between the states of the Union that remained “internally sovereign” within that Union. The individual internal sovereignty of the states was maintained respectively through the Articles as a con-federal treaty and later the Constitution as a federal treaty. Even if this external sovereignty was passed from the Crown to the collective and corporate capacity of the United States, states still retained some external sovereignty with regard to foreign

bound states in the North American region as well as invited Canada to become a member.²⁷ It was a multilateral, federal, constitutional treaty in that it bound thirteen sovereign states into a confederacy and constituted a federal government. For example, the Articles Congress referred to the Articles as a “national constitution,”²⁸ and the Commissioners at the Annapolis Convention and Madison in *The Federalist* No. 40 both referred to the Articles as a “constitution of the federal government.”²⁹ And, like other similar multilateral treaties, it established a league of friendship, trade, and mutual defense.³⁰ The thirteen states were just the same as other foreign states, but they had placed themselves into a federal arrangement.

However, the Articles were less than perfect in ensuring that the thirteen states acted uniformly in their international relations between themselves and foreign states, not doubt in part because the Confederation was a diplomatic body, according to John Adams³¹ and because states (with three exceptions³²) failed to employ the boards of commissioners or federal courts provided by the Articles of Confederation for resolving inter-state disputes.³³ States enacted trade barriers and entered into treaties with each other, and violated

states. *See* U.S. CONST. art. I, § 10, cl. 3 (“No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact . . . with a foreign Power . . .”). States subsequently have entered into agreements with foreign states. *See, e.g.*, Public Law 85-145 (Joint Resolution consenting to agreement between New York and Canada providing for continued existence of Buffalo and Fort Erie Public Bridge Authority), 71 Stat. 367 (1957).

27. THE ARTICLES OF CONFEDERATION art. XI (U.S. 1781) (inviting Canada to become member) [hereinafter ARTICLES OF CONFEDERATION].

28. 32 JOURNALS OF THE CONTINENTAL CONGRESS 177 (1912) (letter to Great Britain dated Apr. 13, 1787).

29. Proceedings of Commissioners to Remedy Defects of the Federal Government, Annapolis in the State of Maryland (Sept. 14, 1786) at para. 11; THE FEDERALIST NO. 40, at para. 3 (James Madison) (1788) (citing same language).

30. ARTICLES OF CONFEDERATION art. III (“states hereby severally enter into a firm league of friendship”).

31. 3 JOHN ADAMS, A DEFENSE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 505 (photo. Reprint 1971) (1787).

32. Connecticut v. Pennsylvania, 24 JOURNALS OF THE CONTINENTAL CONGRESS 6-32 (1912) (1783 dispute over Wyoming Valley adjudicated by federal court established under the Articles); Massachusetts v. New York, 33 JOURNALS OF THE CONTINENTAL CONGRESS 617-29 (territorial dispute adjudicated by federal court established under the Articles and subsequently settled); Georgia v. South Carolina, 31 JOURNALS OF THE CONTINENTAL CONGRESS 651 (congressional resolution approving establishment of federal court for resolving territorial dispute).

33. ARTICLES OF CONFEDERATION art. IX (providing for court and boards of commissioners for resolving inter-state conflicts).

treaties with Great Britain, France and Holland.³⁴

1.2 The Constitution as Federal Treaty

As a result of these problems, the people of the United States “in Order to form a more perfect Union” replaced the Articles with another regional, multilateral, federal, constitutional treaty – *viz.*, the Constitution. Whereas the individual states of the United States were to remain intact, the government under the Articles was replaced with a different government under the Constitution. The legal status of the thirteen states under the Articles of Confederation as states did not change under the Constitution. They were still sovereign states with international legal personalities. As under the Articles,³⁵ states still could enter into agreements with foreign states and each other with Congressional approval under the Constitution.³⁶ Only the legal relations between the states, and between the states and federal government were altered through the adoption of the Supremacy Clause that ensured the supremacy of federal law (which included treaties) over state law.³⁷ The compulsory original jurisdiction of the

34. James Madison, *Vices of the Political System of the United States*, in 9 THE PAPERS OF JAMES MADISON 348-57 (William T. Hutchinson, *et al.*, eds., 1962-77) [hereinafter Madison, *Vices*].

35. ARTICLES OF CONFEDERATION art. VI (“No State, without the consent of the United States in Congress assembled, shall . . . enter into any conference, agreement, alliance or treaty with any King, Prince or State No two or more States shall enter into any treaty, confederation or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.”).

36. U.S. CONST. art. I, § 10, cl. 1 (“No State shall enter into any Treaty, Alliance, or Confederation”) and 3 (“No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign power”).

37. U.S. CONST. art. VI, § 2 (“This Constitution, and the Law of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

It is interesting to note that the Supremacy Clause ensures that state judges can apply treaties and federal law as the supreme law of the land. This was to ensure that state courts had lawful jurisdiction to apply federal law that, otherwise, they could not apply. Recall that although British courts could apply customary international law, they could not apply treaties without implementing legislation from Parliament. *See* 3 Vattel, *supra* note 6, n. (172) (“And in Great Britain, no municipal court, whether of common law or equity, can take cognizance of . . . any question respecting the infraction of treaties be directly agitated before courts of law” (Ed.’s note)). To avoid this scenario, the Supremacy Clause guaranteed that state courts could directly apply treaties and federal statutory law (a species of international law). *See infra* discussion accompanying note 208 (federal statutory law as international law). Furthermore, state courts—like the British

United States Supreme Court ensured that inter-state conflicts and treaty violations were to be resolved and not allowed to fester, as they had under the Articles.³⁸ Only the constitutional law compliance mechanism had been altered for the states – not the states themselves. Again, like under the Articles of Confederation, the states were the same as foreign states, but they had placed themselves in a federal arrangement. If the Framers had wanted to make the thirteen states not “states” in the international legal sense, they would have done so by calling the states something else. They did not.

For the Framers, using a treaty was the proper vehicle for joining the thirteen states into the United States and the peoples therein as one nation because it was the customary legal instrument for uniting states and consolidating peoples.³⁹ Of course, the United States Constitution was not the first treaty establishing a constitution. Earlier examples included the Articles of Confederation and the Union of Utrecht (1579). As one Anti-Federalist put it, “Who is it that does not know, that by treaties in Europe the succession and

courts—already could apply customary international law. *See, e.g.,* *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 114 (Pa. Oyer and Terminer, 1784); *Nathan v. Commonwealth of Virginia*, 1 U.S. (1 Dall.) 77, 78 (Common Pleas, Philadelphia County, 1781). *VATTEL*, *supra* note 6, *Preliminaries*, n. (1) (“The law of nations is adopted in Great Britain in its full and most liberal extent by the common law, and is held to be part of the law of the land; and all statutes relating to foreign affairs should be framed with reference to that rule. (Ed.’s note, citing 4 BLACKSTONE’S COMMENTARIES ON THE LAWS OF ENGLAND 67.)) Hence, there was no need to include the customary law of nations in the Supremacy Clause.

38. *See* U.S. CONST. art. III, § 2, cl. 2 (“In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original Jurisdiction.”)

39. The Declaration of Independence earlier also stated that the people of the different colonies were one people. DECLARATION OF INDEPENDENCE para. 6 (“We . . . the Representatives of the united States of America . . . do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States . . .”).

It is important to note the difference between “nations” and “states.” Nations are peoples. States are bodies politic. When a nation and state are joined, they constitute a “nation-state.” The American people were the people in the United States under both the Articles of Confederation and the Constitution. Sometimes nations are not organized into states (as is the case of the Kurdish people in Turkey and Iraq). Also, a state may include multiple nations. For example, Florida includes both the American and Seminole nations.

There also is a difference between states and governments. The government of a state can change without eliminating the state. For example, the recent change of government in Iraq did not eliminate the state of Iraq. The United States were not eliminated when the government under the Articles of Confederation was replaced with the Constitution’s government.

constitution of many sovereign states, ha[ve] been regulated?”⁴⁰ In arguing for the adoption of the Constitution, Jay made a favorable comparison of the consolidation of the American people under the Constitution with the consolidation of the British people by implicit reference to the Treaty of Union (1707) between England and Scotland.⁴¹ Like the Treaty of Union, the Constitution as a treaty operated to unify states and consolidate peoples. As James Madison in 1833 pointed out in his letter to Daniel Webster, the states were “parties” to the Constitution, and the Constitution made the American people “one people, [i.e.,] nation.”⁴²

However, Madison made two statements during his life appearing to suggest that the Constitution was not a treaty. During the Constitutional Convention, he is reported to have stated that “[h]e considered the difference between a system founded on the Legislatures only, and one founded on the people, to be the true difference between a *league* or *treaty*, and a *Constitution*.”⁴³ Later in his 1833 letter to Daniel Webster, he also stated the following:

It is fortunate when disputed theories, can be decided by undisputed facts. And here the undisputed fact is, that the Constitution was made by the people, but as imbodyed into the several states, who were parties to it and therefore made by the States in their highest authoritative capacity. They [i.e., the states] might, by the same authority & by the same process have converted the Confederacy into a mere league or treaty; or continued it with enlarged or abridged powers; or have imbodyed the people of their respective States into one people, nation or sovereignty; or as they did by a mixed form make them one people, nation, or sovereignty, for certain purposes, and not so for others.⁴⁴

It is important to note in the above two excerpts that Madison is not saying that the Constitution is not a “treaty” in its sense of being a legal instrument. Madison was using the term “treaty” to refer to the

40. THE ANTI-FEDERALIST NO. 75, at para. 2 (Hampden) (1788).

41. See THE FEDERALIST NO. 5, at para. 3 *et passim* (John Jay) (1787).

42. James Madison to Daniel Webster (15 Mar. 1833), in 1 THE FOUNDERS' CONSTITUTION, ch. 3, doc. 14 (Gaillard Hunt ed.), available at <http://press-pubs.uchicago.edu/founders/documents/v1ch3s14.html> (last visited Feb. 15, 2003).

43. JAMES MADISON, DEBATES IN THE CONVENTION OF 1787 (July 23, 1787).

44. James Madison to Daniel Webster (15 Mar. 1833), in 1 THE FOUNDERS' CONSTITUTION, ch. 3, doc. 14 (Gaillard Hunt ed.), available at <http://press-pubs.uchicago.edu/founders/documents/v1ch3s14.html> (last visited Feb. 15, 2003).

political system of a league or alliance or confederacy⁴⁵—another, somewhat arcane, meaning of the word “treaty.”⁴⁶

Indeed, there appears to be *no* evidence during the drafting and ratification of the Constitution that the Founders thought that the Constitution was not a treaty. The Founders operated under the assumption that the Constitution was a treaty. The issue was non-controversial.⁴⁷

1.2.1. The Dissolution of the Articles of Confederation and Ratification of the Constitution Governed by the Law of Treaties

Furthermore, the only legal instrument that could have dissolved the Articles of Confederation was another treaty because only a

45. Appearing to rely on Madison’s above statements, both early and contemporary writers often incorrectly state that the Constitution was not a treaty in the sense of being a legal instrument. They fail to recognize that Madison was referring to the government created by the Constitution – not the Constitution itself—and that his use of “treaty” meant the political organization of a “league.” See, e.g., David Golove, *The New Confederatism: Treaty Delegations of Legislative, Executive, and Judicial Authority*, 55 STAN. L. REV. 1697, 1714 (2003) (“the proposed Constitution crossed the line that separates a league or treaty”); John Marshall, *A Friend of the Constitution, In Defense VII* (July 9, 1819), in JOHN MARSHALL’S DEFENSE OF MCCULLOCH V. MARYLAND 199 (ed. Gerald Gunther 1969) [hereinafter Marshall, *Friend of the Constitution VII*] (“[O]ur constitution is not a league. It is a government; and has all the constituent parts of a government.”).

46. However, it is important to note that Madison was incorrect in arguing that constitutional forms of government were distinguished from confederate forms of government on the basis that the former were established by the people, whereas the latter were established by state legislatures. Like the United States Constitution, the Confederate Constitution (1861) was established by the people and ratified by state constitutional conventions. See CONSTITUTION OF THE CONFEDERATE STATES OF AMERICA pmbl. (“We, the people of the Confederate States, each State acting in its sovereign and independent character, in order to form a permanent federal government, establish justice, insure domestic tranquillity, and secure the blessings of liberty to ourselves and our posterity—invoking the favor and guidance of Almighty God—do ordain and establish this Constitution for the Confederate States of America.”) and art. VII, § 1 (“The ratification of the conventions of five States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.”).

47. Subsequent to the ratification of the Constitution, it was only appropriate that the First Congress in 1789 gave custody and charge of all treaties and other international legal instruments – including the Constitution, Articles of Confederation, and the Declaration of Independence – to the Secretary of the Department of Foreign Affairs (which was the forerunner of the United States Department of State). See “An act for establishing an executive department to be denominated the Department of Foreign Affairs,” 1 Stat. 29, 1st Cong. 1st Sess., ch. 4, § 4, (July 27, 1789); see also Roger A. Bruns, *A More Perfect Union: The Creation of the U.S. Constitution*, U.S. National Archives and Records Administration (Dec. 30, 2003), available at http://www.archives.gov/national_archives_experience/charters/constitution_history.html.

treaty could replace the reciprocal obligations under an earlier treaty made between the same states and addressing the same subject-matter.⁴⁸ Otherwise, the states would have been violating their obligations under the law of nations, and the states recognized the law of nations.⁴⁹

However, Professors Bruce Ackerman and Sanford Levinson have argued that the Constitution was illegally ratified because Article VII of the Constitution only required the Constitution's ratification by nine state conventions to enter into force and Article XIII of the Articles of Confederation required approval from all thirteen state legislatures for the Articles to be altered.⁵⁰ On the other hand, Professor Akhil Reed Amar has argued that the Constitution's ratification was legal because states had violated the Articles and state-party breach of a treaty allows other states-parties to void the treaty under international law. Therefore, the Articles had been voided.⁵¹ Professor Amar's argument is the same that was used by Madison at the Constitutional Convention in 1787.⁵² However, both

48. Cf. 2 Vattel, *supra* note 6, § 205 ("as treaties are made by the mutual agreement of the parties, they may also be dissolved by mutual consent, at the free will of the contracting powers"); *Vienna Convention*, art. 59 ("A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and . . . it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty. . . .").

The Articles and the Constitution addressed the same subjects. Compare, e.g., ARTICLES OF CONFEDERATION arts. IV-VI, IX, and XII-XIII (full faith and credit, establishment of Congress, limitations on states, Congressional declaration of war, previous debts, supremacy of constitutional law) with U.S. CONST. arts. I, IV, and VI (same).

49. See, e.g., *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 114, 120 (Pa. Oyer and Terminer, 1784) ("principles of the laws of nations . . . form part of the municipal law of Pennsylvania"); *Nathan v. Commonwealth of Virginia*, 1 U.S. (1 Dall.) 77, 78 (Common Pleas, Philadelphia County, 1781) (law of nations part of common law and "consequently extended to Pennsylvania"). Indeed, in *Rutgers v. Waddington*, the New York City Mayor's Court in 1784 recognized that customary international law trumped a New York statute.

50. Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1058 (1984); Sanford Levinson, CONSTITUTIONAL FAITH 130-31 (1988).

51. Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988).

52. See, e.g., 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 424 (Jonathan Elliot ed., 1968) [hereinafter ELLIOT'S DEBATES] (Madison: "Although all the states have assented to the Confederation, an infraction of any one article by one of the states is a dissolution of the whole. This is the doctrine of the civil law on treaties."); 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 122-23 (Max Farrand ed., 1911) (Madison: "[A]s far as the articles of Union were to be considered as a Treaty only of a particular sort, among the

Professor Amar and Madison cited no authorities from the law of nations in support of their arguments.

The respective arguments of Professors Ackerman and Levinson, and Professor Amar and Madison are both flawed. In the eighteenth century, international legal scholars differed on whether a party could terminate a bilateral treaty if another party violated the treaty. Grotius and Vattel argued that even partial violation of a bilateral treaty by one party allowed another party to terminate the treaty.⁵³ On the other hand, Christian Wolff argued that partial violation of a

Governments of Independent States, the doctrine might be set up that a breach of any one article, by any of the parties, absolved the other parties from <the whole> obligation.”) [hereinafter FARRAND]; see also Madison, *Vices*, *supra* note 34, para. 8 ([I]t seems to follow from the doctrine of compacts, that a breach of any of the articles of the confederation by any of the parties to it, absolves the other parties from their respective obligations, and gives them a right if they chuse to exert it, of dissolving the Union altogether.”).

53. 2 VATTEL, *supra* note 6, § 200 (“The party . . . who is offended or injured in those particulars which constitute the basis of the treaty, is at liberty to choose the alternative of either compelling a faithless ally to fulfil his engagements, or of declaring the treaty dissolved by his violation of it.”) and § 202 (“Some writers [] would extend what we have just said to the different articles of a treaty which have no connection with the article that has been violated,—saying we ought to consider those several articles as so many distinct treaties concluded at the same time. They maintain, therefore, that, if either of the allies violates one article of the treaty, the other has not immediately a right to cancel the entire treaty, but that he may either refuse, in his turn, what he had promised with a view to the violated article, or compel his ally to fulfil his promises if there still remains a possibility of fulfilling them,—if not, to repair the damage; and that for this purpose he may threaten to renounce the entire treaty,—a menace which he may lawfully put in execution, if it be disregarded by the other. Such undoubtedly is the conduct which prudence, moderation, the love of peace, and charity would commonly prescribe to nations. Who will deny this, and madly assert that sovereigns are allowed to have immediate recourse to arms, or even to break every treaty of alliance and friendship, for the least subject of complaint? But the question here turns on the simple right, and not on the measures which are to be pursued in order to obtain justice; and the principle upon which those writers ground their decision, appears to me utterly indefensible. We cannot consider the several articles of the same treaty as so many distinct and independent treaties: for, though we do not see any immediate connection between some of those articles, they are all connected by this common relation, *viz.* that the contracting powers have agreed to some of them in consideration of the others, and by way of compensation. I would perhaps never have consented to this article, if my ally had not granted me another, which in its own nature has no relation to it. Every thing, therefore, which is comprehended in the same treaty, is of the same force and nature as a reciprocal promise unless where a formal exception is made to the contrary. Grotius very properly observes that “every article of a treaty carries with it a condition, by the non-performance of which the treaty is wholly cancelled.” [] He adds, that a clause is sometimes inserted to the following effect, *viz.* “that the violation of any one of the articles shall not cancel the whole treaty,” in order that one of the parties may not have, in every slight offence, a pretext for receding from his engagements. This precaution is extremely prudent, and very conformable to the care which nations ought to take of preserving peace, and rendering their alliances durable.”).

bilateral treaty did not allow the treaty's termination.⁵⁴ However, even Vattel recognized that the violation of a *multilateral* peace treaty by one party did not necessarily void the treaty:

The infractions of a treaty of peace by allies . . . who joined in it as principals, can therefore produce no rupture of it except with regard to themselves, and do not affect it in what concerns their ally, who, on his part, religiously observes his engagements. With respect to him, the treaty subsists in full force⁵⁵

For some of the Framers, this rule appears to have extended to other multilateral treaties because they believed that the violation of any treaty was *casus belli* under the law of nations that effectively made any treaty a peace treaty. For example, in discussing a multilateral navigational treaty, William Grayson stated during the Virginia Convention that "by the law of nations, if a negotiator makes a treaty, in consequence of a power received from a sovereign authority, non-compliance with his stipulations is a just cause of war."⁵⁶ Under Hobbesian natural law theory, the violation of treaties returned states to a state of nature at war with each other.⁵⁷ Hamilton appears to have ascribed to this tenet in discussing why violations of the Articles had not terminated the Articles. During the Constitutional Convention, Hamilton "denied the doctrine that the States were thrown into a State of nature. He was not yet prepared to admit the doctrine that the Confederacy, could be dissolved by partial

54. CHRISTIAN WOLFF, *THE LAW OF NATIONS* § 432 (James Brown Scott ed., Oxford U. Press 1934) (1750) ("if one ally violates a treaty as regards one term, the other ally has no right for this reason to withdraw from the entire treaty . . .").

55. 4 VATTEL, *supra* note 6, § 53.

56. 3 ELLIOT'S DEBATES, *supra* note 52, at 342; *see also* VATTEL, *supra* note 6, *Preliminaries*, § 3, n.1, para. 9 (Citing Vattel, Chitty notes: "If the *perfect general rights* or *law* of nations be violated, then it appears to be conceded, that such violation may be the actual and avowed ground of a *just* war; and it is even laid down that it is the duty of every nation to chastise the nation guilty of the aggression."); *see also* CHRISTIAN WOLFF, 2 *THE LAW OF NATIONS* 293 in M.S.E. (Joseph H. Drake trans., Oxford Univ. Press) (1764) ("If in a doubtful case one nation is not willing to accept a conference for an amicable adjustment or compromise, or to accept a submission to an arbiter, the one making the offer has the right of war against the one unwilling to accept, by which the former is driven to a settlement by force of arms.").

57. THOMAS HOBBS, *LEVIATHAN* ch. XV, para. 1 (Richard Tuck ed., Cambridge Univ. Press 1996) (1651) ("From that law of Nature . . . there followeth a Third [natural law]; which is this, That men performr their Covenants made: without which Covenants are in vain, and but Empty words; and the Right of all men to all things remaining, we are still in the condition of warre.").

infractions of it.”⁵⁸ Therefore, the partial breach of a multilateral treaty by only some of its parties did not necessarily allow the treaty to be dissolved.⁵⁹ Most importantly, those parties to a multilateral treaty that violated the treaty remained legally bound by the treaty regardless of their violations if the other parties wished to retain the treaty. Although the Framers may have been divided as to exactly what international law required of them in replacing the Articles, it is clear that the international law of treaties was the governing law and that the establishment of the Constitution could not violate the international law governing treaties.

In the case of the Articles of Confederation, the Articles appears to have been violated by some – not all – of the states by, *inter alia*, making Congressionally unauthorized treaties with each other and Indian tribes, violating treaties with other foreign states, and maintaining navies and armies.⁶⁰ Professor Amar claims without providing any supporting authority that “the Articles had been routinely and flagrantly violated on all sides.”⁶¹ However, it appears

58. 1 FARRAND, *supra* note 52, at 324-25.

59. Present international law has *explicitly* adopted this rule for all multilateral treaties because present international law does not allow the violation of any treaty to be a just cause for war. *See Vienna Convention*, art. 60(2) (listing acts that state-parties may undertake in case of material breach of multilateral treaty by other state-party). Although the rights to self-defense and the recommencement of hostilities for serious violations of a peace treaty have been maintained under international law, treaty violations must be resolved by pacific means under present international law. *See, e.g., United Nations Charter*, June 26, 1945, art. 2 (3), 59 Stat. 1031, T.S. 993, 3 Bevens 1153 (entered into force Oct. 24, 1945) (“All Members shall settle their international disputes by peaceful means . . .”) [hereinafter *UN Charter*]; *id.* at art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations . . .”); *General Treaty for the Renunciation of War (Kellogg-Briand Pact)*, Aug. 27, 1928, art. II, 46 Stat. 2343, 2346, 94 L.N.T.S. 57 (entered into force July 24, 1929) (“The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.”); *Hague Convention (IV) Respecting the Laws and Customs of War on Land*, Oct. 18, 1907, art. 40, T.S. 539, 1 Bevens 631 (entered into force Jan. 26, 1910) (“Any serious violation of the armistice by one of the parties gives the other party the right of denouncing it, and even, in cases of urgency, of recommencing hostilities immediately.”).

60. 1 ELLIOT’S DEBATES, *supra* note 52, at 424 (Madison: “Has not Georgia, in direct violation of the Confederation, made war with the Indians, and concluded treaties? Have not Virginia and Maryland entered into a partial compact? Have not Pennsylvania and Jersey regulated the bounds of the Delaware?”); Madison, *Vices*, *supra* note 34, paras. 2-3 (maintenance of troops by Massachusetts, violation of treaties with Great Britain, Holland, and France); CARL VAN DOREN, *THE GREAT REHEARSAL: THE STORY OF THE MAKING AND RATIFYING OF THE CONSTITUTION OF THE UNITED STATES* 44 (1948) (nine states organized navies).

61. Akhil Reed Amar, *Popular Sovereignty and Constitutional Amendment*, at 5,

that some states (such as Connecticut and New Hampshire) were not even accused of violating the Articles, much less accused of violating their duties to all parties to the Articles. Therefore, the Articles could have been retained by those states that did not violate the Articles if they wished so. Moreover, those states that did violate the Articles would have been still bound by the Articles regardless of their previous violations. And, those states that did violate the Articles often did not violate the Articles in respect to their treaty duties to all of the other states. For example, the Congressionally unauthorized Virginia-Maryland Compact (1785) regarding state boundaries did not violate duties under the Articles in relation to some of the other states, such as, *e.g.*, Georgia.

However, it was difficult to enumerate exactly which and how many of the thirteen states had faithfully observed the Articles because states customarily do not admit that they have violated their treaty obligations. It was clear that some states had violated the Articles. Virginia, Maryland, New Jersey, Pennsylvania, and Georgia had made treaties without Congressional authorization in violation of the Articles.⁶² Other alleged violations were less clear. For example, did Massachusetts violate the Articles by maintaining troops and a navy? Or, were such troops a militia and was the navy necessary for combating piracy – two exceptions allowed under the Articles?⁶³

The issue of how many state convention ratifications were legally necessary for replacing the Articles with the Constitution deeply concerned the Framers because the Articles of Confederation was a treaty whose obligations were to be observed. Madison recognized that treaty law governed both subjects of voiding the Articles and of the Constitution's ratification:

It is an established doctrine on the subject of treaties, that all the articles are mutually conditions of each other; that a breach of any one article is a breach of the whole treaty; and that a breach committed by either of the parties absolves the others; and authorizes them, if they please, to pronounce the treaty violated and void. Should it unhappily be necessary to appeal to these delicate truths for a justification for dispensing with the consent of particular States to a dissolution of the federal pact,

available at <http://216.239.39.100/search?q=cache:f8iFr1OlyuQJ:ni4d.us/library/amarpaper.pdf+amar+%22articles+of+confederation%22+Ackerman&hl=en&ie=UTF-8> (last visited June 3, 2003).

62. See ARTICLES OF CONFEDERATION art. VI (no state without congressional approval may enter into treaty with another state or foreign state).

63. *Id.*

will not the *complaining parties* find it a difficult task to answer the MULTIPLIED and IMPORTANT *infractions with which they may be confronted?*⁶⁴

A thirteen-state rule legally was unnecessary because some states had violated the Articles.⁶⁵ Madison's notes from the Constitutional Convention indicate that the Convention's delegates supporting a non-unanimity rule did so on two bases: (i) to ensure that a minority of states could not frustrate a majority of states wishing to establish a new constitution and (ii) to continue the Articles' nine-state rule for deciding important issues, including the ratification of treaties.⁶⁶ The Constitutional Convention eventually adopted the nine-state convention rule – a modification of the nine-state treaty rule under the Articles. Of course, the Convention did not state exactly which nine states conventions were needed to ratify the Constitution because this probably would have been a difficult question to resolve given that states probably would not admit or did not believe that they had violated the Articles. To require the Constitution to name which states conventions were required to ratify the Constitution would have embarrassed the other states conventions whose ratifications were not required and would have served to provoke the latter to not ratify.

In summary, a treaty still was required to replace the Articles, but practical and legal considerations allowed a non-unanimity rule to be implemented for the ratification of the new treaty – *viz.*, the Constitution. The nine-state rule appeared to have been sufficiently legal even to those states that initially opposed the Constitution (such as North Carolina and Rhode Island) because such states did not avail themselves of their opportunity to sue the other states for their ratifications of the Constitution in an Articles federal court before the

64. THE FEDERALIST NO. 43, at § 9 (James Madison) (1788) (emphases added).

65. Of course, Madison's justification on the basis of treaty law was not quite correct. See discussion *supra* Part 1.2.1.

66. See JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 496 (Aug. 30, 1787) (Butler "revolted at the idea, that one or two States should restrain the rest from consulting their safety."); *id.* at 498 (Aug. 31, 1787) (Col. Mason: "Nine States had been required in all great cases under the Confederation & that number was on that account preferable."); see also THE FEDERALIST NOS. 40, 191 (James Madison) (1788) ("the absurdity of subjecting the fate of 12 States to the perverseness or corruption of a thirteenth"); THE FEDERALIST NO. 43, at § 9 (James Madison) (1788) ("To have required the unanimous ratification of the thirteen States, would have subjected the essential interests of the whole to the caprice or corruption of a single member."); ARTICLES OF CONFEDERATION art. IX (nine states needed for ratification of treaties).

Constitutional government went into operation in March of 1789. What is important to recognize from all of this is that the replacement of the Articles of Confederation was governed by the international law governing treaties and that the Articles as a treaty only could be replaced by another treaty that could ensure the same reciprocal legal relations. A unanimity rule was not legally applicable because the Articles were not being altered. Instead, a new treaty (*viz.*, the Constitution) was being adopted and an earlier government replaced, and the nine-state rule was the applicable rule under the Articles for adopting a new treaty.

In the end, it is not so important to this Article's thesis that the Constitution is a treaty whether the Framers got it right about whether the Constitution's specific ratification process conformed to the international law governing treaties – although they did get it right. *What is dispositive to determining whether the Constitution is a treaty is the fact that the Framers presumed (correctly) that the international law of treaties governed the Articles' dissolution and the Constitution's establishment.*

Consequently, the Constitution was “ratified” as other treaties are “ratified.”⁶⁷ Also as a treaty, the Constitution came into force when a certain pre-determined number of state conventions had ratified the Constitution, thereby – as the language of the Constitution puts it – “[e]stablishing . . . this Constitution *between* the States.”⁶⁸ After all, treaties are agreements made “between” states and “governed by international law.”⁶⁹

It is a mistake to claim that the Constitution is not a treaty because its Preamble says that it was “ordain[ed] and establish[ed]” by the people.⁷⁰ It is important to note that the Constitution was

67. U.S. CONST. art. VII.

68. *Id.* (emphasis added).

69. The *Vienna Convention on the Law of Treaties* defines a treaty as “an international agreement concluded between States in written form and governed by international law.” *Vienna Convention*, art. 2(1)(a).

70. U.S. CONST. pmb. Strictly speaking, it is also incorrect to claim, as Thomas Jefferson stated, that the Constitution is “a compact of independent nations.” Letter from Thomas Jefferson to Edward Everett (Apr. 8, 1826), in *THE POLITICAL WRITINGS OF THOMAS JEFFERSON*, at 151 (Edward Dumbauld ed., 1955). The Constitution expressly says that it was a constitution between the states – not nations. Nations or peoples are not identical to states, and the Constitution's Preamble makes mention of only one people (*i.e.*, nation). U.S. CONST. art. VII. However, assuming that Jefferson meant “states” instead of “nations,” Jefferson was correct to claim that the Constitution was a treaty “subject to the rules acknowledged in similar cases.” *Id.* Like the Framers, Jefferson recognized that the law governing treaties also governed the Constitution.

ratified by individual state conventions – not by the American people as a whole. There was no single constitutional convention attended by all of the American people residing in the thirteen individual states.⁷¹ The ordination and establishment of the Constitution by the people could only take place after the Constitution's ratification by individual state conventions. Indeed, the American people as a whole could not ratify the Constitution according to its terms. The Constitution expressly required ratification by individual state conventions.⁷²

To claim that the Constitution is not a treaty because it was ordained and established by the people is to flagrantly ignore its ratification process – a process that established it as a treaty and a process that the Framers explicitly stated was governed by the law of treaties. However, the Preamble's "We the People" *legally* serves to preclude the possibility that the replacement of the Articles was illegal because the law of nations recognized that the original locus of sovereignty resided in the people.⁷³ An appeal to merely domestic social contract theory would have been legally insufficient because such theory did not apply to inter-state relations. Any remaining question as to the lawfulness of the Constitution's establishment was mooted.

71. This is not to say that treaties cannot be ratified by convention or plebiscite. Under international law, treaties can be ratified not only by states but also by the people in a plebiscite or through representatives in convention. For example, the Treaty of Maastricht (1992) was submitted to the Danish, Swiss, Irish, and Norwegian peoples for ratification by plebiscite because of their respective constitutional law requirements. See A CONCISE ENCYCLOPEDIA OF THE EUROPEAN UNION, "Ratification," *available at* <http://www.euro-know.org.dictionary/r.html> (last visited May 24, 2003).

72. U.S. CONST. art VII. Ratification by conventions instead of legislatures only grounds the legal instrument in firmer legal authority. A helpful analogy is when a person exercising power of attorney signs a contract with another party. Whether or not it is the party's representative or the party itself that signs the contract has no bearing on whether it is a contract. Whether or not the treaty is ratified by legislatures or conventions has no bearing on whether it is a treaty.

73. J.J. BURLAMAQUI, 2 THE PRINCIPLES OF NATURAL AND POLITIC LAW, pt. II, ch. VI, § VI (Thomas Nugent trans., 5th ed., Cambridge Univ. Press 1807) (1748) ("sovereignty resides originally in the people") [hereinafter BURLAMAQUI]; FRANCISCO DE VITORIA, ON THE LAW OF WAR (1557); see Ruben C. Alvarado, *Fountainhead of Liberalism*, 10 COMMON L. REV. (1994), *available at* http://www.wordbridge.net/ccsp/cm10_font.html (last visited 15 Feb. 2003) (sovereignty resides in peoples (*i.e.*, nations) – not states – under international law).

1.2.2. *Being a Treaty, the Constitution Is Governed by Customary International Legal Norms Through Their Incorporation in the Constitution.*

For the Framers, the Constitution could not violate customary international law. For example, Randolph, Madison, and others argued that the Constitution did not allow Congress to violate state navigational rights because this would violate the law of nations – even if there was no explicit prohibition in the Constitution. During the Virginia state constitutional convention, Governor Randolph stated:

The gentleman wishes us to show him a clause [in the Constitution] which shall preclude Congress from giving away this right [to navigation on the Mississippi River]. It is first incumbent upon him to show where the right is given up. There is a prohibition naturally resulting from . . . the law of . . . nations, to yield the most valuable right of a community, for the exclusive benefit of one particular part of it.⁷⁴

The Constitution as a treaty could not violate the law of nations.⁷⁵ Although few treaties explicitly require that they be governed by international law,⁷⁶ treaties often incorporate international legal norms. After all, if a treaty is a written agreement between states “governed by international law,” the best way to ensure that the agreement is governed by international law is to explicitly *write such international law into the agreement*.⁷⁷ It is no different with the Constitution. For example, the Supremacy Clause explicitly states

74. 3 ELLIOT’S DEBATES, *supra* note 52, at 362; *see also* Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1094-95 (1985) [hereinafter Lobel, *Limits*]; *cf.* *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 132-33 (1923) (Sutherland, J., dissenting) (“principles of international comity, which exists between friendly nations, in my opinion, forbids the construction of the Eighteenth Amendment . . . which the present decision advances”).

75. *See infra* Part 4; *cf.* 2 Vattel, *supra* note 6, § 165:

A sovereign already bound by a treaty cannot enter into others contrary to the first. The things respecting which he has entered into engagements are no longer at his disposal. If it happens that a posterior treaty be found, in any particular point, to clash with one of more ancient date, the new treaty is null and void with respect to that point, inasmuch as it tends to dispose of a thing that is no longer in the power of him who appears to dispose of it. (We are here to be understood as speaking of treaties made with different powers.)

76. *See, e.g.*, Rome Statute of the International Criminal Court, July 17, 1998, art. 21(1)(b), UN Doc. A/CONF.183/9 (entered into force July 1, 2002) (mandating application of other treaties and rules of international law).

77. *See Vienna Convention*, art. 2(1)(a).

that treaties (like the Constitution) are part of “the supreme Law of the Land.”⁷⁸ Furthermore, the Constitution incorporates many substantive international legal norms. For example, the Constitution has incorporated the international legal principle of state co-equality⁷⁹ guaranteeing full faith and credit between the states.⁸⁰ Also incorporating the law of nations, the Constitution did not allow the federal government to violate the territorial integrity of the states (without their consent).⁸¹ As under the Articles of Confederation (a treaty), the Constitution guarantees that states retained their international legal personality by being able to enter into agreements with each other and with foreign states, subject to Congressional approval.⁸² The Constitution also incorporates the international legal doctrine of state succession regarding continuity of treaty obligations by expressly recognizing that the United States is still bound by treaties that the United States entered into under the Articles of Confederation.⁸³ The Eleventh Amendment also effectively ensured the retention of state sovereign immunity (guaranteed by the law of nations) from federal suits prosecuted by citizens of another state, or citizens or subjects of foreign states.⁸⁴

78. U.S. CONST. art. VI, cl. 2.

79. See, e.g., VATTEL, *supra* note 6, *Preliminaries*, at § 18 (“[s]mall republic is no less a sovereign state than the most powerful kingdom.”); *UN Charter*, art. 2(1) (sovereign equality of states).

80. U.S. CONST. art. IV, § 1 (full faith and credit clause). Consequently, Congress has included in each state’s act of admission a clause providing that the state enters the Union “on an equal footing with the original States in all respects whatever.” 1 Stat. 491 (1796). Prior to 1796, the acts of admission for Vermont and Kentucky contained different but similar terminology. 1 Stat. 191 (1791); 1 Stat. 189 (1791).

81. U.S. CONST. art. IV, § 3; 2 VATTEL, *supra* note 6, § 93 (prohibition of usurpation of territory); *UN Charter*, art. 2, para. 4 (prohibiting states from threatening or using force against state’s territorial integrity or political independence).

82. U.S. CONST. art. I, § 9, cl. 3. However, other federal nation-states, such as Germany and Switzerland, allow their constitutive states to enter into treaties among themselves without approval from their respective central governments.

83. U.S. CONST. art. VI, § 2 (“[A]ll Treaties *made* . . . shall be the supreme Law of the Land.”) (emphasis added); 2 VATTEL, *supra* note 6, § 191; SAMUEL PUFENDORF, *OF THE LAW OF NATURE AND NATIONS*, bk. VIII, ch. ix, § 8 (James Brown Scott ed., 1933) (1672) (recognizing successor state responsibility for complying with treaties entered into by earlier state) [hereinafter PUFENDORF].

84. U.S. CONST. amend. XI. The Eleventh Amendment was ratified in response to the United States Supreme Court’s decision in *Chisholm v. Georgia*. 2 U.S. (2 Dall.) 419 (1793). After the adoption of the Eleventh Amendment, *Chisholm* was dismissed. *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798). Although the Eleventh Amendment did not ensure absolute state sovereign immunity from federal suits, states (United States or foreign) often surrender aspects of their sovereignty (including immunity from suits). This surrender does not alter their status as states. As Justice Jay

Furthermore, the substantive text of the Constitution addresses a plethora of international legal matters appropriate for a treaty. In terms of legal hierarchy and jurisdiction, the Constitution expressly establishes that treaties are part of the supreme law of the land, that the President can make treaties (with Senate consent), that the Supreme Court has jurisdiction over cases involving treaties, and that Congress can define and punish violations of the law of nations.⁸⁵ In terms of substantive content, the Constitution addresses customary international legal matters such as war, piracy, ambassadors, naturalization, and trade.⁸⁶

Perhaps most revealing about the Constitution's incorporation of international law is that the Constitution explicitly states that it was established by "the people,"⁸⁷ which was the original locus of sovereignty according to international law. The Constitution's Preamble placed the Constitution's foundation on the international legal principle of popular sovereignty forward and center.⁸⁸ Indeed, the Constitution's ratification process through individual state conventions may have reflected a more legally authentic ratification process than that of most other treaties. The ratification process of most other treaties often involved the participation of fewer representatives of the people. For example, ratification of most treaties only required the consent of the crown.

When the Constitution's preamble states "[w]e the People of the United States, in Order to form a more perfect Union," these clauses denoted that the "people" singular (as sovereign in relations both

stated in *Chisholm* even before the adoption of the Eleventh Amendment, "suability and state sovereignty are not incompatible." 2 U.S. (2 Dall.) at 473 (Jay, J.). Indeed, the very recognition of statehood is premised on a state's recognition of international legal norms that inherently limit state sovereignty.

85. U.S. CONST. art. I, § 8, cl. 10 (law of nations); art. II, § 2, cl. 2 (treaties); art. III § 2 (treaty jurisdiction); art. VI, § 2 (treaties as supreme law of land).

86. U.S. CONST. art. I, § 8, cl. 3 (state and foreign trade); art. I, § 4 (naturalization); art. I, § 10 (piracy); art. I, § 11 (war); art. II, § 2, cl. 2 (ambassadors).

87. U.S. CONST. pmb. l.

88. Although James Wilson (both the Preamble's drafter and an international legal specialist) stated that the Constitution's government was not "founded upon compact; it is founded upon the power of the people," one must be careful to note that he is talking about the Constitution's *foundation* – not the kind of legal instrument that the Constitution is. 2 ELLIOT'S DEBATES, *supra* note 52, at 497. This is made clear by the rest of Wilson's remarks: "[the Constitution's government] is founded upon the power of the people. They express in their name and their authority—'We, the people, do ordain and establish,' &c.; from their ratification alone it is to take its constitutional authenticity; without that, it is no more than tabula rasa." *Id.*

external and internal to the Union) were confirming⁸⁹ the lawful establishment of a new government for the “nation-states” plural – not a “nation-state” singular.⁹⁰ In this way the American people could make a social compact that disabled the states from withdrawing from the Constitution if one of them should violate it. Only the people as a whole could dissolve the constitutional compact – not the individual states (nor their respective citizens). The states *per se* retained a residual sovereignty derivative of their respective citizens, but their external sovereignty was limited because that external sovereignty resided more fully in the consolidated people of the United States exercised through the federal government.⁹¹ However, as under the Articles of Confederation (a treaty), the fact that states *qua* states were retained indicates that the Constitution is a treaty, too. After all, if the Constitution was not a treaty between states and binding on the states, why retain the states as states? At least one Framers considered the possibility of not retaining the states as states. James Patterson had considered proposing the elimination of the states at the Constitutional Convention, but he eventually rejected this idea

89. The people of the United States only “confirmed” the legitimacy of the new government established by the Constitution. The “People” (*i.e.*, nation) and the “United States” existed prior to the Constitution’s ratification. The Declaration of Independence earlier had declared a new nation and new states in 1776. DECLARATION OF INDEPENDENCE, para. 5 (“We, therefore, the Representatives of the *United States* of America, in General Congress, Assembled, . . . do, in the Name, and by Authority of the good *People* of these Colonies. . . .”(emphasis added)); ARTICLES OF CONFEDERATION art. IV (“The better to secure and perpetuate mutual friendship and intercourse among the *people of the different States in this Union*, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States”(emphasis added)).

90. The Constitution refers to the United States only in the plural except when it is a party to a case. *See, e.g.*, U.S. CONST. art. III, § 2, cl. 1 (“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 Controversies to which the United States shall be *a Party*.” (emphasis added)); U.S. CONST. art. III, § 3, cl. 1 (“Treason against the United States, shall consist only in levying War against *them*, or in adhering to *their* Enemies.”) (emphasis added); U.S. CONST. amend. XIII (“Neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to *their* jurisdiction.” (emphasis added)). Early constitutional jurists also referred to the United States as plural. *See, e.g.*, JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1160 (1833) [hereinafter STORY] (“United States *are* responsible to foreign governments for all violations of the law of nations.”) (emphasis added).

91. *See Skiriotes v. Florida*, 313 U.S. 69, 77, 78-79 (1941) (“Save for the powers committed by the Constitution to the Union, the State of Florida has retained the status of a sovereign . . . When its action does not conflict with federal legislation, the sovereign authority of the State over the conduct of its citizens upon the high seas is analogous to the sovereign authority of the United States over its citizens in like circumstances.”).

because such action would have diminished the sovereignty of the states, which he—as author of the New Jersey Plan—wanted to avoid.⁹² Also during the Constitutional Convention, Rufus King analogized the Constitution’s retention of states to the Treaty of Union between the English and Scottish states.⁹³

1.3 States’ Rights & Nationalism: Early 19th Century Misunderstandings About International Law and the Constitution’s Status as a Federal Treaty.

However, the idea that the Constitution was a treaty was debated later during the early years of the Republic in the contexts of state nullification of federal laws, state and national sovereignty, compact theory, and, ultimately, slavery. During these debates, the nationalists (such as John Marshall, Daniel Webster and Joseph Story) argued that the Constitution was not such a treaty because such a treaty allowed its individual states-parties unilaterally to construe the treaty that could lead to another state-party claiming a treaty violation and the latter’s lawful withdrawal from the treaty.⁹⁴ This was untrue. The Articles of Confederation, the United States-Britain (Jay) Treaty (1794), and the Treaty of Ghent (1814) had provisions respectively providing for the establishment of international courts and/or boards

92. Notes of William Paterson in the Federal Convention of 1787, in “Notes Apparently Used by Patterson in Preparing the New Jersey Plan, June 13-15,” available at <http://www.yale.edu/lawweb/avalon/cpnst/patterson.htm> (last visited Aug. 27, 2003). In his preliminary notes on the New Jersey Plan, Patterson considered proposing the dissolution of the states and transforming them into only districts:

Whereas it is necessary in Order to form the People of the U. S. of America into a Nation, that the States should be consolidated, by which Means all the Citizens thereof will become equally intitled to and will equally participate in the same Privileges and Rights, . . . that all the Lands contained within the Limits of each State individually, and of the U. S. generally be considered as constituting one Body or Mass, and be divided into thirteen or more integral Parts. . . . Resolved, That such Divisions or integral Parts shall be styled Districts.

93. See 1 FARRAND, *supra* note 52, at 492-93 (“Mr. King was for preserving the States in a subordinate degree. . . . He did not think a full answer had been given to those who apprehended a dangerous encroachment on their jurisdictions. . . . The articles of Union between Engld. & Scotland furnish an example of such a provision in favor of sundry rights of Scotland.”).

94. See Marshall, *Friend of the Constitution VII*, *supra* note 45 (“[O]ur constitution is not a league. It is a government; and has all the constituent parts of a government.”); Daniel Webster, *Speech to Congress*, in THE SPEECHES AND ORATIONS OF DANIEL WEBSTER, WITH AN ESSAY ON DANIEL WEBSTER AS A MASTER OF ENGLISH STYLE (Edwin Whipple ed., 1879) (states are “own judges” in construing treaty because of absence of “superior” authority) [hereinafter Webster, *Speech*]; STORY, *supra* note 90, § 321 *passim* (each state allowed to construe treaty because of absence of “common arbiter”).

of commissioners to resolve treaty disputes between states-parties.⁹⁵ The Constitution also created an international court: the United States Supreme Court.⁹⁶ Indeed, courts established under both the Articles of Confederation and the Constitution were called “federal courts.”⁹⁷ Furthermore, Story contradicted himself. On the one hand, he (incorrectly) argued that states could unilaterally withdraw from treaties, but on the other hand, he (correctly) recognized that the states could not unilaterally withdraw from the Articles of Confederation, which was a treaty.⁹⁸

Marshall argued that confederations (unlike a constitutional government) generally could not independently execute its own resolutions.⁹⁹ This also was not necessarily true. The Continental Army executed the resolutions of the Articles Congress. Marshall also argued that unlike the Constitution that is formed by the whole people acting in convention, a “league is formed by the sovereigns [*i.e.*, state legislatures] who become members of it.”¹⁰⁰ Again, this was not necessarily true. The Constitution was not formed by the whole of the American people acting in single constitutional convention. It was formed by thirteen separate state conventions.

Finally, Marshall argued that unlike Congressional

95. ARTICLES OF CONFEDERATION art. IX (providing for court and boards of commissioners); Jay Treaty, art. 6 (1794), *available at* <http://www.yale.edu/lawweb/avalon/diplomacy/britian/jay.htm> (last visited Oct. 5, 2003) (providing for board of commissioners); Treaty of Ghent, art. 4 (1814), *available at* <http://www.yale.edu/lawweb/avalon/diplomacy/britian/ghent.htm> (last visited Oct. 5, 2003) (providing for board of commissioners).

96. *See Kansas v. Colorado*, 185 U.S. 125, 146-47 (1902) (stating that the Supreme Court was sitting as international tribunal in dispute between Kansas and Colorado). The Supreme Court also described itself as an international court when sitting as a prize court because prize cases were determined by the law of nations. *Penhallow v. Doane*, 3 U.S. (3 Dall.) 54, 91 (1795) (“A prize court is, in effect, a court of all the nations in the world, because all persons, in every part of the world, are concluded by its sentences.”).

97. THE FEDERALIST NO. 7, at § 3 (Alexander Hamilton) (1787) (referring to federal court established under the Articles for settling dispute between Connecticut and Pennsylvania); *see Connecticut v. Pennsylvania*, 23 JOURNALS OF THE CONTINENTAL CONGRESS 6-32 (1912) (1783 dispute over Wyoming Valley adjudicated by federal court established under the Articles).

98. *Compare* STORY, *supra* note 90, § 321 (Arguing that each state is allowed to construe treaty because of absence of “common arbiter”) *with* § 353 (“it was deemed a political heresy to maintain, that under [the Articles of Confederation] any state had a right to withdraw from it at pleasure, and repeal its operation; and that a party to the compact had a right to revoke that compact.” [*citing* THE FEDERALIST NOS. 22, 43]).

99. Marshall, *Friend of the Constitution VII*, *supra* note 45, at 199 (“A government, on the contrary, carries its resolutions into execution by its own means.”).

100. *Id.* at 202.

representatives that are not constitutionally bound to act in conformity with instructions from their state legislatures, “the representatives of sovereigns in league with each other, act in subordination to those sovereigns, and under their particular instructions.”¹⁰¹ Again, this was not quite true. Delegates to intergovernmental organizations created by treaty are not necessarily prohibited from acting independently of their states.¹⁰² Indeed, there was nothing in the Articles of Confederation that prevented the delegates from voting in disregard of their instructions (if any) from their states absent the possibility of recall after they had disregarded their instructions.¹⁰³ Inversely, there was nothing in Constitution that prevented state legislatures from ordering their Senators to vote in conformity with their instructions.¹⁰⁴ Indeed, at least one Senator was censured by his state legislature for failing to obey its instructions.¹⁰⁵

Finally, it is striking that both Marshall and Story who sat on the Supreme Court never rejected the idea that the Constitution was a treaty in their Supreme Court and Circuit Court decisions – either when writing for the Supreme Court or a Circuit Court, or in a concurring or dissenting opinion. They certainly had the opportunity to do so in several cases challenging the unconstitutionality of federal law and state laws.¹⁰⁶ Indeed, no United States Supreme Court

101. *Id.*

102. *See, e.g.*, Treaty Establishing the European Union, art. 213, para. 2, 31 I.L.M. 247 (1992) (“The Members of the Commission shall, in the general interest of the Community, be completely independent in the performance of their duties. In the performance of these duties, they shall neither seek nor take instructions from any government or from any other body. They shall refrain from any action incompatible with their duties. Each Member State undertakes to respect this principle and not to seek to influence the Members of the Commission in the performance of their tasks.”); Constitution of the International Labour Organisation, June 28, 1919, art. 7 (entered into force January 10, 1920) (“Delegates to the Conference, members of the Governing Body and the Director-General and officials of the Office shall likewise enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.”). Indeed, commissioners to the European Union are required to vote independently from their members states.

103. ARTICLES OF CONFEDERATION art. V, para. 1.

104. U.S. CONST. art. I, § 3, cl.1 (“The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof . . . ; and each Senator shall have one vote.”). This clause was amended by the Seventeenth Amendment. U.S. CONST. amend. XVII, § 1 (“The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof . . . ; and each Senator shall have one vote.”).

105. *See* E. McPherson, *The Southern States and the Reporting of Senate Debates, 1789-1802*, 12 J. SOUTHERN HIST. 223, 228-35 (1946).

106. *See, e.g.*, *Gibbons v. Ogden*, 22 U.S. (Wheat.) 1 (1824) (per Marshall) (suit

decision has held that the Constitution is not a treaty.

However, the states' rights advocates (such as Thomas Jefferson, John Calhoun, and Spencer Roane) also got it wrong. Although the Constitution was a treaty¹⁰⁷ (as they correctly argued), it was a federal compact made by the whole of the American people and which could not be dissolved by the individual states or citizens therein (as they disputed).¹⁰⁸ Although the Constitution was a treaty, individual states could not nullify federal law and could not secede from the Constitution¹⁰⁹ because the Constitution provided for a Supreme Court to resolve conflicts between the federal government and the states. The law of nations (to which the states were bound) required states-parties to a treaty to seek a peaceful resolution to a claimed treaty violation through arbitration, and the Constitution provided such the means through the establishment of the Supreme Court.¹¹⁰ If

challenging New York statute); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (per Marshall) (suit challenging federal law).

107. Subsequent to the Declaration of Independence, some states did declare their own independence and negotiated their own treaties with other foreign states, hence disclosing the fact that many states did consider themselves sovereign also in their external relations with foreign states. Van Tyne, *Sovereignty in the American Revolution: An Historical Study*, 12 AM. HIST. REV. 529 (1907).

108. See, e.g., STORY, *supra* note 90, § 311.

109. See, e.g., John C. Calhoun, *The South Carolina Exposition and Protest* (1828), 10 THE PAPERS OF JOHN C. CALHOUN 442 (1977) (stating that people in state convention could nullify federal law's effect within state, and federal government's persistent attempt to enforce law justified state secession); Congressional Resolution introduced by Pennsylvania (Jan. 11, 1811) (drafted by Roane) (declaring Constitution "to all intents and purposes" was "a treaty among sovereign states" and its "general government, by this treaty, was not constituted the exclusive or final judge of the powers it was to exercise; for if it were so to judge, then its judgment, and not the constitution, would be the measure of its authority."), in JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND 150 (ed. Gerald Gunther 1969); Kentucky Legislature Resolutions of Interposition (1798) (drafted by Jefferson) ("That the Government created by this compact was not made the exclusive or final judge of the extent the measure of its powers; but that as in all other cases of compact among parties having no common judge, each party had an equal right to judge for itself, as well of infractions as of the mode and measure of redress.").

110. 2 Vattel, *supra* note 6, § 338 ("If the subject of the dispute be an injury received, the offended party ought to follow the rules we have just established. His own advantage, and that of human society, require, that, previous to taking up arms, he should try every pacific mode of obtaining either a reparation of the injury, or a just satisfaction, unless there be substantial reasons to dispense with his recurrence to such measures."); *id.*, § 329.4, para. 1 ("When once the contending parties have entered into articles of arbitration, they are bound to abide by the sentence of the arbitrators: they have engaged to do this; and the faith of treaties should be religiously observed."); *id.*, § 329.4, para. 4 ("The Swiss have had the precaution, in all their alliances among themselves, and even in those they have contracted with the neighbouring powers, to agree beforehand on the manner in which their disputes were to be submitted to arbitrators, in case they could not adjust them in an amicable manner. This wise precaution has not a little contributed to maintain the

the states allegedly violated their constitutional obligations to each other or the federal government violated the Constitution, the Constitution provided redress by having the issue settled by an international tribunal – the United States Supreme Court.¹¹¹ Although Roane conceded that the Supreme Court had constitutional power to decide cases between states, he still argued that the Constitution did not give the Supreme Court “jurisdiction over its own controversies, with a state or states.”¹¹² To have done so would have made the Supreme Court the final judge in its own case because the Supreme Court was part of the federal government. Of course, this argument fails to recognize that the independence of the federal judiciary is established by the Constitution’s separation of powers arrangement and its judicial life appointments, and that the appointment of Supreme Court justices was confirmed by Senators appointed by the states.

States did not have the right to secede just because another state allegedly had violated its constitutional obligations to the other states or that the federal government had violated the Constitution. Indeed, to a certain extent this issue already had been settled some seventy years earlier when the Constitutional Convention adopted the nine-state convention ratification rule for establishing the Constitution. State breach of the Articles of Convention did not dissolve the Articles altogether because not all states had violated the Articles.¹¹³

Helvetic republic in that flourishing state which secures her liberty, and renders her respectable throughout Europe.”).

111. See U.S. CONST. art. III, § 2, cl. 1 (“The judicial Power shall extend to all Cases in Law and Equity, arising under this Constitution, the Laws of the United States . . . to Controversies between two or more States.”). International tribunals (such as the U.S. Supreme Court) often have jurisdiction to decide whether the action by an intergovernmental organization is lawful under its constitutive treaty. For example, the International Court of Justice opined that Inter-Governmental Maritime Consultative Organization’s constitution did not authorize establishment of Maritime Safety Committee. *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Committee*, Advisory Opinion, 1960 I.C.J. 150 (June 8, 1960); see also *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, 1996 I.C.J. 1 (July 8, 1996) (World Health Organization (WHO) did not have authority to ask the ICJ for advisory opinion under WHO’s constitution). Indeed, international tribunals often also have the authority to nullify laws enacted by intergovernmental legislatures. See, e.g., *Federal Republic of Germany v. European Parliament & Council of the European Union*, C-376/98, Eur. Ct. J. (2000) (annulling EU directive banning tobacco advertising as violation of European Community Treaty).

112. JOHN MARSHALL’S DEFENSE OF MCCULLOCH V. MARYLAND 153 (Gerald Gunther ed., 1969).

113. Even the Articles of Confederation provided for “supreme courts” to decide such controversies through the vehicles of Congressionally appointed courts and boards of

Much later, when the southern states did secede and establish their own constitution that also provided for the establishment of a Confederate Supreme Court, the Confederate Congress refused to enact implementing legislation to establish their Supreme Court because the Congress recognized that the Confederate Supreme Court could have nullified decisions from state supreme courts and, thereby, undercut states' rights.¹¹⁴ Consequently, when North Carolina became unhappy with the Confederacy's conduct of the war, some North Carolinians in 1863 considered calling for a state convention in order to secede from the Confederacy. One of the reasons why the Confederacy was dysfunctional probably was its failure to implement its Supreme Court to settle conflicts.

These constitutional principles partially reflected the United States Constitution's character as a *foedus*. A *foedus* was a suzerainty-type of treaty imposed on nations by the Roman Empire. Such nations could not withdraw from their *foedus* with Rome. A suzerain was a nation that controlled the international affairs of other nations but allowed them to exercise sovereignty over their domestic matters.¹¹⁵ Accordingly, these nations could not violate or suspend norms established by the law of nations ("*jus gentium*") of which the *foedus* was part. Similar to a *foedus*, the Constitution was a treaty whose provisions could not be violated or suspended, or from which no state could withdraw – much like many modern multilateral and constituent treaties that do not allow their provisions to be violated or suspended, do not provide for the withdrawal of its parties, and provide for international tribunals.¹¹⁶ The Constitution established a federal form of government. Indeed, the word "federal" comes from the word "*foedus*." The very idea of a federal constitution is one

commissioners. ARTICLES OF CONFEDERATION art. IX (providing for courts and boards of commissioners).

114. CONSTITUTION OF THE CONFEDERATE STATES OF AMERICA art. III, para. 1 (1861) (providing for establishment of Confederate Supreme Court).

115. See 2 Vattel, *supra* note 6, § 152 ("A treaty, in Latin *foedus*, is a compact made with a view to the public welfare, by the superior power, either for perpetuity, or for a considerable time.").

116. See, e.g., *UN Charter*, arts. 94 and 103 (Art. 94 states that UN members are required to comply with International Court of Justice decisions. Art. 103 states: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."); *Vienna Convention*, art. 60(5) (termination or suspension of humanitarian treaty not justified by breach); UN Human Rights Committee, General Comment No. 26(61), U.N. Doc. CCPR/C/21/Rev.1/Add.8 (1997) (state-party cannot denounce or withdraw from *ICCPR*).

rooted in international law.¹¹⁷ The Constitution as a “federal compact” was a “treaty constitution.”¹¹⁸

Given the Constitution’s success, it is no surprise that states in other regions subsequently have modeled both their intra- and inter-governmental bodies on the United States Constitution’s federal system.¹¹⁹ It also is no surprise that both global and regional, multilateral human rights treaties have been modeled on the Constitution and its Bill of Rights.¹²⁰ Indeed, the Constitution as a federal treaty may be the most successful international instrument in history if the number of nation-states that have adopted its political and legal structure is any measure.¹²¹

Why then did the nationalists insist on saying that the Constitution was not a treaty? Although even Story referred to the

117. See SAMUEL H. BEER, *TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM* 315 (1993) (arguing that when Madison used “foederal” in context of compact federalism, he meant contemporary conventional sense of *foedus*, or treaty).

118. One writer has argued – albeit somewhat summarily – that because amendments to the Constitution do not require unanimous consent from the states, the Constitution is no longer a treaty. Torkel Opsahl, *An “International Constitutional Law”?* 10 INT’L. & COMP. L.Q. 760, 771 (1961) (“If the original concept [of the Constitution] had been adhered to, it goes without saying the amendments could only have taken place by the conclusion of an additional treaty.”). However, constituent treaties often “force” their states-parties to accept new obligations and new states-parties, and to comply with other actions undertaken pursuant to the treaty. See, e.g., *UN Charter*, art. 18 (2) (admission of new states to UN only on basis of two-thirds of General Assembly members); *id.* at art. 2 (5) (UN members required to give UN “every assistance in any action it takes in accordance with the [UN] Charter”); *id.* at art. 108 (amendments binding on all UN members when adopted by two-thirds of General Assembly and Security Council). If a state agrees to a treaty provision whose future implementation conflicts with the state’s wishes, that does not mean that the state’s sovereignty or consent has been nullified. Indeed, state consent to a treaty generally reflects a self-imposed limitation of its own sovereignty because the treaty inherently limits actions by the sovereign state. This state self-imposed limit on sovereignty extends not only to “internal” matters but also “external” matters. Hence, the Constitution as a treaty can limit the individual state’s sovereignty both as to internal matters (e.g., human rights, state admission) and external matters (e.g., making treaties).

119. The European Union is the most successful and well-known intergovernmental example. See *Treaty on European Union*, Feb. 7, 1992, 1992 O.J. (C 191) 1, 31 I.L.M. 253. Intra-governmental examples include Canada, Switzerland, and Australia.

120. Compare the substantive rights provisions of, e.g., the *ICCPR*, *ECHR*, and *ACHR* with the Constitution’s rights provisions and Bill of Rights. See also LOUIS HENKIN, *THE AGE OF RIGHTS* (1990) (modern manifestation of human rights drawn from Constitution and Bill of Rights).

121. See Siegfried Wiessner, *The Movement Toward Federalism in Italy: A Policy-Oriented Perspective*, 15 ST. THOMAS L. REV. 301, 302 (2003) (“it is estimated that over forty percent of the Earth’s territory and fifty-two percent of the world’s population are governed by more or less federally organized systems of government”).

Constitution as a “federal compact,”¹²² there appears to be no literature explicitly describing the Constitution as a “federal treaty.”¹²³ The reason probably can be found in American legacy of slavery. As what often happens in heated, politically charged debates, the participants on both sides used overreaching arguments. The states’ rights advocates used the idea of the Constitution as treaty to buttress states’ rights and to secure the institution of slavery. However, in doing so, the states’ rights proponents overreached. However, the nationalists also overreached as well as contradicted themselves. For the nationalists, the Constitution perhaps had come to represent rhetorically all of what the Articles of Confederation was not – including its status as a treaty.

Of course, the question of whether states could withdraw from the Union was eventually and effectively decided by the Civil War, the legal question being later decided by the Supreme Court.¹²⁴ Because the nationalists’ conclusions finally won the day, they were able to rhetorically break the Constitution from its legal moorings as a treaty and set it adrift on the high seas of international legal unaccountability. The Constitution has become law accountable only to itself, its expositors increasingly have become buccaneers.¹²⁵ However, this was only a rhetorical victory – one won by employing overreaching, contradictory, and false premises. The rejection of the idea that the Constitution was a treaty became another casualty of the Civil War, but, as discussed below (Parts 2-5), the resurrection of this idea is not only necessary to ensure that the United States’ international legal obligations do not conflict with the Constitution but also that constitutional construction itself is coherent.

122. STORY, *supra* note 90, at § 311.

123. If the Articles of Confederation was a federal compact or treaty, as the Framers held, why wouldn’t the Constitution as a federal compact also be a treaty? See, e.g., JAMES MADISON, DEBATES IN THE CONVENTION OF 1787 105-06 (Galliard Hunt & James Brown Scott eds., 1920) (June 16, 1787) (Patterson describing Articles of Confederation as federal compact); (June 30, 1787) (Madison describing Articles of Confederation as federal compact); *id.* at 309-10 (July 23, 1787) (Govr. Morris describing Articles of Confederation as federal compact). Isn’t a federal compact a treaty in that the use of the word “federal” limits the meaning of “compact” to refer only to treaty compacts and not other kinds of compacts, such as contracts.

124. Texas v. White, 74 U.S. (7 Wall.) 700, 726 (1869) (Texas could not unilaterally secede from the Union).

125. See *infra* text accompanying notes 136-50 (discussing federal courts’ adoption of last-in-time rule and diminished legal authority of customary international law).

2. The Constitution's Hierarchical Structure of Legal Authority Based on International Law

The hierarchical structure of legal authority in the Constitution reflects an international legal perspective consistent with the Constitution's status as a treaty. Again, if a treaty is a written agreement between states governed by international law, the best way to ensure that the agreement is *governed by international law* is to explicitly write such international law into the agreement.¹²⁶ The Constitution gives international law a unique kind of legal authority. Of all the specific sources of law mentioned in the Constitution, only three cannot be unilaterally made by either the federal government or individual states of the Union: the law of nations, treaties, and the Constitution (which is also a treaty for the aforementioned reasons).

Other sources of law mentioned in the Constitution can be unilaterally made and un-made by either the federal government or the individual states of the Union. Federal statutes unilaterally can be made by the federal government as well as invalidated if they violate the Constitution or are repealed by subsequent federal law.¹²⁷ States can unilaterally make and un-make state law, and the federal government unilaterally can invalidate such law by passing conflicting federal law.¹²⁸ An individual state unilaterally can make common law and unilaterally unmake it by enacting conflicting statutes.

The other specific sources mentioned in the Constitution cannot unilaterally be made. Those sources of law are the law of nations, treaties, and the Constitution. The Constitution states that Congress may only "define" offenses against the law of nations, and the records from the Constitutional Convention make it clear that the word "define" meant "clarify" – not "create."¹²⁹ It only makes sense that

126. See *Vienna Convention*, art. 2(1)(a).

127. *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137 (1803) ("an act of the legislature, repugnant to the constitution, is void").

128. U.S. CONST. art. VI (Supremacy Clause).

129. 2 FARRAND, *supra* note 52, at 61 ("To pretend to define the law of nations which depended on the authority of all the Civilized Nations of the World, would have a look of arrogance. that would make us ridiculous. Mr. Govr: The word define is proper when applied to offences in this case; the law of nations being often too vague and deficient to be a rule.").

The authority to define and punish "Offences against the Law of Nations" includes both criminal and non-criminal violations of the law of nations. See STORY, *supra* note 90, at § 1160 ("As the United States are responsible to foreign governments for all violations of the law of nations, . . . congress ought to possess the power to define and punish all such offences, which may interrupt our intercourse and harmony with, and our duties to them."); WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND, *Of*

the United States (or any other foreign state) cannot unilaterally make the law of nations because, by definition, such law is made by “nations” plural. All the United States can do, is to “contribute” to the formation of the law of nations by making or refusing to sign treaties, or acquiescing or objecting to an emerging customary international law norm.¹³⁰

However, in the case of treaties *per se*, the Constitutional text is less clear at first glance. It is textually clear that the President with the two-thirds of the Senate can make treaties. It is less textually clear that the federal government can un-make treaties because treaties can only be made with the consent of other nations. The structure of the treaty process indicates that the federal government can un-make treaties under certain circumstances according to the *lex specialis* governing the treaty process. This *lex specialis*, namely, the conventional and customary international law of treaties, recognizes that the federal government can withdraw its consent or dissolve the treaty on a number of grounds, including treaty violation by its treaty partner, a fundamental change of circumstances, and – most importantly – if the treaty manifestly violates constitutional law.¹³¹ The federal government also can un-make treaties if the treaty itself allows it. But, the federal government cannot lawfully unilaterally “violate” its treaty obligations. Furthermore, the Constitution’s Supremacy Clause made it clear that the individual states of the Union could not violate the United States’ treaty law obligations.

Contrast the Supremacy Clause’s language dealing with federal

Offences Against the Law of Nations, ch. 5 (1760) (ed. St. George Tucker 1803) (listing both criminal and non-criminal offenses against the law of nations).

130. A method of explicitly accepting an emerging customary international law norm is to enter into a treaty that recognizes the norm. The customary method of effectively objecting to an emerging customary international law norm is to not enter into a treaty recognizing the norm or make a reservation concerning the treaty norm and attach it to the ratified treaty when deposited.

131. 2 Vattel, *supra* note 6, §§ 202 (breach) and 296 (change of circumstances); *Vienna Convention*, arts. 46 (fundamental law), 60 (breach), and 62 (fundamental change of circumstances); *Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations*, Mar. 21, 1986, arts. 46, 60, and 62, U.N. Doc. A/CONF.129/15, 25 I.L.M. 543 (fundamental law, breach, change of circumstances) [hereinafter *Vienna Convention-SIO*].

The United States State Department has recognized the *Vienna Convention*’s substantive provisions “as the authoritative guide to current treaty law and practice.” S. Exec. Doc. L. 92d Cong., 1st Sess. (1971) p.1; *see, e.g.*, *Weinberger v. Rossi*, 456 U.S. 25, 29 (1982) (using *Vienna Convention*); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (S.W. Africa) Notwithstanding Security Council Resolution No. 276 (1970)*, 1971 I.C.J.16 at 47 (*Vienna Convention* reflects customary international law).

laws with that of treaties. In regard to federal law, the Supremacy Clause says that “the Laws of the United States which shall be made in Pursuance [of the Constitution] . . . shall be the supreme Law of the Land.” In regard to treaties, the Supremacy Clause says that “all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land.” Federal laws are only made in *pursuance* of the Constitution. On the other hand, treaties are made under the *authority of the United States*. The language of the Supremacy Clause indicates that treaties have greater authority than federal laws by virtue of treaties being made under the authority of the United States, whereas the authority of federal laws is only derivative from the Constitution. The Constitution only says how treaties are to be made under the authority of the United States (*viz.*, by the President with the advice and consent of two-thirds of Senators present). The authority to make treaties (both the Constitution and other kinds of treaties) is inherent in the attribute of sovereignty, which resides in the people.¹³² Treaties and the Constitution are ordained by the American people. Federal laws only implement the Constitution and, sometimes, treaties.¹³³ Therefore, implementing legislation in pursuance of the Constitution has only a derivative authority unlike that authority of the Constitution and other treaties. Also, if the Constitution was to be dissolved, treaties (but not federal statutes) would continue to bind the United States in the same way that treaties made by the Articles Congress continue to bind the United States according to the Supremacy Clause and international law.¹³⁴ The continuing legally binding authority of United States treaties upon the United States does not rely upon the continuing existence of the federal government. However, the Constitution has authoritative primacy over other treaties because it was ordained and established by the people of the United States, whereas other treaties are made through the manner prescribed by

132. Another inherent attribute of sovereignty includes the power to control immigration. *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952).

133. *Cf. Missouri v. Holland*, 252 U.S. 416, 433 (1920) (“Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention.”).

134. *See* U.S. CONST. art. VI, § 2 (“all Treaties *made* . . . under the Authority of the United States, shall be the supreme Law of the Land”(emphasis added)); 2 VATTEL, *supra* note 6, § 191; PUFENDORF, *supra* note 83, bk. VIII, ch. ix, § 8 (recognizing successor state responsibility for complying with treaties entered into by earlier state).

the Constitution and only derivatively through the people of the United States.¹³⁵

Although federal courts subsequently have held that federal statutes can trump customary international law and earlier treaties, these precedents are fraught with a litany of insurmountable problems. In cases where federal courts have held that federal statutes can supercede earlier ratified treaties, this last-in-time rule is problematic because of its racist and anti-immigrant etiology,¹³⁶ its incompatibility with multilateral treaties,¹³⁷ its violation of the separation of powers principle,¹³⁸ its failure to recognize a number of grounds allowed by the law of nations for states to withdraw from treaties,¹³⁹ and its conflict with the original understanding of the Framers and early Supreme Court precedent.¹⁴⁰ Indeed, the last-in-time rule in regard to federal statutes superceding treaties is a continuation of the *Plessy v. Ferguson*¹⁴¹ legacy of racist constitutional construction. The same Supreme Court that embraced a “separate

135. A treaty, strictly speaking, cannot violate the Constitution. *Reid v. Covert*, 354 U.S. 1, 15-19 (1957).

136. *See, e.g.*, *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616 (1871) (breaking treaty with Cherokee nation by charging tax on tobacco); *Head Money Cases*, 112 U.S. 580 (1884) (breaking friendship treaties by charging head tax on entering aliens); *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581 (1889) (breaking treaty with China by excluding Chinese immigrants); *Thomas v. Gay*, 169 U.S. 264 (1898) (breaking treaty with Cherokee nation by denying self-government); *Stephens v. Cherokee Nation*, 174 U.S. 445 (1899) (breaking treaty with Cherokee nation by taking land); *see also* Howard Tolley, *The Domestic Applicability of International Treaties in the United States*, 17 REV. JUR. U.P.R. 403 (1983).

137. How does one determine whether a multilateral treaty is the last-in-time or not when the treaty provides for an interstate complaint procedure that creates mutual obligations between parties? As states become new parties to the multilateral treaty creating new obligations for the United States *vis-a-vis* these new states-parties, any prior legislation is nullified in respect to these new parties. Therefore, the last-in-time rule's application becomes problematic. *See, e.g.*, *ICCPR*, art. 41 (interstate complaint procedure). Also, many multilateral treaties do not allow party withdrawal. General Comment No. 26, UN Human Rights Committee, 61st Sess., 84 ¶ 2, U.N. Doc. CCPR/C/21/Rev.1/Add.8 (1997) (state-party cannot denounce or withdraw from *ICCPR*).

138. If the last-in-time rule was valid, Congress alone without the President's approval could invalidate the treaty by subsequent legislation if the bill received 2/3 of votes from each House. If such a federal statute violated the law of nations, this would exceed Congress' limited authority to only “define” offenses against the law of nations and only make laws that are “necessary and proper.”

139. *See supra* note 131.

140. *See infra* text accompanying notes 175-85. For a fuller discussion of the last-in-time rule's insurmountable difficulties in regard to federal statutes superceding treaties, *see* MARTIN, CHALLENGING, *supra* note 9, at 14-17.

141. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

but equal” construction of the Fourteenth Amendment’s Equal Protection Clause in regard to African-Americans also embraced a last-in-time rule construction of the Article II treaty clause in regard to Native-Americans, Chinese and other aliens.¹⁴² Therefore, the last-in-time rule has serious constitutional infirmities.

Also, recent federal court practice seems to suggest that federal statutes and executive orders always trump customary international law regardless of when it emerged.¹⁴³ However, this recent rule is also fraught with insurmountable problems, such as its basis on a paraphrasing of dicta in the United States Supreme Court’s *The Paquete Habana*¹⁴⁴ that is overreaching,¹⁴⁵ its failure to recognize earlier conflicting case law and authorities,¹⁴⁶ its absurd results (such as indefinite detention),¹⁴⁷ its mis-characterization of customary international law as merely common law that can be superceded by statute,¹⁴⁸ its displacement of customary international law by treaty

142. Compare, e.g., *Chae Chan Ping v. United States*, 130 U.S. 581, 595 (1889) (“the presence of Chinese laborers had a baneful effect upon the material interests of the state, and upon public morals; that their immigration was in numbers approaching the character of an Oriental invasion, and was a menace to our civilization”), with *Plessy*, 163 U.S. at 544 (“Laws permitting, and even requiring, [the separation of Whites and Negroes], in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other . . .”).

143. See, e.g., *Galo-Garcia v. Immigration & Naturalization Serv.*, 86 F.3d 916, 918 (9th Cir. 1996) (federal statute supercedes customary international law); *Comm. of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929, 938 (D.C. Cir. 1988) (federal statute supercedes customary international law); *United States v. Merkt*, 794 F.2d 950, 964 (5th Cir. 1986) (federal statute supercedes customary international law); *Garcia-Mir v. Meese*, 788 F.2d 1446, 1455 (11th Cir. 1986) (federal statutes and executive orders supercede customary international law); *United States v. Howard-Arias*, 679 F.2d 363 (4th Cir. 1982) (federal statute supercedes customary international law); *Tag v. Rogers*, 267 F.2d 664, 666 (D.C. Cir. 1959) (federal statute supercedes customary international law).

144. 175 U.S. 677, 700 (1900) (dictum) (“where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations”).

145. For example, some federal courts have overreached the dictum’s meaning by adding the word “only,” as in “[o]nly ‘where there is not treaty and no controlling executive or legislative act or judicial decision,’ resort will be made to the customary international law.” *In re Extradition of Cheung*, 968 F. Supp. 791, 803 n.17 (D. Conn. 1997); see also *Dimon-Sainz v. United States*, No. 97-3117-RDR, 1999 U.S. Dist. LEXIS 18582, *5 (D. Kan. 1999) (same); *Tag*, 267 F.2d at 666 (same).

146. See, e.g., *Macintosh v. United States*, 283 U.S. 605, 622 (1931) (dictum) (Congress under war powers authority cannot violate international law); see also Jordan Paust, *Rediscovering the Relationship Between Congressional Power and International Law: Exceptions to the Last in Time Rule and the Primacy of Custom*, 28 VA. J. INT’L L. 393 (1988), for additional authorities cited therein.

147. See, e.g., *Garcia-Mir*, 788 F.2d at 1455 (indefinite detention).

148. See, e.g., Louis Henkin, *The Constitution and United States Sovereignty: A Century*

law as a superior authority of law,¹⁴⁹ and – again – its conflict with the original understanding of the Founders.¹⁵⁰ Therefore, this rule has serious constitutional infirmities.

Finally, like the rest of international law, the Constitution cannot unilaterally be made by the individual states. The ratifications of nine states were needed to put the Constitution into force.¹⁵¹ Amendments to the Constitution only require the ratifications of three-fourths of the individual states of the Union.¹⁵² In conclusion, the Constitution gives international law (including itself) greater legal authority than other federal, state or common law: This legal hierarchy also reflects international law. The Constitution's hierarchy of legal authorities is consonant with the Constitution's status as a treaty.

3. The Original Understanding of the Constitution as Social Contract Based in International Law & the Application of the Law of Nations to Domestic Affairs

The original understanding of the Constitution by the Founders also was conceptually framed in terms of international law. The very concepts of constitutionalism, federalism, popular sovereignty, social compact, and natural law had come from international jurisprudence.¹⁵³ Accordingly, the Founders cited many of these international legal authorities.¹⁵⁴

of Chinese Exclusion and Its Progeny, 100 HARV. L. REV. 853 (1987) [hereinafter Henkin, *Chinese Exclusion*] (disputing customary international law as being only federal common law).

149. If federal statutes as well as treaties have equal authority – as the last-in-time rule holds – then treaties trump customary international law. However, this inference violates international law. See *infra* Part 4.

150. See *infra* text accompanying notes 175-85. For a fuller discussion of the last-in-time rule's insurmountable difficulties in regard to federal statutes and executive orders superceding customary international law, see MARTIN, CHALLENGING, *supra* note 9, at 48-55.

151. U.S. CONST. art. VII.

152. U.S. CONST. art. V.

153. See, e.g., Union of Utrecht (1579) (treaty establishing constitutional form of government); FRANCISCO DE VITORIA, ON THE LAW OF WAR (1557) (popular sovereignty); HUGO GROTIUS, ON LAWS OF WAR AND PEACE, bk. II, ch. XV, ¶¶ 15-16 (1625) (social compact and natural law); PUFENDORF, *supra* note 83 (natural law); 1 VATTEL, *supra* note 6, § 10 (federalism) and ch. 3 (constitutions); BURLAMAQUI, *supra* note 73, at vol. II, pt. II, ch. VI, § VI (popular sovereignty).

154. See, e.g., THE FEDERALIST NO. 20 at ¶¶ 12-13 (Hamilton & Madison) (1787) (citing Grotius and Union of Utrecht); JAMES MADISON, DEBATES IN THE FEDERAL CONVENTION OF 1787 (June 27, 1787) (L. Martin citing Vattel); JAMES WILSON, *Of the Law of Nations*, in LECTURES IN LAW ¶¶ 6, 8, and 13 (1791) (citing Grotius, Pufendorf,

Social contract and natural law theory that undergirds the United States constitutional compact also governs relations between nations. For social compact theorists, such as Hobbes, Rousseau, and Locke, individuals existed in a state of nature governed by natural law expressed through compacts with each other for their self-governance.¹⁵⁵ International jurisprudence also used social contract and natural law theory before Hobbes, Rousseau, and Locke to describe and prescribe relations not only between the sovereign and his subjects but also between nations.¹⁵⁶

Before these domestic social compact theorists, Grotius in his *ON LAWS OF WAR AND PEACE* (1625) had based both his international and domestic jurisprudence on social contract and natural law theory. For Grotius, nations also existed in a state of nature governed by natural law that was expressed through pacts (*i.e.*, treaties) between these nations. The reservoir of positive law articulated by these treaties and expressed by customs practiced by these nations constituted the *jus gentium* or the "law of nations." Like the later social compact theorists, Grotius also recognized that pacts were the positive law expressions of natural law between individuals existing in the state of nature.¹⁵⁷ He recognized that there is a necessary identity

and Burlamaqui) [hereinafter WILSON]; *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 221 (1796) (Chase, J., citing Vattel); *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 143 (1812) (Marshall, C.J., citing Vattel); THOMAS JEFFERSON, *A MANUAL OF PARLIAMENTARY PRACTICE: FOR THE USE OF THE SENATE OF THE UNITED STATES* § LII (1812) (citing Vattel).

Between 1789 and 1820, Vattel was cited thirty-eight times in United States Supreme Court opinions. See FRANCIS STEPHEN RUDDY, *INTERNATIONAL LAW IN THE ENLIGHTENMENT* 284 (1975) (citing Edwin Dickinson's research); see also JAMES KENT, *COMMENTARY ON INTERNATIONAL LAW* 36 (1878) ("[Vattel's book] has been cited more freely than that of any other public jurist, and is still the statesman's manual and oracle."); DANIEL GEORGE LANG, *FOREIGN POLICY IN THE EARLY REPUBLIC: THE LAW OF NATIONS AND THE BALANCE OF POWER* 95 (1985) (noting that Hamilton called Vattel "perhaps the most accurate and approved of the writers on the law of nations.") (citation omitted); Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 *VAND. L. REV.* 819, 823 (1989) ("In ascertaining principles of the law of nations, lawyers and judges [in eighteenth century America] relied heavily on continental treatise writers, Vattel being the most often consulted. . . . An essential part of a sound legal education consisted of reading Vattel, Grotius, Pufendorf, and Burlamaqui, among others.").

155. THOMAS HOBBS, *THE LEVIATHAN* (1651); JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* (1762); JOHN LOCKE, *SECOND TREATISE ON THE STATE OF NATURE* (1690).

156. See, e.g., 1 *VATTEL*, *supra* note 6, ch. 2 ("General Principles of the Duties of a Nation towards herself").

157. In his *ON LAWS OF WAR AND PEACE*, Grotius begins his analysis of international relations and law with a discussion of the relations between individuals.

between the contractual dynamics of municipal law and international law because both are governed by the natural law that required the making of pacts to ensure the long-term preservation of both parties' self-interest by reciprocal guarantee to the other.

In order to separate positive law from natural law – the “is” from the “ought”—on the international level, Grotius analyzed the power dynamics of pacts or treaties between nations, and argued that “promises should be kept” (“*pacta sunt servanda*”) in order to ensure that the nations existing in a state of nature do not go to war with each other and, thereby, violate the very natural law that governs the state of nature. This contractual paradigm not only explained relations between nations existing in a state of nature, it also incorporated moral accountability in those relations by explaining why such contracts were “necessary” – that is, why such contracts were consistent with natural law. Such inter-national contracts were necessary to “safeguard [a nation’s] own future peace” because the absence of treaties or their violation could result in war.¹⁵⁸

However, the notion of the “law of nations” (in which these treaty norms were embedded) appears to have become mistakenly limited to refer only to the law governing relations *between* nation-states for some jurists – hence, the modern and somewhat unfortunate – phrase “*inter-national law*” emerged. However, *jus inter gentes* is only a subset of *jus gentium*, and the phrase “international law” was not even coined until 1780 by Jeremy Bentham.¹⁵⁹ For example, the *lex mercatoria* (private international law) was and continues to be a subset of law that governs commercial transactions between private individuals.

This definitional change is probably associated with three

[S]ince it is a rule of the law of nature to abide by pacts (for it is necessary that among men there be some method of obligating themselves one to another, and no other natural method can be imagined), out of this source the bodies of municipal law have arisen. . . .

. . . . [T]he mother of municipal law is that obligation which arises from mutual consent

GROTIUS, *supra* note 153, at ¶¶ 15-16.

158. *Id.* at ¶ 18. Violation of treaties was *casus belli* under the old law of nations. However, present international law generally outlaws war for treaty violations. *See, e.g., UN Charter*, art. 2(4) (“All members shall refrain in the international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”).

159. JEREMY BENTHAM, *PRINCIPLES AND MORALS OF LEGISLATION, Preface*, at Part the Seventh (1789) (“Principles of legislation in matters betwixt nation and nation, or, to use a new though not inexpressive appellation, in matters of *international law*.”).

developments. First, the ideas of “nation” and “state” appear to have become increasingly conflated with the emergence of the modern state as a “nation-state,” which is generally dated at the end of the Thirty Years War with the signing of the Peace of Westphalia in 1648 and the dissolution of the Holy Roman Empire into nation-states.¹⁶⁰ However, strictly speaking, “nations” are peoples, and “states” are bodies politic. With the emergence of the modern state, the state became identified increasingly only with the crown because often the crown was the head of state. As Louis XIV (1643-1715) succinctly put it, “*L’État c’est Moi.*” The locus of sovereignty in the nation appears to have become increasingly displaced by the king through his identification with the state.

Second, monarchs began to assert the divine right of kings. As James I put it in his speech to Parliament in 1609:

The state of monarchy is the supremest thing upon earth; for kings are not only God’s lieutenants upon earth, and sit upon God’s throne, but even by God himself are called gods. There be three principal similitudes that illustrate the state of monarchy: one taken out of the word of God; and the two other out of the grounds of policy and philosophy. In the Scriptures kings are called gods, and so their power after a certain relation compared to the divine power. Kings are also compared to fathers of families: for a king is truly *Parens patriae*, the politique father of his people. And lastly, kings are compared to the head of this microcosm of the body of man.¹⁶¹

Under the divine right of kings, the king was the political head of his people. The people were not sovereign, and only the king could make treaties.¹⁶² Absolute monarchy resulted in the loss of the peoples’ standing in the law of nations.

Third, with the emergence of the modern state, the inter-state mechanism of making *jus gentium* through treaties became increasingly prominent, serving to marginalize the domestic

160. The conceptual vacillation between distinguishing a nation from a state and the conflation of nation with state is seen in Vattel. Compare, e.g., 1 VATTEL, *supra* note 6, at § 1 (“A NATION or a state is . . . a body politic”) with § 4 (“Every nation that governs itself, under what form soever, without dependence on any foreign power, is a *Sovereign State.*”).

161. King James I, On the Divine Right of Kings, ¶ 1 (Mar. 21, 1609) (speech to Parliament).

162. GROTIUS, *supra* note 153, bk. II, ch. 15, ¶ 5 (“in monarchies, the power of making treaties belongs to the king alone”).

dimensions of *jus gentium* by focusing on state-to-state relations. Because of these three developments, individuals increasingly appeared to lose their international standing as well as their domestic standing in the social contract. With this loss of standing, they often also lost their rights.

Furthermore, under the incorrect conceptualization of the law of nations as only a law between nation-states, the king exercising his divine right of power was not accountable to natural law expressed domestically through positive law.¹⁶³ However, *jus gentium* had governed not only relations between peoples but also relations between governments and the governed. The contractual paradigm as instantiated by treaties between sovereigns demanded the application of the natural law, the performance of mutual duties, and observance of mutual rights. Locke retained the applicability of social contract and natural law theory to international relations,¹⁶⁴ but most importantly, Locke (following Rousseau) also recovered the contractual paradigm and natural rights theory for establishing the proper relationship between the sovereign and his subjects.¹⁶⁵

One of the Founders, James Wilson, reiterated these points. According to Wilson, “[t]he law of nature, when applied to states or political societies, receives a new name, that of the law of nations.”¹⁶⁶ Using this social contract and natural law theory derived from international jurisprudence, Wilson recognized that the law of nations governed not only relations between nations but also relations between the state and its citizens.

Some seem to have thought, that [the law of nations] respects and regulates the conduct of nations only in their intercourse with each other. A very important branch of this law – that

163. King James I, On the Divine Right of Kings, ¶ 2 (Mar. 21, 1609) (kings “have power of raising and casting down, of life and of death, judges over all their subjects and in all causes and yet accountable to none but God only”). As Hobbes argued, although the sovereign (*i.e.*, king) could act immorally, the sovereign could not act unjustly in the legal sense. Having experienced the English Civil War (1642-51), Hobbes argued for the suspension of the domestic legal accountability of the king at the expense of the peoples’ rights in order to facilitate domestic tranquility that seemed to him more securable through a strong central executive.

164. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT, “OF THE STATE OF NATURE” ¶ 14 (W. von Leyden ed., Oxford Clarendon Press 1954) (1690) (“all princes and rulers of independent governments all through the world are in a state of nature”).

165. *Id.* at § 95 (“Men being . . . by nature all free, equal, and independent, no one can be put out of this estate and subjected to the political power of another without his own consent.”).

166. WILSON, *supra* note 154, at ¶ 1.

containing the duties which a nation owes itself – seems to have escaped their attention. “The general principle,” says Burlamaqui, “of the law of nations, is nothing more than the general law of sociability, which obliges nations to the same duties as are prescribed to individuals.”¹⁶⁷

For the Founding Fathers, the United States’ obligations under the law of nations also imposed duties both towards and upon United States nationals. For example, in ordering its army and naval forces as well as privateers to observe the laws of war in their conduct of war against Great Britain,¹⁶⁸ Congress authorized the capture and condemnation of ships belonging to United States citizens according to the law of nations.¹⁶⁹ In establishing prize courts, Congress also recognized the possibility that private Americans might have claims against United States authorities and privateers who seized their cargo in violation of the law of nations.¹⁷⁰ The law of nations governing piracy also protected United States nationals.¹⁷¹ The law of nations also created duties for private Americans *vis-a-vis* foreign nationals (such as ambassadors),¹⁷² and the United States was responsible for ensuring that private individuals observed this law of nations because, otherwise, the United States would acquire liability.¹⁷³ In conclusion, the law of nations always governed relations

167. *Id.*

168. 19 JOURNALS OF THE CONTINENTAL CONGRESS 361 (1912). These instructions included not to kill, torture, or treat inhumanely persons “contrary to common usage, and the practice of civilized nations in war.” *Id.* at 363.

169. 21 *id.* at 1154. Congress also apportioned prizes for sea and land captures by privateers according to the law of nations. *Id.* at 1157-58.

170. *See id.* at 315 (prize courts governed by law of nations) and 364 (privateers violating laws of nations subject to forfeiture of commission and “liable to an action for breach of the condition of [privateer’s] bond, [and] responsible to the party grieved for damages sustained by such malversation”).

171. *See* Act of Mar. 3, 1819, ch. 77, § 5, 3 Stat. 513-14 (“that if any person or persons whatsoever ever, shall, upon the high seas, commit the crime of piracy, as defined by the law of nations, and such offender or offenders shall be brought into, or found in the United States, every such offender or offenders shall, upon conviction thereof, . . . be punished with death.”).

172. *See* 21 JOURNALS OF THE CONTINENTAL CONGRESS 1136-1137 (1912) (recommending states punish law of nations violations, including attacks on ambassadors); 1 Op. Att’y Gen. 57, 59 (1795) (foreign nationals have private cause of action against United States nationals for violation of law of nations or treaty under *Alien Tort Statute* (1789), presently codified at 28 U.S.C. § 1350).

173. *See* *Henfield’s Case*, 11 F. Cas. 1099, 1108 (C.C.D. Pa. 1793) (No. 6360) (Wilson, J.) (Charge to Grand Jury) (stating if the nation refused to require its citizens to make reparation or to punish citizens for committing offenses against law of nations, the nation “renders itself in some measure an accomplice in the guilt, and becomes responsible for

between the state and the governed, *i.e.*, domestic affairs.¹⁷⁴

The Founders did not adhere to an American exceptionalism in international law and affairs. For example, in response to certain states of the United States violating the Paris Peace Treaty, the Articles Congress wrote a letter to Great Britain in 1787 clearly stating that neither the United States nor its individual states could violate its obligations under either treaties or the law of nations.

Our national constitution having committed to us the management of the national concerns with foreign States and powers, it is our duty to take care that all the rights which they ought to enjoy within our Jurisdiction by the laws of nations and the faith of treaties remain inviolate. . . . For as the Legislature only which constitutionally passes a law has power to revise and amend it, so the sovereigns only who are parties to the treaty have power, by mutual consent and posterior Articles to correct or explain it. . . . As the treaty of peace so far as it respects the matters and things provided for in it, is a Law to the United States, which cannot by all or any of [the United States] be altered or changed,¹⁷⁵....

The Founders' belief that the United States' international legal obligations could not be violated by either the federal government or the individual states was not limited to the government under the Articles of Confederation but also extended to the Constitution.¹⁷⁶ In Federalist Number sixty four, Jay stated:

They who make laws may, without doubt, amend or repeal them; and it will not be disputed that they who make treaties may alter or cancel them; but still let us not forget that treaties are made, not by only one of the contracting parties, but by both; and consequently, that as the consent of both was

the injury”).

174. *Hilton v. Guyot*, 159 U.S. 113, 163 (1895) (“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...what is usually called private international law...and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominion of another nation – is part of our law.”).

175. 32 JOURNALS OF THE CONTINENTAL CONGRESS 177, 177-81 (1912) (letter to Great Britain dated Apr. 13, 1787).

176. Madison stated that “[t]he powers relating to...treaties...are all vested in the existing Congress by the Articles of Confederation. The proposed change [by the Constitution] does not enlarge these powers; it only substitutes a more effectual mode of administering them.” THE FEDERALIST NO. 45, at ¶ 11 (James Madison) (1788).

essential to their formation at first, so must it ever afterwards be to alter or cancel them. The proposed Constitution, therefore, has not in the least extended the obligation of treaties. They are just as binding, and just as far beyond the lawful reach of legislative acts now, as they will be at any future period, or under any form of government.¹⁷⁷

177. THE FEDERALIST NO. 64, at ¶ 12 (John Jay) (1788). During the North Carolina Constitutional Convention, William Davie stated, “although treaties are mere conventional acts between the contracting parties, yet, by the law of nations, they are the supreme law of the land to their respective citizens or subjects. All civilized nations have concurred in considering them as paramount to an ordinary act of legislation.” ELLIOT’S DEBATES, *supra* note 52, at 119 (July 28, 1788). Hamilton later would write that it was “understood by all” during the Constitutional Convention that the Constitution’s treaty power was “competent to . . . controul and bind the legislative power of Congress” and that “no objection was made to the idea of its controuling future exercises of the legislative power.” Alexander Hamilton, *The Defence No. 38* (1795), in 20 THE PAPERS OF ALEXANDER HAMILTON 22, 25 n.* (H. Syrett ed., 1974).

In 1791, James Wilson argued that the reason for why a nation could not violate its treaties with other nations was because such a violation was a disservice to the nation’s own members:

When men have formed themselves into a state or nation, they may reciprocally enter into particular engagements, and, in this manner, contract new obligations in favour of the members of the community; but they cannot, by this union, discharge themselves from any duties which they previously owed to those, who form no part of the union. They continue under all the obligations required by the universal society of the human race – the great society of nations. The law of that great and universal society requires, that each nation should contribute to the perfection and happiness of the others. It is, therefore, a duty which every nation owes to itself, to acquire those qualifications, which will fit and enable it to discharge those duties which it owes to others.

WILSON, *supra* note 154, at ¶ 32.

During the Jay Treaty controversy five years later, United States Supreme Court Chief Justice Oliver Ellsworth wrote that “a Treaty cannot be repealed or annulled by Statute because it is a compact with a foreign power, and one party to a compact cannot dissolve it without the consent of the other.” William Casto, *Two Advisory Opinions*, 6 GREENBAG 414 (2003) (letter dated Mar. 13, 1796 to John Trumbull); see ANNALS OF CONGRESS 479, 4th Cong. 2nd Sess. (Mar. 1796) (Roger Griswold: treaty superior to Congressional act and, consequently, treaty provision cannot be repealed by mere Congressional act). However, also during the Jay Treaty controversy, Treasury Secretary Oliver Wolcott opined that Congress lawfully could enact a law to “repeal” an earlier treaty, but it is important to note that Wolcott used the example of a Congressional declaration of war “repealing” an earlier treaty. 1 OLIVER WOLCOTT, MEMOIRS OF THE ADMINISTRATIONS OF WASHINGTON AND JOHN ADAMS 1796 (1846). Wolcott was effectively correct. As noted above, under the law of nations, a state lawfully could “terminate” (not “repeal”) a treaty on the grounds that another state had violated either its treaty or customary international legal obligations with the first state. Violations of treaty or customary international legal obligations could be sufficient grounds under the law of nations for waging war. See *supra* notes 56-57 and 158. Madison during the Jay Treaty controversy staked out a middle ground that created a dilemma. He argued that federal statutes could not violate treaties, but he also argued that treaties could not violate federal statutes. ANNALS OF CONGRESS 479, 4th Cong. 2nd Sess. (Mar. 1796).

However, Thomas Jefferson later wrote that legislative acts constitutionally could violate treaties.¹⁷⁸ In this regard, it is important to note that Jefferson was not a Framers. He was in France during the drafting and ratification of the Constitution, and his understanding of the Constitution was flawed. Furthermore, Jefferson contradicted himself because he had indicated that the Constitution was a treaty and that federal legislation lawfully could not violate it.¹⁷⁹

The Supreme Court a few years later would state that “[w]hen the United States declared their independence, they were bound to receive the law of nations.”¹⁸⁰ “[T]he United States by taking a place among the nations of the earth [became] amenable to the law of nations.”¹⁸¹ Most importantly, the United States Supreme Court in 1812 held that civilized nations could not violate treaties. In *The Antelope*, the Court stated the following:

In almost every instance, the treaties between civilized nations contain a stipulation to this effect in favor of vessels driven in by stress of weather or other urgent necessity. In such cases the sovereign is bound by compact to authorize foreign vessels to enter his ports. The treaty binds him to allow vessels in distress to find refuge and asylum in his ports, and *this is a license which he is not at liberty to retract.*¹⁸²

It was clear that the United States government could not violate

178. THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE: FOR THE USE OF THE SENATE OF THE UNITED STATES § LII (1812) (“Treaties being declared, equally with the laws of the United States, to be the supreme law of the land, it is understood that an act of the legislature alone can declare them infringed and rescinded.”).

179. Letter from Thomas Jefferson to Edward Everett (Apr. 8, 1826), in THE POLITICAL WRITINGS OF THOMAS JEFFERSON 151 (E. Dumbauld ed., 1955) (Constitution is a compact between independent nations); Kentucky Resolution at ¶ 1 (1799) (drafted by Jefferson), available at <http://www.yale.edu/lawweb/avalon/kenres.htm> (last visited Oct. 5, 2003) (stating that federal Alien and Sedition Acts were unconstitutional).

180. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 281 (1796); see also 1 Op. Att’y Gen. 27 (1792), reprinted in 1 OPINIONS OF THE ATTORNEYS GENERAL 27 (Dennis & Co., Inc. 1945) (“The law of nations, although not specifically adopted by the Constitution or any municipal act, is essentially a part of the law of the land.”). It was hardly controversial to American jurists in the eighteenth and nineteenth centuries that the law of nations was United States law – regardless of Article III’s failure to explicitly mention it. See Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819 (1989).

181. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793).

182. 11 U.S. (7 Cranch) 116, 141 (1812) (emphasis added).

either the law of nations or its treaties. When the United States in its early years did stop complying with its treaty obligations, it did so because its treaty partner had breached the treaty¹⁸³ or the treaty itself allowed termination;¹⁸⁴ treaty breach by one of its parties or unilateral withdrawal per a treaty's provisions is sufficient ground to void a treaty under the law of nations.¹⁸⁵

This only made sense because the Founders ascribed to social compact and natural law theory that was based in international jurisprudence.¹⁸⁶ The normative paradigm of covenant laid the foundation for the Founders' political, legal, and moral worlds. The Founders saw covenants (such as treaties, social compacts or constitutions) as means of enabling peoples to articulate natural and inalienable rights as well as to secure these rights for themselves by way of other peoples through the reciprocity inherent in these contractual mechanisms.¹⁸⁷ These covenants gave corporeal expression and definition to natural rights and duties, and these rights and duties, in turn, became embedded in, reflected in, and guaranteed by the law of nations – a global reservoir of natural rights and duties that applied to both international and domestic affairs. Contracts were the sinews of the body politic. Break the contract and you hamstring the nation and states.

In conclusion, there should be no doubt that the Constitution is a federal treaty. The Constitution's text denotes it as a treaty, addresses international legal subjects, and incorporates international legal norms. The Founders – Federalist and Anti-Federalist alike – as

183. See, e.g., An Act to Declare the Treaties Heretofore Concluded with France, no Longer Obligatory on the United States, 1 Stat. 578 (1798) (repeated treaty violations by France and French failure to compensate for violations justifies United States voiding of treaties).

184. For example, President Polk in 1846 requested that Congress approve his authority to withdraw from the Oregon Territory Treaty (1827) with Great Britain and notify the British government of the United States' withdrawal *per* the Treaty's terms. Congress did so in Joint Resolution of April 27, 1846, 9 Stat. 109-110 (1846).

185. 2 Vattel, *supra* note 6, § 202 (breach); *Vienna Convention*, arts. 42 (2) (withdrawal according to treaty provisions) and 60 (breach).

186. *But see* Robert Anderson IV, "Ascertained in a Different Way": *The Treaty Power at the Crossroads of Contract, Compact, and Constitution*, 69 G.W. L. REV. 189, 214 *et passim* (2001) (distinguishing treaties from compacts on the basis that the latter created communities whereas the former were merely contracts). However, as demonstrated in the aforementioned discussion, a treaty also can create a community or nation. Indeed, treaties serve to establish a community of nations.

187. These contractual mechanisms also provided the necessary restraint on unilateral, unbridled assertion of an arguably unlimited number of rights, which historically has been a practical operational problem with the concept of natural law.

well as early 19th century states' rights advocates recognized the Constitution as a treaty. The Framers were acutely aware that they had to ensure that the ratification of the Constitution did not violate the law of nations governing treaties and that the Constitution itself did not violate the law of nations. The social contract theoretical foundations of the Constitution reflected international jurisprudence. In light of all of this, it is difficult to see how the Constitution is *not* a federal treaty. Indeed, there is nothing in the Constitution's text or its original public understanding that indicates that the Constitution is not a treaty. Recognizing the Constitution as a federal treaty may require a conceptual paradigm shift for most constitutional lawyers. However, such shifts are not unknown to our history of constitutional jurisprudence.

4. Why Must the Constitution Be Construed in Conformity with the United States' Customary International Legal Obligations?

Why should we go further and conclude that our federal Constitution must be construed according to the United States' customary international legal obligations? From an originalist viewpoint, the Founders believed that the Constitution must be construed in conformity with the law of nations, of which customary international law constituted a substantial proportion.¹⁸⁸ From an international law perspective, the simple answer is that treaties (such as the Constitution) generally must be construed in conformity with the law of nations. Treaties as international legal instruments must be first construed in conformity with the other laws suitable to its genre, namely, the law of nations. As numerous international courts and tribunals have held, "an international instrument must be interpreted and applied within the overall framework of the [international] juridical system in force at the time of the interpretation."¹⁸⁹ Treaties

188. See *supra* text accompanying note 74 (statement by Randolph).

189. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, 31 (1971); Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. Ser. A, No. 10, at ¶ 37 (1989); *Coard v. United States*, Inter-Am. Cm. H.R., No. 109/99 at ¶ 40 (1999), available at <http://www.cidh.oas.org/annualrep/99eng/Merits/UnitedStates10.951.htm> (last visited Feb. 15, 2003); see also *Vienna Convention*, art. 31(3)(c) (treaty must be interpreted in light of "any rules of international law applicable in the relations between the parties");

generally cannot violate extant customary international legal norms binding on a treaty's parties for a couple of reasons. First, to violate a customary international legal norm by implementing a conflicting treaty norm is to violate the principle of *pacta sunt servanda* that establishes the basis for most of international law – whether treaty law or customary international law that is reflected by treaties. One cannot say that s/he promises to abide by a certain norm and subsequently promise to abide by a conflicting norm because the later promise is not credible. Second, implementing a treaty norm that conflicts with a customary international legal norm would result in the unraveling of the international legal order through a “domino-effect”

Vienna Convention-SIO, art. 31(3)(c) (treaty between intergovernmental organization and state must be interpreted in light of “any relevant rules of international law applicable in the relations between the parties”). *Geofroy v. Riggs*, 133 U.S. 258, 271 (1890) (meaning of treaty language “to be taken in their ordinary meaning, as understood in the public law of nations”).

As the International Court of Justice's Advisory Opinion notes, a treaty must be interpreted according to *present* customary international law – not outdated customary international law in force at the time the treaty came into force. If a treaty were to be construed in conformity with customary international legal norms present at the time of the treaty coming into force but that were no longer valid, the treaty may conflict with the state's present international legal obligations not only with other states but with its treaty partner. *Cf. Aloeboetoe et al. v. Suriname*, Inter-Am. Ct. H.R. (Ser. C) No. 15, at §§ 56-57 (1994) (recognizing that 1762 Netherlands-Saramaka treaty allowing sale of slaves – which had been protected by contemporary customary international law – “would be today null and void” because treaty violates present *jus cogens*).

Furthermore, a treaty cannot be construed in conformity *only* with those customary international legal norms that existed at the time of a treaty coming into force (and which are still valid) because a treaty must be interpreted and applied within the “*overall framework*” of international law, according to the International Court of Justice's advisory opinion. If a treaty were to be construed only in conformity with the customary international law existing at the time of the treaty entering into force, the implementation of the treaty may violate present customary international legal norms with not only other states but also with the original treaty partner. Therefore, the Constitution as a treaty cannot be construed in conformity with outdated invalid customary international legal norms or only in conformity with those customary international legal norms that were recognized by the Framers in 1789 and persist today.

In the context of federal statutory law, Judge Robert Bork has argued that violations of international law over which the Alien Tort Statute provides jurisdiction should be limited to only those international legal violations recognized in 1789, the date of the Alien Tort Statute's enactment. *Tel-Oren v. Libya*, 726 F.2d 774, 813 (D.C. Cir. 1984) (Bork, J. concurring). If this were to be the case, an alien today seeking compensation for the loss of his slaves freed in another country would have a colorable claim covered by the Alien Tort Statute because the law of nations protected slavery in 1789. *See The Antelope*, 23 U.S. (10 Wheat.) 66 (1825) (law of nations protects slavery); 3 Vattel, *supra* note 6, § 152 (law of nations allows enslavement of prisoners of war). Indeed, one of the first reported cases that addressed the Alien Tort Statute involved this very issue. *See Bolchos v. Darrel*, 3 F.Cas. 810 (D.S.C.1795) (No. 1607) (suit for restitution for loss of slaves available under Alien Tort Statute).

of state withdrawals from their customary international legal obligations with the violating states.¹⁹⁰ The only exception to this general rule of international law is when the norm is of a human rights or humanitarian nature because such norms transcend the inter-state dimensions of international law.¹⁹¹

Another, more theoretical answer to why the Constitution must be construed in conformity with the law of nations is that in recognizing the validity of the very social contract that authorizes the federal government to govern the American people – namely, our Constitution – we are logically committed to recognizing that the federal government cannot violate our reciprocal arrangements with other nations that is embedded in the law of nations. To allow the federal government to commit such violations would allow these other nation-states, in turn, to violate our rights recognized by these treaties and customary international law. Construing our Constitution to allow that such international rights lawfully could be violated would make our Constitution a “suicide pact” in so far as our rights are concerned.¹⁹² By violating our treaty and customary international legal obligations, the federal government violates its social compact with its own people by placing their rights at peril. Recall that some of the complaints in the Declaration of Independence that justified the American people “dissolving” the social contract with the British government was the British government’s violation of rights possessed not only by the American people but also by foreign peoples that were guaranteed by the law of nations, such as those involving freedom of trade and the seas.¹⁹³ To put it another way, the Brits broke *brith* not only with the American people but also with foreign peoples.

190. However, a state lawfully can enter into a new multilateral treaty that abrogates a customary international legal norm, assuming a sufficient number of states agree to this new treaty.

191. See UN Human Rights Committee, General Comment No. 24, U.N. Doc. HRI/GEN/1/Rev.3 at ¶ 8 (1997) (“Although treaties that are mere exchanges of obligations between States allow them to reserve *inter se* applications of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction . . .”); *Vienna Convention*, art. 60 (5) (termination or suspension of humanitarian treaty not justified by breach).

192. See *Billings v. United States*, 232 U.S. 261, 282 (1914) (“It is also settled beyond dispute that the Constitution is not self-destructive.”).

193. DECLARATION OF INDEPENDENCE at ¶ 3 (“For cutting off our Trade with all parts of the world. . . . He has plundered our seas.”). The law of nations guarantees freedom of trade and the seas. See, e.g., HUGO GROTIUS, OF THE FREEDOM OF THE SEAS ch. 12 (1609).

Furthermore, international lawmaking can be more advantageous to the American people than the Congressional lawmaking or amendment making mechanisms. International lawmaking allows both the articulation and recognition of rights that otherwise would be unavailable under the Congressional lawmaking or amendment making mechanisms because such rights require acceptance from foreign states for their observance.¹⁹⁴ Such rights include (but are necessarily restricted to) those having an extraterritorial extension in other countries or in international spaces. Although the Congressional lawmaking and amendment lawmaking mechanisms can articulate such rights, the recognition of those rights often necessarily relies upon other foreign states for their enforcement in the territories of these states and in international spaces.

Furthermore, unlike most of the Constitution's rights protections (as presently construed),¹⁹⁵ international law can be more advantageous to the American people because it often creates affirmative state duties for protecting fundamental individual rights.¹⁹⁶ Also, attempts through the State Commerce Clause and the penumbras of the Fourth, Fifth, and Ninth Amendments to recognize other fundamental rights (such as workers' and privacy rights) are controversial because of their loose constructions of the Constitution. Hence, such attempts often fail.¹⁹⁷ However, international law

194. See *Missouri v. Holland*, 252 U.S. 416, 433 (1920) ("It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could")

195. See U.S. CONST. art. I, § 9 (habeas corpus, bills of attainder and ex post facto), Amendments I (speech, assembly, press), II (bear arms), III (quartering of soldiers), IV (unreasonable searches and seizures), V (grand jury indictment, double jeopardy, self-incrimination, due process), XIII (slavery), XIV (citizenship, immunities, equal protection), XV (race discrimination in voting), XIX (sex discrimination in voting), and XXIV (inability to pay poll tax does not disenfranchise). Only Amendment VI (right to a fair trial) and VII (right to jury civil trial) create governmental affirmative duties.

196. See, e.g., *Velásquez Rodríguez v. Honduras*, Inter-Am. Ct. H.R., Ser. C., No. 4 at ¶ 172 (1988) (state affirmative duty to prevent right to life, humane treatment, and liberty violations committed by private or state actor); *Osman v. United Kingdom*, 29 E.H.R.R. 245 (2000) (affirmative state duty to prevent right to life violations committed by private actor); *A. v. United Kingdom*, 27 E.H.R.R. 611 (1999) (affirmative state duty to prevent right to humane treatment violations committed by private actor).

197. See, e.g., *National League of Cities v. Usery*, 426 U.S. 833 (1976) (protection of state government workers' rights through minimum wage law not authorized by Interstate Commerce Clause); *Bowers v. Hardwick*, 478 U.S. 186 (1986) (no privacy right to engage in homosexual conduct under the Fourth and Fifth Amendments), *rev'd* in *Lawrence v. Texas*, 539 U.S. 558 (2003).

guarantees such fundamental rights.¹⁹⁸ Construing the State Commerce Clause, and the Fourth, Fifth, and Ninth Amendments in conformity with the United States' international legal obligations ensures the protection of such rights. Indeed, for Ninth Amendment construction, the use of the law of nations is especially appropriate given that this law protects the fundamental rights of nations, *i.e.*, peoples, such as those shared by the American people that cannot be denied or disparaged by the enumeration of other rights in the Constitution.¹⁹⁹

On the other hand, what if the President and Senate make a treaty that undermines these international rights? For example, what if the treaty eroded individual human rights at the expense of securing corporate trade advantages that harmed the natural environment in which the American people lived? The solution to this problem is found on the international law level. As John Jay noted in Federalist No. 64, such a treaty "would be null and void by the law of nations."²⁰⁰ Furthermore, international law creates a hierarchy of norms on top of which sit *jus cogens* norms that are strongly identified with fundamental human rights norms, such as the rights to life, humane treatment, liberty, and non-discrimination (among others).²⁰¹ Such *jus cogens* norms invalidate provisions of treaties that conflict with these norms.²⁰² Even those human rights norms that do not reflect *jus cogens* still can trump provisions of treaties that violate human rights

198. See, *e.g.*, Universal Declaration of Human Rights, 10 Dec. 1948, G.A. Res. 217A (III), art. 23 (3), U.N. Doc. A/810, at 71 (1948) ("right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity") [hereinafter *UDHR*]; Toonen v. Australia, Communication No. 488/1992, UN Hum. Rts. Ctte., U.N. Doc. CCPR/C/50/D/488 (1994) (right to privacy includes right to engage in homosexual conduct under *ICCPR*).

199. MARTIN, CHALLENGING, *supra* note 9, at 64-65; Jordan J. Paust, *Human Rights and the Ninth Amendment: A New Form of Guarantee*, 60 CORNELL L. REV. 231 (1975).

200. THE FEDERALIST NO. 64 (Jay) at ¶14 (1788) (treaty obtained through corruption would "be null and void by the law of nations"); see also, VATTEL, 2 LAW OF NATIONS, *supra* note 6, § 170:

If the assistance and offices that are due by virtue of such a treaty should on any occasion prove incompatible with the duties a nation owes to herself, or with what the sovereign owes to his own nation, the case is tacitly and necessarily excepted in the treaty. For, neither the nation nor the sovereign could enter into an engagement to neglect the care of their own safety, or the safety of the state, in order to contribute to that of their ally.

201. *Jus cogens* norms are non-derogable, peremptory norms. *Vienna Convention*, art. 53; see Francisco Forrest Martin, *Delineating a Hierarchical Outline of International Law Sources and Norms*, 65(2) SASK. L. REV. 333 (2002) (listing *jus cogens* norms) [hereinafter Martin, *Delineating*].

202. *Vienna Convention*, art. 53 (*jus cogens* norms trump treaties).

because many human rights norms have derivative *jus cogens* status by virtue of the fact that their observance is essential for the protection of *jus cogens* norms.²⁰³ Although the Constitution does not guarantee *jus cogens* norms as such, treaties can and do.²⁰⁴

Another reason why the Constitution as a treaty must be construed with the law of nations is because the contemporary conventional customary international law is often more specific than the general language of the Constitution. Both international and domestic laws require that specific law prevail over general law.²⁰⁵ The Constitution contains many vague provisions that require further definition that can be found in modern customary international law.²⁰⁶

Finally, construing the Constitution in conformity with customary international law accommodates the Constitution *per se*. Customary international law recognizes that a treaty (such as the Constitution) must be construed according to the ordinary meaning of the treaty's terms in their context, and that the context must be construed in conformity with "any relevant rules of international law applicable in the relations between the parties" (*i.e.*, the states of the Union).²⁰⁷ Indeed, one correctly can say that general rules of constitutional construction represent general rules of regional (*i.e.*, American) international law because of the Constitution's status as a regional inter-state treaty.²⁰⁸ However, a global (or more widely accepted regional) rule generally would trump such regional rules for a couple of reasons. First, as discussed above, violating the global (or more widely accepted regional) rule would dismantle the larger international legal order.²⁰⁹ Second, the global (or more widely

203. Martin, *Delineating*, *supra* note 201, at 348-53.

204. See, e.g., *ICCPR*, art. 4 (listing non-derogable, peremptory norms).

205. Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 341 (1996) (*lex specialis derogat generali*); *Powerline Industries Corp. v. Klockner Moeller Corp.*, 202 F.3d 450 (1st Cir. 2000) (same).

206. See, e.g., *Vienna Convention*, arts. 31 (3)(c) and 43 (recognizing other international legal rules).

207. *Vienna Convention*, art. 31 (1). Consistent with this international law principle, the United States Supreme Court repeatedly has held that international law governs the relations between states of the Union. *Arkansas v. Tennessee*, 310 U.S. 563, 570 (1940); *Wisconsin v. Michigan*, 295 U.S. 455, 461 (1935); *Connecticut v. Massachusetts*, 282 U.S. 660, 670 (1931); *Kansas v. Colorado*, 185 U.S. 125, 143 (1902).

208. Furthermore, federal legislation implementing the Constitution also would be regional international law, but on a lower order of authority because such legislation's authority is only derivative of the Constitution.

209. See, e.g., *Prosecutor v. Kovacevic*, Case No. IT-97-24-AR73, Int'l Crim. Trib., Appeals Chamber (29 May 1998) (customary international legal principle governing

accepted regional) rule often has a better pedigree because more states have observed the rule, thereby providing stronger evidence of its objective normativity. This is especially true if such a rule reflects a new customary international law norm or *jus cogens* because such a rule respectively would replace or supercede the constitutional regional rule.²¹⁰

Although the present text of Constitution does not necessarily conflict with the United States' customary international legal obligations, some United States courts have construed certain constitutional provisions effectively to allow for violations of customary international legal and *jus cogens* norms that emerged after the ratifications of the Constitution and its Amendments. Therefore, these judicial constructions are unconstitutional because the relevant constitutional provisions were not construed in conformity with the United States' customary international legal or *jus cogens* obligations.²¹¹ It is important to note that although certain

arrangements with supranational body trumps customary international law governing relations only between states); *cf. UN Charter*, art. 103 (obligations under global *UN Charter* prevails over any other treaty obligation).

210. *Vienna Convention*, art. 53 (*jus cogens* trumps treaty); *see* Martin, *Delineating*, *supra* note 201, at 352, 359, 362-63 (discussing greater normative objectivity of global norms).

211. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, art. 47, 16 I.L.M. 1391 (entered into force Dec. 7, 1979) (prohibiting mercenaries); Judicial Guarantees in States of Emergency (Arts. 27(2), 25, and 8 of the American Convention on Human Rights), Advisory Opinion OC-9/97, Inter-Am. Ct. H.R. (Ser. A) No. 9 (1987) (habeas corpus cannot be suspended during national emergencies); Statehood Solidarity Committee v. United States, Case 11.204, Report No. 98/03, Inter-Am. C.H.R., OEA/Ser.L/V/II.114 Doc. 5 rev. 1 at xx (2003) (denial of District of Columbia residents right to vote in congressional elections violative of right to vote guaranteed under the American Declaration on the Rights and Duties of Man).

Another example is of juvenile executions. The United States Supreme Court has held that the execution of persons committing capital crimes under the age of eighteen is not prohibited by the Eighth Amendment. *Stanford v. Kentucky*, 492 U.S. 361 (1989). Customary international law and *jus cogens* prohibit such executions. *See, e.g., ICCPR*, art. 6 (5); *Pinkerton and Roach v. United States*, Inter-Am. Comm. H.R. No. 3/87, ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS: 1986-87, OEA/Ser.L/V/II.71/doc.9 147 (1987) (execution of persons committing capital crimes under the age of 18 held violative of *jus cogens*). Although the United States deposited a reservation to the *ICCPR* stating that it could impose capital punishment on persons committing crimes below the age of eighteen, the reservation was not valid because it violated extant customary international law and *jus cogens*. Issues relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in relation to Declarations under Article 41 of the Covenant: 04/11/94, General Comment 24, 52d Sess., ¶¶ 8 and 10, UN Doc. CCPR/C/21/rev.1, add.6 (1994) ("provisions in the Covenant that represent customary international law. . . may not be the subject of

textual provisions in the Constitution arguably may violate present customary international law in general, those textual provisions can be considered evidence of the United States' persistent objection to those norms when they were emerging; hence the United States is not bound by these new customary international legal norms. For example, the constitutional authority to issue letters of marque and reprisal (art. I, § 8, cl. 11), to suspend the writ of habeas corpus (art. I, § 9, cl. 2), and to effectively deny United States citizens residing in the District of Columbia the right to elect representatives to the House and Senate (art. I, § 8, cl. 17) represent persistent objections to norms that subsequently may have emerged as customary international law.

However, customary international law often will be silent on a particular issue, providing no *lex specialis* to apply. In such cases, the already existing, substantial body of constitutional jurisprudence will fill the vacuum, and it is only appropriate that it should because this jurisprudence is also international law, albeit only a regional American international law.

5. Three Mysteries of Constitutional Faith and the Primacy of Customary International Law for Constitutional Construction.

Such regional American international law has developed general principles of constitutional construction – such as federalism, separation of powers, and “the living Constitution.” Theories of constitutional construction that rely upon the “living Constitution” principle use extra-constitutional authorities that are often far removed from period of the Constitution's drafting because in order for the Constitution to be “living” it must be construed using modern sociological, political, and/or moral authorities in order to ensure its adaptation to current social, legal, and political conditions, and/or to be morally responsive.²¹² Theories of constitutional construction that

reservations” and state-party bears “heavy onus” in justifying reservation to peremptory treaty norm). Furthermore, the reservation was deposited too late because the customary international law norm that Article 6 (5) reflects already had emerged. MARTIN, CHALLENGING, *supra* note 9, at 153. Therefore, such executions are unconstitutional because they conflict with the United States' customary international legal obligations.

212. Such theorists generally are associated with the loose-constructionist schools of legal realism (and its sub-genre of critical legal studies), and moralist or naturalist theories. *See, e.g.*, BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991) (arguing that three great transformative movements of constitutional law and politics (called “constitutional moments”) were characterized by legal creativity bordering on illegality but were authentic response to political crises and eventually legitimized by American people); RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996) (arguing for moral reading of Constitution and criticizing strict

predominantly rely upon the principles of federalism and separation of powers use extra-constitutional authorities more closely associated with the period of the Constitution's framing because federalism and separation of powers are issues that deeply concerned the Founding generation and accordingly are reflected in the Constitution's text and structure.²¹³

These general principles are plastic allowing adaptability to new situations and, thereby maintaining the Constitution's viability. However, such plasticity often allows judges to make law often in an arguably arbitrary, case-by-case fashion according to their personal social or political predilections with little democratic accountability. On the other hand, contemporary customary international law is less plastic because most of it is codified in multilateral treaties. This law accommodates these general principles as well as provides greater determinacy often resolving dilemmas and controversies associated with the use of these general principles. Also, this modern customary international law generally has been developed through the democratically accountable branches of governments – including the United States.²¹⁴ For these reasons, the law of nations acquires

historical reading of Constitution); SANFORD V. LEVINSON, *CONSTITUTIONAL FAITH* (1988) (arguing for critical legal studies interpretation of Constitution); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 883 (1996) (deciding cases by reasoning from precedent rather than by appealing to constitutional text). However, some of these theorists increasingly identify themselves with the originalist camp. See, e.g., BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991).

213. Such theorists generally are associated with the strict-constructionist schools of textualism and originalism. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA* 4 (1997) (Constitution's text mandates separation of powers and federalism); JOHN HART ELY, *DEMOCRACY AND DISTRUST* 73-104, 116-79 (1980) (arguing for construction of open-ended constitutional provisions with predominant, textually-based values of procedural fairness and representative democracy); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001) (original understanding of constitutional text derived from, e.g., *THE FEDERALIST PAPERS*, debates from the Constitutional Convention and state constitutional convention); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 INDIANA L. J. 10 (1971) (Constitution should be construed according to original understanding of Constitution derived from Constitution's text, structure, and history). These schools often reject an evolving construction of the Constitution. However, some members of these schools increasingly are recognizing that meaning of constitutional provisions should be evolving. See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989) (embracing "faint-hearted originalism" with a "trace of constitutional perfectionism").

214. Furthermore, the substantive norms of international law demand democratic accountability. See, e.g., *ICCPR*, art. 25 (right to vote and elect representatives); *ACHR*, art. 23 (same). Furthermore, individual rights guarantees in international human rights law often may only be limited if "necessary in a democratic society." *ICCPR*, art. 22 (2) (right to association); *ACHR*, art. 16 (2) (same); see also *ECHR*, art. 10 (2) (right to freedom of expression). Finally, in applying international law, the Statute of the

primacy over such general principles for constitutional construction.

To claim that the Constitution is viable commits one to a belief in three mysteries of constitutional faith whose resolutions often are only obtainable by placing primacy on modern customary international law for construing the Constitution. In the following illustrations, we examine how using customary international law often resolves and transcends these three mysteries: federalism as *koan*, separation of powers as *trimurti*, and “the living Constitution” as *eschaton*.

5.1 The “Living Constitution” as *Eschaton*

A general principle of Constitutional construction is the “living Constitution” principle.²¹⁵ It is a mystery of Constitutional faith because it paradoxically incorporates both the fulfillment and evolution of the Constitutional covenant by creating and sustaining the American body politic. However, like the meaning of *eschaton* in Christianity, the meaning of the “living Constitution” is subject to debate.²¹⁶ Were the meanings of the Constitution and its Amendments perfected at their respective ratifications, or is the Constitution’s and Amendments’ meanings evolving?

For example, the “evolving standards” test articulated by *Trop v. Dulles* for Eighth Amendment cases under the “living Constitution” principle has been especially criticized for its apparent indeterminacy and sometime reliance upon international law.²¹⁷ Mr. Justice Scalia has argued that the evolving standards doctrine is indeterminate. The doctrine allows the Constitution to become a “sort of an empty bottle that contains the aspirations of the society, just all sorts of wonderful aspirations, the precise content of which is quite indeterminate.”²¹⁸

However, an evolving standards doctrine based on modern customary international law is not indeterminate because most

International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1005, T.S. 993, places politically non-accountable judicial decisions in the subordinate position of being only a subsidiary means of interpretation.

215. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (“we must never forget, that it is a constitution we are expounding”).

216. When Christ said, “the kingdom of God is at hand,” did he mean that it was coming or already had come? Mark 1:15 (King James Version). Was the *eschaton* the resurrection of Christ, or will the *eschaton* take place in the future?

217. See 356 U.S. 86, 101 (1958) (Eighth Amendment “must draw its meaning from the evolving standards of decency.”).

218. Antonin Scalia, “A Theory of Constitutional Interpretation,” remarks delivered at The Catholic University of America Washington, D.C. Oct. 18, 1996, available at <http://courttv.com/legaldocs/rights/scalia.html> (last visited Feb. 15, 2003).

principles of customary international law have been codified in multilateral treaties. This conventional customary international law is comprehensive and specific, discouraging rule plasticity and indeterminacy. For example, in the case of the Eighth Amendment prohibition of “cruel and unusual punishment,” the rights to life and humane treatment under international human rights law has articulated specific prohibitions, including prohibitions against juvenile executions and execution by gas asphyxiation.²¹⁹ Recently, the Missouri Supreme Court has held that the execution of persons committing capital crimes under the age of eighteen violated the Eighth Amendment’s prohibition of “cruel and unusual punishment” as considered in light of international opinion, citing the *Convention on the Rights of the Child*.²²⁰

Furthermore, an evolving standards doctrine based on conventional customary international law incorporates and complements principles of evolutionary development.²²¹ For example, the *ECHR* reflects customary international law²²² and democratic accountability²²³ while at the same time guaranteeing that individual rights are not eroded by tyrannical popular majorities exercising

219. *ICCPR*, art 6 (5) (prohibiting death penalty for persons committing crimes under age of eighteen); *Ng v. Canada*, Communication No. 469/1991, UN Hum. Rts. Ct., 98 I.L.R. 479 (1993) (execution by gas asphyxiation violative of right to humane treatment). The United States is a party to the *ICCPR*. MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY GENERAL: STATUS AS OF 31 DEC. 1992, at 132, U.N. Doc. ST/LEG/SER.E/11 (1993) [hereinafter MULTILATERAL TREATIES].

220. *See* *State ex rel. Simmons v. Roper*, 112 S.W. 397, 411 (2003 Mo.), *cert. granted*, 124 S.Ct. 1117 (U.S. Jan. 26, 2004). (“We also find of note that the views of the international community have consistently grown in opposition to the death penalty for juveniles. Article 37(a) of the United Nations Convention on the Rights of the Child and several other international treaties and agreements expressly prohibit the practice.”).

221. *See* *Bankovic and Others v. Belgium and Others*, Application No. 52207/99 (2001) (discussing evolutive technique for interpreting European Convention on Human Rights); Paul Mahoney, *Judicial Activism and Judicial Restraint in the European Court of Human Rights*, 11 HUM. RTS. L. J. 57 (1990) (“The function of the [*ECHR*], like that of the American Constitution...is ‘to provide a continuing framework...for the unremitting protection of individual rights and liberties.’ This special purpose and object, and thus the intention of the drafters, would be largely defeated if the Court could not interpret the [*ECHR*] in the light of present-day conditions.”).

222. *See* *Rodriguez Fernandez v. Wilkinson*, 505 F. Supp. 787, 797 (D. Kan. 1980) (*ECHR* “indicative of the customs and usages of civilized nations”); RESTATEMENT, *supra* note 6, at ¶ 103 (2) (a) comment b; Francisco Forrest Martin, *Using International Human Rights Law for Establishing a Unified Use of Force Rule in the Law of Armed Conflict*, 64(2) SASK. L. REV. 347, 388-91 (2001) (*ECHR* reflects global customary international law).

223. *See supra* note 214.

legislative power.²²⁴

The “evolving standards” doctrine also has been criticized when international legal standards are used. In *Atkins v. Virginia*, Mr. Chief Justice Rehnquist argued against the plurality Court’s reliance on international laws in *Trop* because the Court offered no justification for such reliance. He argued that the “bare citation of international laws by the *Trop* plurality as authority to deem other countries’ sentencing choices germane” was invalid because “the viewpoints of other countries simply [were] not relevant” for establishing evidence of a national consensus regarding sentencing practices for the United States.²²⁵

However, Mr. Chief Justice Rehnquist appears to have misunderstood how the *Trop* Court’s citation of the sentencing practices of other nations and international law should have functioned. The sentencing practices of other nations in their domestic laws and treaties serve as evidence of customary international law. Such customary international law was not necessarily merely *foreign* law. Such law effectively reflected the United States’ customary international legal obligations, with which the Eighth Amendment should have been construed in conformity.²²⁶

Furthermore, the inherent evolving nature of customary international law accommodates the “living Constitution” principle and, more specifically, the evolving standards test. As early as 1796, the United States Supreme Court recognized the evolving nature of the law of nations.²²⁷ It is important to note that much of the law of nations is mutable. Only what Vattel calls the “necessary law of nations” is immutable because of its identification with natural law.²²⁸

224. See *ECHR*, art. 60 (“Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party.”); see also *ICCPR*, art. 5 (2) (“There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.”).

225. 536 U.S. 304, 325 (2002) (Rehnquist, C.J., dissenting).

226. The United States did not signal its objection to the customary international legal norm prohibiting the execution of juveniles reflected in the *ICCPR* until 1992 – after the norm already had emerged and been accepted by the United States. MARTIN, CHALLENGING, *supra* note 9, at 152.

227. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796) (distinguishing between ancient and modern law of nations).

228. VATTEL, *supra* note 6, *Preliminaries*, at § 8 (“Since therefore the necessary law of nations consists in the application of the law of nature to states, which law is immutable,

Later, the United States court of appeals in *Filártiga v. Peña-Irala*²²⁹ incorporated this understanding by rejecting the lower district court's claim that customary international law did not extend to a state's treatment of its own nationals on the basis that this claim was outdated customary international law.²³⁰

Therefore, the Constitution is an "eschatological" instrument whose meaning is both determinate and evolving if it is construed according to modern customary international law. The customary dichotomization of originalism and the "living Constitution" concept collapses when one recognizes that the Founders viewed the Constitution as a treaty that must be construed in conformity with customary international law that itself was evolving.

5.2 Separation of Powers as *Trimurti*

Another general principle of constitutional construction is the separation of powers principle. It holds that the three branches of the federal government cannot usurp the respective powers of another branch nor surrender their respectively exclusive powers to another branch.²³¹ Associated with this general principle is the execution doctrine.²³² However, this principle creates a constitutional conundrum – another mystery of constitutional faith. For example, how can the separation of powers principle allow constitutional amendments, treaties, or statutes be created yet not sustained sometimes as self-executing? One is reminded of the Hindu mystery of *trimurti*: the tripartite personality yet unitary substance of God. How can God create, sustain, and destroy at the same time?²³³

as being founded on the nature of things, and particularly on the nature of man, — it follows that the *Necessary* law of nations is *immutable*." (emphases in original)); see also BURLAMAQUI, *supra* note 73, vol. I, pt. II, ch. VI, § IX (1748) (one kind of law of nations is "universal, necessary, and self-obligatory — and differs in nothing from the law of nature, and is consequently immutable").

229. 630 F.2d 876, 884-85 (2d Cir. 1980).

230. Furthermore, the district court was incorrect in claiming that customary international law did not create duties for a state to protect its own nationals. See *supra* Part 3.

231. See, e.g., *Clinton v. City of New York*, 524 U.S. 417 (1998) (statute allowing line-item veto held unconstitutional as violation of separation of powers principle).

232. Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 717 (1995) [hereinafter Vázquez, *Four Doctrines*]. However, the execution doctrine is not necessarily a separation of powers doctrine. Legal instruments – whether United States, foreign, or international – often require implementing law to give the instrument effect.

233. The *trimurti* is the Hindu trinity of gods consisting of Brahma the creator, Vishnu the preserver, and Shiva the destroyer. A theological parallel is that of the Christian

A treaty, constitutional provision, or statute sometimes requires an additional law (such as a statute, executive or administrative agency order, or judicial order) in order to give the instrument effect because the instrument needs further definition.²³⁴ Sometimes a statute is needed to provide a private cause of action for the violation of a constitutional provision.²³⁵ The instrument also may require additional action from another branch or sub-branch of the government. For example, Congress often must enact implementing legislation to set penalties for treaty violations.²³⁶ Another example is that the House of Representatives must introduce appropriations legislation to implement federal law requiring funding.²³⁷

However, not all legal instruments require additional law for their execution. For example, many treaty and constitutional provisions are self-executing.²³⁸ Whether a legal instrument is self-executing turns on constitutional restraints, the language of the particular instrument,²³⁹ and/or the contemporaneous practice of the

Trinity: God, the Father; Jesus, the Son; and the Holy Spirit. It, too, creates a mystery of faith: how can Jesus, the begotten of the Father, beget himself? See NICENE CREED at ¶ 2 (c. 325) (“We believe in one Lord, Jesus Christ, the only Son of God, eternally begotten of the Father, God from God, . . . begotten, not made, of one Being with the Father.”).

234. *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997) (ambiguous federal statute); Vázquez, *Four Doctrines*, *supra* note 232, at 713-15 (ambiguous treaties).

235. See, e.g., 42 U.S.C. § 1983 (providing private cause of action for constitutional violations committed by state authorities).

236. See, e.g., “War Crimes Act of 1996,” 18 U.S.C. § 2441(a) (implementing penalty legislation for Hague and Geneva Conventions).

237. U.S. CONST. art. I, § 7, cl. 1.

238. See, e.g., *Bivens v. Six Unknown Named Agents*, 402 U.S. 388 (1971) (recognizing availability of damages relief for Fourth Amendment violations committed by federal authorities); *Bolling v. Sharpe*, 347 U.S. 497 (1954) (recognizing availability of injunctive relief for Fifth Amendment violations committed by federal authorities); *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833) (United States-Spain treaty provision self-executing).

239. The *Vienna Convention* states:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation

parties in the instrument's implementation.²⁴⁰ Use of the instrument's legislative history may only be used as a supplemental means of interpretation.²⁴¹

However, the execution doctrine becomes problematic when one tries to apply it by using a separation of powers doctrine extrapolated only from the text and structure of the Constitution. For example, when one tries to determine whether treaty provisions are self-executing or non-self-executing by appealing only to the text and structure of the Constitution, a dilemma results. The same dilemma results for customary international legal norms because treaties can serve as evidence of extant customary international legal norms or signal the acceptance of emerging customary international legal norms. On the one hand, to allow the President with the Senate to make self-executing federal law through their joint treaty making authority under Article II sometimes can appear to circumvent and usurp the House of Representative's essential role in lawmaking and intrude upon areas of lawmaking that historically have been assigned to both Houses under Article I. These areas include declaring war, raising taxes, and imposing criminal penalties. Such a construction of the treaty making power arguably violates the separation of powers principle. On the other hand, to allow Congress to make self-executing law that intrudes upon the President's and Senate's treaty making power also violates the separation of powers doctrine.²⁴²

of the treaty or the application of its provisions;

...

Vienna Convention, art. 31 (1)-(3).

240. *Vienna Convention*, art. 31 (3) (b) ("any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation"). As the Supreme Court stated in the context of constitutional construction:

The construction placed upon the Constitution by the first act of 1790, and the act of 1802, by the men who were contemporary with its formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight, and when it is remembered that the rights thus established have not been disputed during a period of nearly a century, it is almost conclusive.

Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57 (1884).

241. *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994); HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 840-41 (4th ed. 1996).

242. A construction using the Necessary and Proper Clause does not solve this dilemma. Congress may only enact legislation that is necessary and proper for executing treaties, but what is "necessary and proper" depends on how one interprets the separation of powers principle. If all treaties (regardless if their provisions are self-executing) require implementing legislation in order to avoid a separation of powers conflict, then this legislation is proper and necessary. On the other hand, if Congress cannot legislate in

Examples of such usurpation could take the form of statutes violating a previously ratified treaty or the form of statutes addressing any area in which treaties could govern.²⁴³ Therefore, both constructions of the separation of powers principle in relation to the self-execution or non-self-execution of treaties founders on the horns of a dilemma created by relying solely upon the text and structure of the Constitution.²⁴⁴

Consider another related separation of powers dilemma. Take the example of the Senate conditioning its consent to a treaty on the acceptance of a reservation that certain treaty provisions are non-self-executing.²⁴⁵ On the one hand, the Constitution makes no mention of conditional consent. Either two-thirds of the Senate gives its consent to a treaty, or it does not; therefore, such conditional consent arguably could be a violation of the separation of powers principle.²⁴⁶ Furthermore, if the reservation requires a certain interpretation of the treaty, the reservation arguably would run afoul of the judicial branch's final authority to interpret federal law.²⁴⁷ If the Senate's

areas already covered by the treaties made under the authority of the President and Senate, any legislation that attempts to usurp or circumvent these treaties violates the separation of powers principle, and such legislation is neither necessary or proper.

243. One easily can imagine a vague federal trade statute that would require a trade treaty to give the statute definition. Indeed, the *Charming Betsy* Rule requires that federal statutes be construed in conformity with United States treaty obligations. *Weinberger v. Rossi*, 456 U.S. 25 (1982).

244. Even an appeal to democratic accountability and state equality as the underlying justifications for the separation of powers principle does not get one off the horns of this dilemma. Both a Presidential/Senatorial exclusive treaty-making power and an extension of Congressional lawmaking power to international affairs are subject to democratic accountability and state co-equality. Both constructions of the execution doctrine incorporate state co-equality and at least different but roughly equal measures of democratic accountability. The plenary treaty making power is checked by the state equality in the Senate and by the people in a President elected by an electoral college whose members are chosen according to the numbers of citizens in each state. The extension of Congressional lawmaking power to international affairs is also checked by state equality in the Senate as well as by the people in the House of Representatives whose members are elected according to the numbers of citizens in each state. Therefore, both Presidential/Senatorial and Congressional authorities have equal claims to reflecting democratic accountability and state equality that do not resolve whose lawmaking authority trumps the other.

245. *See, e.g.,* U.S. Reservations, Declarations, and Understandings to the International Covenant on Civil and Political Rights, 138 Cong. Rec. S4783-4 (daily ed., April 2, 1992) (declaring that substantive individual rights provisions in articles 1-27 of ICCPR as non-self-executing).

246. *Cf. Clinton v. City of New York*, 524 U.S. 417 (1998) (Presidential line-item veto held unconstitutional.)

247. *Cf. City of Boerne v. Flores*, 521 U.S. 507 (1997) (judicial branch has exclusive final authority in interpreting Constitution).

reservation requires the President to submit this reservation upon the treaty's ratification, the Senate's reservation arguably would intrude upon the President's ratification authority.

On the other hand, the Constitution is designed to ensure efficient lawmaking. For example, the Constitution allows the Senate to propose amendments to appropriations bills which do not originate in the Senate but are still subject to the Senate's consent for becoming law.²⁴⁸ This process is designed to avoid inefficiency resulting from reintroduction of appropriations bills whose earlier versions did not meet conditions for Senate approval. It would appear that the treaty making process should also reflect such efficiency by allowing the Senate to condition its consent to a treaty by way of submitting a reservation to ensure that the treaty's implementation is consistent with Senate intent. Hence, applying a separation of powers principle based merely on the text and structure of the Constitution creates constitutionally internal contradictions by both allowing and disallowing the Senate to condition its consent through the submission of reservations.

The solution to these constitutional conundrums is *not* to figure out where one branch's power ends and another begins. As earlier discussed, treaties and customary international law have superior legal authority over federal statutory law, and therefore, the treaty-making authority of the President and Senate must not be conceived as being able to intrude upon the House's inferior lawmaking role. Although international law often accommodates the separation of powers principle,²⁴⁹ the solution is to construe the Constitution in conformity with the United States' modern customary international law and treaty obligations.

In the case where a treaty (or customary international legal norm) is being used to construe a constitutional provision that is itself

248. U.S. CONST. art. I, § 7, cl. 1.

249. For example, the right to an impartial hearing under international human rights law requires the functional independence – but not necessarily formal separation – of the judiciary and political branches. *Procola v. Luxembourg*, 326 Eur. Ct. H.R. (ser. A) (1995); *see also*, *A. v. United Kingdom*, Application No. 35373/97, at § 77 (2002) (parliamentary immunity enjoyed by Minister of Parliament pursued legitimate aims of protecting free speech in Parliament and maintaining separation of powers between legislature and judiciary). International law provides states a degree of deference (known as the “margin of appreciation doctrine”) in fashioning their domestic measures of complying with their international legal obligations that is scaled according to, *inter alia*, the amount of interference with the particular human right. *See* Laurence R. Helfer, *Consensus, Coherence and the European Convention on Human Rights*, 26 CORNELL INT’L L.J. 133 (1993) (discussing margin of appreciation doctrine).

self-executing in the sense that it does not need a federal statute to provide a private cause of action, the issue of whether a treaty (or customary international legal norm) is self-executing is moot because it is not the treaty (or customary international legal norm) *per se* that is being implemented. The constitutional provision already provides a private cause of action, and the treaty (or customary international legal norm) is being used only for the provision's construction.

In the case of a constitutional provision that is non-self-executing in the sense that it requires definition or does not provide a private cause of action, the provision can become implemented by construing it in conformity with a treaty (or customary international legal norm). After all, the notion of non-self-execution means that the legal instrument requires action from a political branch of the government for the instrument to be implemented, and in the case of a non-self-executing constitutional provision, the President and Senate can take such action through their treaty-making authority.

In the case where a treaty (or customary international law) addresses a substantive area to which the Constitution does not speak (*e.g.*, space exploration), the norm is self-executing unless legislation is necessary for its execution. Such legislation could be that which provides, *e.g.*, needed clarification to the international law's provisions, a private cause of action for ensuring the international law's enforcement by persons whose rights have been violated, or appropriations for the execution of the international law's provisions. If such legislation arguably is necessary, then Congress is under as much a constitutional duty to enact such legislation as it is under a constitutional duty to execute other federal law – be it constitutional or federal statutory law. Indeed, under the Object and Purpose Rule, Congress' power “[t]o make all Laws which shall be necessary and proper for carrying into Execution” the treaty power, must be construed in conformity with the Constitution's Preamble, and the Preamble states that the Constitution's objects and purposes, *inter alia*, are to “establish Justice, provide for the common defence, [and] promote the general Welfare” – objects and purposes that often require Congress to enact laws.²⁵⁰ If Congress fails to do so, then there is a presumption that no legislation is needed, and the federal courts have the constitutional obligation to apply the international legal norm and – if a violation is found – fashion remedies. The constitutional authority of a federal court to perform a United States

250. *Vienna Convention*, 31(1) (object and purpose rule); U.S. CONST. pmbl., art. I, § 8, cl. 10, and art. I, § 9.

international legal obligation is acquired by construing its statutory jurisdictional grant in conformity with customary international law guaranteeing judicial remedies *per* the *Charming Betsy* Rule.²⁵¹ At the very least, the performance of such international legal obligations by federal courts would include a declaration that the United States has failed to comply with its international legal obligations. Also, the court must award monetary damages, the quantum of which would depend on the measure of harm incurred by the victim. Further relief, such as punitive damages, criminal prosecution, and other injunctive relief, will depend on the factual circumstances of the case and the limits of the United States' international legal obligations.

Even in cases where a treaty (or customary international law) addresses a subject over which Congress has been given the specific authority, *e.g.*, under Article I, Section 8 to legislate (*e.g.*, declaring war, taxation, defining and punishing offenses against the law of nations) or under the Fourteenth Amendment to enact implementing legislation,²⁵² there is no constitutional requirement for implementing legislation – unless such legislation is necessary. If such legislation is arguably necessary, then Congress is under a constitutional obligation to enact proper legislation. Again, if Congress fails to do so, then there is a presumption that no legislation is needed, and the federal courts are free to apply the treaty (or customary international legal norm) and fashion remedies. This conclusion even extends to cases in which the House of Representatives has the exclusive authority to introduce appropriations bills. If the House has failed to introduce

251. See *infra* note 257 (discussing customary international law guaranteeing effective judicial remedies); see, *e.g.*, 28 U.S.C. § 1331 (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”); *Murray v. the Schooner Charming Betsy*, 6 U.S. (2 Cranch.) 64, 118 (1804) (federal statutory law must be construed in conformity with customary international law).

However, the U.S. Supreme Court recently in *Sosa v. Alvarez-Machain* noted in dicta that federal question jurisdiction under 28 U.S.C. § 1331 might not be available for customary international law claims. – U.S. – n.19, 124 S.Ct. 2739, 159 L. Ed. 2d 718 (2004) (dicta). However, the Court failed to consider the *Charming Betsy* Rule’s application to such jurisdictional statutes that would provide a statutory construction requiring the recognition of jurisdiction for individual claims. And, because other customary international legal norms also must be used to construe the substantive constitutional rights, individuals would have a private cause of action under those federal statutes (*e.g.*, 42 U.S.C. § 1983) or judicial remedies (*e.g.*, *Bivens v. Six Unknown Named Agents*, 402 U.S. 388 (1971) (recognizing private cause of action for constitutional violations)) that implement such constitutional rights.

252. See U.S. CONST. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).

appropriations necessary for the execution of the United States' international law obligations, then a state or individual victim can sue in federal court and obtain a money judgment against the United States.

In the case of the proper reach of the Senate's treaty making authority in the context of conditional consents, the solution is to conceptualize the Constitution as treaty, and as a treaty, the Constitution becomes "amenable to the law of nations."²⁵³ Customary international law establishes that the conclusion of a treaty can be invalidated by a party on the basis of error or fraud.²⁵⁴ Evidence of such error or fraud could be established by an interpretive declaration submitted by the President and/or Senate. Otherwise, the ordinary meaning of the treaty's terms in their context and in light of the treaty's object and purpose governs. However, if the interpretation given by one of the state-parties to the treaty conflicts with the ordinary meaning of the treaty or clearly violates the treaty's object and purpose, the interpretation is just not valid. Hence, an interpretive reservation made by the Senate (or President) that conflicts with the meaning of the treaty or violates the treaty's object and purpose is not valid.²⁵⁵ For example, if the reservation states that a provision in a human rights treaty will not be self-executing by providing a private cause of action, the reservation may not be valid²⁵⁶ because states must provide individuals with an effective and sufficient domestic judicial remedy under international human rights law.²⁵⁷ Although, generally speaking, international law often allows

253. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).

254. *Vienna Convention*, arts. 48 (error) and 49 (fraud).

255. *Vienna Convention*, art. 19(c).

256. *See Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961) ("While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight."). However, the Supreme Court has rejected interpretations that clearly conflict with the language of the treaty. *Id.* at 192 ("This Court has many times set its face against treaty interpretations that unduly restrict rights a treaty is adopted to protect.").

257. International law generally requires that states provide full reparations, including money damages and, if necessary, injunctive relief when they have committed an illegal act. *See Chorzow Factory Case*, 1928 P.C.I.J. (ser. A) No. 17, at 47 (13 Sept.) (recognizing *restitutio in integrum* principle). International human rights law guarantees that individuals have a remedy enforceable in domestic courts. For example, the International Covenant on Civil and Political Rights states:

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be

states to exercise a certain amount of discretion in fashioning how they provide a domestic remedy for international legal violations, international human rights tribunals have strictly limited this deference and have required a judicial remedy because other remedies (such as those provided by the political branches) are most often ineffective and/or inadequate and a judicial remedy is the only remedy that can provide complete restitution.²⁵⁸ For example, in cases where individuals have committed gross human rights violations,

necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted.

ICCPR, art. 2 (2)-(3); *see* UN Hum. Rts. Ctte., General Comment No. 24 (52), General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, §§ 3 and 12, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994) (state-party cannot make reservation denying remedy – including judicial remedy – for human rights violations).

The American Convention on Human Rights states:

Article 25. RIGHT TO JUDICIAL PROTECTION.

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

2. The States Parties undertake:

- a. To ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
- b. To develop the possibilities of judicial remedy; and
- c. To ensure that the competent authorities shall enforce such remedies when granted.

ACHR, art. 25. *See* MARTIN, CHALLENGING, *supra* note 9, at 77-78 (discussing individual's right to remedy entails judicial remedy).

258. *See, e.g.*, *Anguelova v. Bulgaria*, Application No. 38361/97, Eur. Ct. H.R. at § 161 (2002) (states allowed “some discretion” as to how they provide remedy to individuals for international law violations); M.J. BOSSUYT, GUIDE TO THE “TRAVAUX PRÉPARATOIRES” OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 67 (1987); *Darmburg v. Suriname*, Case No. 10.117, Res. No. 19/89, Inter-Am. Cm. H.R. 138, OEA/ser.L/V.II.76, doc. 10 (1988-89); *Tumilovich v. Russia*, Application No. 47033, Eur. Ct. H.R. (1999) (domestic remedy depending on discretionary powers do not constitute effective domestic remedy).

international human rights law creates an affirmative state duty to punish such persons.²⁵⁹ Only a judicial remedy could provide the required punishment of individuals committing such human rights violations. If the reservation violates extant customary international law or *jus cogens*, then the reservation is invalid because the political branches are violating the Constitution as construed according to customary international law or *jus cogens*.²⁶⁰

Finally, another associated separation of powers principle is the "political question" doctrine that states that the judicial branch cannot examine a decision that is exclusively committed to the political branches. The political question doctrine also is controversial because it sometimes arguably gives the President plenary authority when acting in his/her foreign capacity role that is beyond the reach of both the Congress and the federal courts. However, construing the Constitution in conformity with customary international law can both maintain and restrain the President's authority in international affairs in a determinate fashion. For example in *Goldwater v. Carter*,²⁶¹ three members of the Supreme Court's majority based their dismissal of a challenge to President Carter's unilateral termination of United States-Taiwan defense treaty on political question grounds (and one member based the dismissal on grounds that the suit was not ripe).

However (putting aside the issue of ripeness), the Court could have addressed the merits because international law allows states unilaterally to terminate or suspend treaties when a fundamental

259. See, e.g., *Velásquez Rodríguez v. Honduras*, Inter-Am. Ct. H.R., Ser. C., No. 4 at ¶ 172 (1988) (state affirmative duty to punish rights to life and humane treatment); *Celis Laureano v. Peru*, U.N. Doc. CCPR/C/56/D/540/1993 (1996) (views adopted March 25, 1996) (state affirmative duty to punish violations of rights to life, humane treatment, and liberty and personal security committed by state and non-state actors).

260. See *supra* notes 201-203. However, a reservation's invalidity does not abrogate the United States' customary international legal obligations under the treaty if the United States already effectively has acquiesced to the treaty's norms through, e.g., its signature to the treaty. A way in which a state arguably could lawfully make a reservation to a customary international legal norm in a treaty is if the treaty creates an enforcement organ and if the reservation is interpreted to mean only that the state-party does not recognize the organ's competence to interpret the norm in regard to claims against the state-party. See UN Hum. Rts. Ctte., General Comment No. 24 (52), General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, § 17, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994) ("The principle of inter-State reciprocity has no place, save perhaps in the limited context of reservations to declarations on the Committee's competence" to consider inter-state complaints.); *Belilos v. Switzerland*, 10 E.H.R.R. 466 (1988) (de Meyer, J., concurring).

261. 444 U.S. 996 (1979).

change of circumstances has taken place,²⁶² and such a fundamental change of circumstances had taken place when the United States and the UN recognized the Peoples' Republic of China (and not Taiwan) as the legitimate government of China. Taiwan was no longer recognized as a sovereign state that lawfully could exercise self-defense under *UN Charter*²⁶³ against invasion by the Peoples' Republic of China. The United States-Taiwan mutual defense treaty, however, required both parties to "maintain and develop their individual and collective capacity to resist armed attack and communist subversive activities directed from without against their territorial integrity and political stability."²⁶⁴ This was inconsistent with the Peoples' Republic of China's legitimate claims over Taiwan. Hence, the United States-Taiwan treaty was no longer valid.

However, the separation of powers principle upon which the political question doctrine is based, cuts both ways. The separation of powers doctrine prohibited President Carter from terminating the treaty because it would have intruded upon the Senate's role in making the treaty and the Constitution does not expressly say that a President can terminate a treaty. On the other hand, the President's foreign affairs authority under the Constitution would have allowed him to withdraw state recognition of Taiwan and the consequent nullification of the treaty.²⁶⁵

Again, the solution is to construe the Constitution (specifically, the President's foreign affairs authority) in conformity with customary international law. President Carter constitutionally could have terminated the treaty because he properly would have been "faithfully" executing federal law by terminating a treaty that was no longer lawful under the United States' treaty and customary international legal obligations.²⁶⁶ He would not have been exercising some vague foreign affairs authority that was judicially extracted from the political question doctrine that cuts both ways.

In conclusion, ILC allows us to do an "end-run" around these execution and political question dilemmas. This interpretive move

262. *Vienna Convention*, art. 62.

263. *UN Charter*, art. 51.

264. Mutual Defense Treaty Between the United States of America and the Republic of China, Dec. 2, 1954, art. II, T.I.A.S. 3178; 6 U.S.T. 433-438 (entered into force Mar. 3, 1955).

265. *Goldwater v. Carter*, 444 U.S. 996, 1007 (Brennan, J., dissenting).

266. See U.S. CONST. art. II, § 1, cl. 8 (duty to "faithfully execute the Office of the President").

releases us from the internally contradictory constraints of a separation of powers principle that relies solely upon the Constitution's text and structure. First, the claim that treaties (or customary international law) are unenforceable in United States courts absent an express statement to the contrary or implementing legislation²⁶⁷ is effectively mooted because the determination of whether such treaties (or customary international law) are enforceable is not exclusively tied to the Constitution's ambiguous text and structure but also is tied to customary international law – the appropriate source of law for construing Constitution as a treaty. In the case of treaties requiring an express statement that the treaty is self-executing, such a statement is effectively not required when customary international law (as reflected in treaties or judicial decisions construing such treaties) already speaks to the matter.²⁶⁸ In cases where constitutional text is being construed with a treaty (or customary international law), implementing legislation is not required. It is not legally relevant if the treaty (or customary international law) requires implementing law (for it to be enforced by United States courts) in order for the treaty (or customary international law) to, in turn, be used to construe the Constitution's text. Such treaty law (or customary international law) is not being implemented *per se*.²⁶⁹ The relevant issue is whether the particular

267. See Yoo, *Globalism*, *supra* note 21; Yoo, *Rejoinder*, *supra* note 21.

268. Cf. *Warren v. United States*, 340 U.S. 523, 526-28 (1951) (no Act of Congress required to guide enforcement of treaty provisions because judicial decisions provided sufficient definition to treaty provisions).

269. Indeed, under customary international law governing treaties, courts sometimes can construe a treaty in conformity with other treaties that do not share any states-parties with the treaty being construed and, hence, do not constitute binding law for a party to the treaty being construed. See, e.g., *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. 16, 31 (1971) (“an international instrument must be interpreted and applied within the *overall* framework of the [international] juridical system in force” (emphasis provided)); *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. Ser. A, No. 10, at ¶ 37 (1989) (same). The Inter-American Court of Human Rights has recognized that even non-Inter-American treaties properly can be used to complement and construe Inter-American treaties.

The need of the regional system to be complemented by the universal finds expression in the practice of the Inter-American Commission on Human Rights and is entirely consistent with the object and purpose of the Convention, the American Declaration and the Statute of the Commission. The Commission has properly invoked in some of its reports and resolutions “other treaties concerning the protection of human rights in the American states,” regardless of their bilateral or multilateral character, or whether they have been adopted

Constitutional provision itself is self-executing. For some constitutional provisions, no implementing legislation is required, *e.g.*, to provide definition to the provision, a private cause of action for its violation, or some other action constitutionally addressed to another branch of the federal government. For example, the United States Supreme Court has held that the human rights guarantees contained in the first eight Amendments to the Constitution are self-executing in the sense of not constitutionally requiring a private cause of action.²⁷⁰ Accordingly, these constitutional rights – even if construed according to treaty or customary international legal norms – still are self-executing. Even in cases where constitutional provisions require implementing legislation to provide definition, such provisions do not need such implementing legislation if they have been construed in light of a treaty (or customary international law or any other extra-constitutional authority). The issue of whether the constitutional provision is self-executing or not is made moot by this international legal construction. In cases where Congress has arguably failed to fulfill its constitutional duty, as construed by the Object and Purpose Rule, to provide necessary implementing legislation for a treaty (or customary international legal norm), federal courts are free to apply the treaty (or customary international legal norm) and fashion remedies.

Second, this approach also does an end-run around the political question doctrine when the President acts in his foreign affairs capacity. Without conceptualizing the Constitution as a treaty, the President is restrained only if the federal courts believe that a case is not justiciable (on the basis, *e.g.*, of the political question doctrine) and only if the federal courts have text in the Constitution to interpret.²⁷¹ However, the Constitution as a treaty moots these issues

within the framework or under the auspices of the inter-American system.

“Other Treaties” Subject to the Consultative Jurisdiction of the Court (Art. 64 of the American Convention on Human Rights), Advisory Opinion OC-1/82, Inter-Am. Ct. H.R. (Ser. A) No. 1, at § 43(1982).

270. See *City of Bourne v. Flores*, 521 U.S. 507, 524 (1997) (“first eight Amendments to the Constitution set forth self executing prohibitions on governmental action”); *Bivens v. Six Unknown Named Agents*, 402 U.S. 388 (1971) (recognizing private cause of action for Fourth Amendment violations); *Bolling v. Sharpe*, 347 U.S. 497 (1954) (recognizing private right to injunctive relief for Fifth Amendment violations).

271. This approach also places greater constitutional restraints on Congress when Congress exercises its plenary legislative powers in, *e.g.*, the area of immigration. International law places limits on a state’s plenary power to control its borders. See, *e.g.*, Protocol I Relating to the Status of Refugees, Jan. 31, 1967, 660 U.N.T.S. 195 (entered into force Oct. 4, 1967).

because the President's foreign affairs authority *per* the Constitution as a treaty must be construed in conformity with this international law governing treaties that transcends the Constitution. Hence, the trinitarian mystery of the separation of powers is transcended.

5.3 Federalism as *Koan*

Another general principle of constitutional construction is the principle of federalism that recognizes that both the federal and state governments are limited under the Constitution.²⁷² However, construing the Constitution according to the principle of federalism is like the Zen *koan* of asking "what is the sound of one hand clapping?" The Ninth and Tenth Amendments do not list which powers and rights are retained and reserved respectively by the states and people. Conversely, the State Commerce, Taxation, and Spending Clauses often do not sufficiently detail how far Congress can reach into state matters when it exercises its lawmaking authority under Article I, Section 9.

For example, in 1976, the Supreme Court in *National League of Cities v. Usery*²⁷³ in a 5-4 decision held that the application of the minimum wage and overtime provisions of the Fair Labor Standards Act to state employees violated the Tenth Amendment and exceeded Congress' authority under the Interstate Commerce Clause by intruding into "areas of traditional [state] governmental functions." However, the Court did not provide a principled analysis of which state governmental functions are traditional. As the Supreme Court would later say in *Garcia v. San Antonio Metropolitan Transit Authority*,

Our examination of this 'function' standard applied in these and other cases over the last eight years now persuades us that the attempt to draw the boundaries of state regulatory immunity in

272. U.S. CONST. art. I, § 9 (prohibiting certain Congressional acts) and art. I, § 10 (prohibiting certain state acts), and amends. XIX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."), X ("The 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."), and XI ("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 Foreign State."); *see also* *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 321 (1819) ("We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended.").

273. 426 U.S. 833, 852 (1976).

terms of 'traditional governmental function' is not only unworkable but is also inconsistent with established principles of federalism and, indeed, with those very federalism principles on which National League of Cities purported to rest.²⁷⁴

Nine years later, the Supreme Court again in a 5-4 decision overruled *National League of Cities in Garcia v. San Antonio Metropolitan Transit Authority*.²⁷⁵ The *Garcia* Court articulated a new test for establishing state governmental immunity from federal legislation by looking to the "procedural safeguards inherent in the structure of the federal system [rather] than by judicially created limitations on federal power."²⁷⁶ However, like the *National League of Cities* Court, the *Garcia* Court did not provide a principled analysis.²⁷⁷

Nine years later again, the Supreme Court again in a 5-4 decision in *United States v. Lopez* held that Congress exceeded its authority under the Interstate Commerce Clause by making it a federal offense to possess a firearm within 1,000 feet of a school. The activity outlawed by the relevant provisions of the federal statute did not have a "substantial relation to interstate commerce, . . . i.e., those activities that substantially affect interstate commerce."²⁷⁸ Possessing a firearm within 1000 feet of a school had nothing to do with commerce or any economic enterprise. However, exactly what is "substantial" will be left to judicial tinkering on a case-by-case basis that is particularly susceptible to the personal political or social whims of the individual justices. Indeed, the *Lopez* Court arguably conceded this when it said that its principles were "not precise formulations."²⁷⁹

In *United States v. Morrison*,²⁸⁰ the Supreme Court in another 5-4 decision held that the civil remedy provision of the *Violence Against Women Act of 1994* (VAWA)²⁸¹ unconstitutionally exceeded Congress' authority under both the Interstate Commerce Clause and the Fourteenth Amendment. The provision stated that "[a]ll persons within the United States shall have the right to be free from crimes of

274. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 532 (1976).

275. 469 U.S. 528 (1985).

276. *Id.* at 552.

277. See *United States v. Lopez*, 514 U.S. 549, 564-65 (1995) (dissenting opinion does not provide principled exclusion of federal intrusion upon state activities).

278. *Lopez*, 514 U.S. at 559.

279. *Id.* at 567.

280. 529 U.S. 598 (2001).

281. 108 Stat. 1941-1942, codified at 42 U.S.C. § 13981.

violence motivated by gender.”²⁸² To enforce that right, the statute declared:

A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.²⁸³

The Supreme Court held that the provision exceeded Congressional authority under the Interstate Commerce Clause because the non-economic behavior addressed by the provision had only an “aggregate effect on interstate commerce.”²⁸⁴ The provision also exceeded Congressional authority under the Fourteenth Amendment because the provision also applied to violations perpetrated by non-state actors to which the Fourteenth Amendment purportedly does not apply.²⁸⁵

If the text and structure of the Constitution alone is insufficient for determining a case outcome that is not susceptible to judicial predilections and judge-made law, then one needs to go outside the text and structure, and construe our constitutional treaty in conformity with an authority that is less susceptible to these criticisms. Such an authority is modern customary international law. At the outset, it is important to note that international law often accommodates domestic federalism restraints. For example, the American Convention on Human Rights states:

1. Where a State Party is constituted as a federal state, the national government of such State Party shall implement all the provisions of the Convention over whose subject matter it exercises legislative and judicial jurisdiction.
2. With respect to the provisions over whose subject matter the constituent units of the federal state have jurisdiction, the national government shall immediately take suitable measures, in accordance with its constitution and its laws, to the end that the competent authorities of the constituent units may adopt

282. 42 U.S.C. § 13981(b).

283. 42 U.S.C. § 13981(c).

284. *Morrison*, 529 U.S. 598, 617.

285. *Id.* at 621.

appropriate provisions for the fulfillment of this Convention.²⁸⁶

Also, the State Commerce Clause at issue in the above cases sits between the Foreign Commerce and Indian Commerce Clauses, which address types of commerce that have been governed by international law.²⁸⁷ It is only appropriate that the law of nations should govern the proper construction of the Commerce Clause as a whole if coherence has any constructional value.

Furthermore, the State Commerce Clause does not strictly refer only to commerce “between” states. It refers to commerce “among the several States.”²⁸⁸ It is misleading to call the State Commerce Clause the “Interstate Commerce Clause” because the Clause does not deal only with “inter”-state commerce. The Clause does not strictly refer only to commerce “between” states. It refers to commerce “among the several States,” which indicates that it also includes only intrastate commerce. The use of the word “among” allows for the inclusion of commercial activities within a state.²⁸⁹ Congress constitutionally can make laws that are necessary “for the purpose of executing some of the general powers of the government.”²⁹⁰ One such general power is to execute treaty and customary international legal norms. Therefore, if the conduct of commerce that exclusively takes place within a state interferes with

286. *ACHR*, art. 28 (2)-(3). The United States has signed the *ACHR*, thereby indicating the United States’ acceptance of any regional customary international legal norms reflected therein. See FRANCISCO FORREST MARTIN, *ET AL.*, *INTERNATIONAL HUMAN RIGHTS LAW & PRACTICE: CASES, TREATIES AND MATERIALS (DOCUMENTARY SUPPLEMENT)* xvii (1997) (library edition).

Although the “may adopt” language of Article 28 (3) suggests that constituent units within a federal state retain a degree of discretion in choosing whether or not to “adopt appropriate provisions,” the Supremacy Clause in the United States Constitution explicitly eliminates this discretionary authority insofar as United States treaty obligations are concerned.

287. See, e.g., *Kansas v. Colorado*, 185 U.S. 125, 143 (1902) (international law governs relations between states); General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, April 15, 1994, 33 I.L.M. 1124 (entered into force Jan. 1, 1995) (trade treaty); Treaty with Arikara Tribe, July 18, 1825, 7 Stat., 259, in 2 *INDIAN AFFAIRS: LAWS AND TREATIES*, compiled and edited by Charles J. Kappler (Washington: Government Printing Office, 1904) (treaty governing commerce with Indians); but see 25 U.S.C. § 71 (1988) (prohibiting making of treaties with Indians after 1871).

288. U.S. CONST. art. I, § 8, cl. 3.

289. Also, compare the language of the Foreign Commerce Clause and its use of the word “with” (as opposed to “among”). The United States cannot regulate commerce “among” foreign nations – only “with” foreign nations.

290. *Gibbons v. Ogden*, 22 U.S. (Wheat.) 1, 195 (1824).

the compliance of the United States' treaty or customary international legal norms, then Congress can enact implementing legislation to regulate this exclusively intrastate commerce on the basis of the State Commerce Clause if it is construed in conformity with the United States' treaty or customary international legal obligations.

However, the more direct route would be to justify the federal legislation as implementing legislation pursuant to Congress' treaty authority and authority to define and punish offenses against the law of nations. Indeed, this approach is a necessary corollary of the Supreme Court's *Charming Betsy* Rule that requires federal statutes to be construed in conformity with the United States' international legal obligations. If there is a relevant international legal norm binding on the United States with which a federal statute can be construed, then the federal statute does not violate the principle of federalism because Congress was exercising its constitutional authority to enact legislation implementing international legal obligations that the United States had accepted through its exercise of the Article II treaty and Article I "define and punish" clauses.

Consider the aforementioned problematic federalism cases. In *National League of Cities* and *Garcia* in which employees' rights were at stake, international law creates affirmative state duties in ensuring protection of workers' rights and, accordingly, the appropriate outcome in these cases would have been one protective of such workers' rights. For example, the *Universal Declaration of Human Rights* guarantees that "[e]veryone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity."²⁹¹ The *International Covenant on Economic, Social and Cultural Rights* guarantees "fair wages" and a "decent living."²⁹² In enacting minimum and overtime wage

291. *UDHR*, art. 23(3). Although the *UDHR* arguably may not be self-executing in United States courts, the United States has recognized that it does reflect its customary international legal obligations because it was adopted unanimously by the UN General Assembly (including the U.S.) and has been recognized as reflecting United States customary international legal obligations by the federal courts. See *Sei Fuji v. State*, 38 Cal. 2d 718, 242 P.2d 617 (1952) (*UDHR* is non-self-executing); *Filártiga v. Peña-Irala*, 630 F.2d 876 (*UDHR* reflects customary international law).

292. Dec. 19, 1966, art. 7(a), 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter *ICESCR*]. Over 130 states are parties to the *ICESCR*, providing strong evidence of its customary international legal status. The United States also has signed the *ICESCR*, thereby indicating the United States' acceptance of any global customary international legal norms reflected therein. See *Multilateral Treaties on Deposit with the Secretary General*, (as of 30 Dec. 1999), available at

legislation, Congress constitutionally could have relied jointly upon both an international legal construction of the State Commerce Clause and its authority to define offenses against the law of nations, namely, the failure to provide fair and favourable wages and a decent living.²⁹³

In the case of a federal statute criminalizing the possession of firearms near schools, such as *Lopez*, the statute would be a constitutional exercise of Congress' authority to define and punish violations of the law of nations. Under international human rights law, states have an affirmative duty not only to prevent foreseeable violations of the rights to life and humane treatment perpetrated by private persons but also to punish such violations.²⁹⁴ International human rights law also provides special protection to children.²⁹⁵

<<http://untreaty.un.org/English/sample/EnglishInternetBible/partI/chapterIV/treaty4.asp>> (last visited 23 Aug. 2003).

293. Widely adopted multilateral treaties, such as the *ICESR* (and the customary international law that they reflect), must be construed liberally. *See* *Geofroy v. Riggs*, 133 U.S. 258, 271 (1890) (“It is a general principle of construction with respect to treaties that they shall be liberally construed so as to carry out the apparent intention of the parties to secure equality and reciprocity between them.”). Therefore, minimum wage and overtime legislation that implements the *ICESR*, which does not expressly mention minimum and overtime wage requirements, still would be an appropriate Congressional exercise of its legislative authority.

294. Under this customary international law, both federal and state governments have affirmative duties to prevent foreseeable homicides – even if committed by non-state actors. For example, the Inter-American Court of Human Rights in a case concerning the right to life stated the following:

The...obligation of the States Parties is to “ensure” the free and full exercise of the rights recognized by the [*ACHR*] to every person subject to its jurisdiction. This obligation implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must *prevent*...any violation of the rights recognized by the [*ACHR*]....

Velásquez Rodríguez v. Honduras, Inter-Am. Ct. H.R. (Ser. C) No. 4, at ¶ 166 (1988) (emphasis provided); *see also* *Osman v. United Kingdom*, 29 E.H.R.R. 245 (2000) (affirmative state duty to prevent foreseeable right to life violations committed by private actor); *Baustista de Arellana v. Colombia*, U.N. Doc. CCPR/C/55/D/1993 (1995) (views adopted 27 Oct. 1995) (state affirmative duty to punish violation of right to life); *cf.* *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 2524 (1996) (international human rights law creates duties for non-state actors).

295. *See, e.g.*, *Convention on the Rights of the Child*, 20 Nov. 1989, art. 6 (2), G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989) (entered into force Sept. 2, 1990) (“States Parties shall ensure to the maximum extent possible the survival and development of the child.”). The United States is a signatory to the *Convention on the Rights of the Child*. *See* *Multilateral Treaties on Deposit with the Secretary General*, (as of 30 Dec. 1999), available at <<http://untreaty.un.org/English/sample/EnglishInternetBible/partI/chapterIV/treaty15.asp>>

Therefore, a federal statute criminalizing the possession of firearms near a school would be proper and necessary for preventing foreseeable death and injury to children as guaranteed by the United States' customary international legal obligations.

In *Morrison*, the remedial provision of VAWA would have been found constitutional if the Fourteenth Amendment had been construed in conformity with the United States' customary international human rights legal obligations. International human rights law creates an affirmative state duty to provide a domestic judicial remedy²⁹⁶ for gender based violence²⁹⁷ even if committed by private individuals.²⁹⁸ Therefore, construing the Fourteenth Amendment's equal protection guarantee in conformity with this international human rights law would have resulted in a different outcome in *Morrison*, an outcome upholding the remedial provision of VAWA.²⁹⁹

> (last visited Aug. 23, 2003).

296. See *supra* note 257.

297. See *Rivas Quintanilla v. El Salvador*, Case 10.772, Report No. 6/94, ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1993, OEA/Ser.L/V/II.85 Doc. 9 rev. at 181 (1994) (state violated right to right to humane treatment by failing to investigate sexual assault on girl by state actor).

298. See *X & Y v. The Netherlands*, 91 Eur. Ct. H.R. (ser. A) (1985) (state violated right to privacy for failing to investigate sexual assault against female allegedly committed by non-state actor). Although the European Court of Human Rights' decision in *X & Y v. The Netherlands* was founded on a right to privacy (which generally does not necessarily entail state affirmative duties), sexual assaults also implicate *jus cogens* violations, namely, gender discrimination and inhumane treatment. See, e.g., *ICCPR*, art. 4(2) (rights against sex discrimination and inhumane treatment are non-derogable). Under international human rights and humanitarian law, *jus cogens* norms always require state affirmative duties to prevent, investigate, and punish their violations as well as to provide compensation when the state fails to do so. See, e.g., *Velásquez Rodríguez v. Honduras*, Inter-Am. Ct. H.R., Ser. C., No. 4 at ¶ 172 (1988) (state affirmative duty to prevent, investigate, and punish rights to life and humane treatment, and to provide compensation for state failure to do so); *Celis Laureano v. Peru*, U.N. Doc. CCPR/C/56/D/540/1993 (1996) (views adopted 25 March 1996) (state affirmative duty to investigate and punish violations of rights to life, humane treatment, and liberty and personal security committed by state and non-state actors, and to provide compensation for failure to do so).

299. Another federalism principle is the anti-commandeering doctrine. See, e.g., *Printz v. United States*, 521 U.S. 898 (1997) (interim provisions of Brady Handgun Violence Protection Act requiring state and local police to conduct background checks on prospective handgun purchasers in order to prevent unlawful possession of handguns by convicted felons or fugitives from justice held violative of Tenth Amendment). Preventive crime control laws – such as that at issue in *Printz* – could have been found a constitutional exercise of Congress' Article I, Section 8 authority to enact legislation necessary for punishing offenses against the law of nations that include violations of the right to life under the United States' customary international legal obligations. See *supra* notes 259 and 294. Congress constitutionally could have required state governments to conduct

This approach of recognizing the Constitution as a federal treaty does an end-run around the argument that the State Commerce Clause cannot reach activities that have no substantial affect on interstate commerce because this approach construes the State Commerce Clause within the complete international legal context of the Commerce Clause and, accordingly, in conformity with customary international law that may require implementing legislation. This approach also does an end run around the argument that customary international legal norms are unenforceable in United States courts absent an express statement to the contrary or implementing legislation³⁰⁰ because the issue is mooted by federal law implementing these norms.

Furthermore, such an approach is congruous with another federalist guarantee in the Constitution: the Ninth Amendment. A Ninth Amendment construction in conformity with the law of nations provides an enumeration of fundamental rights “retained by the people,” including the rights to fair and favorable wages, and a decent living. Federal law implementing such customary international legal rights ensures that such rights are recognized as Ninth Amendment rights.³⁰¹

In conclusion, this customary international legal approach transcends the *koan* of federalism. Because the American people’s plenary power (as recognized by the Constitution’s Preamble and Tenth Amendment) both encompasses and underlies the constitutionally derivative claims to power by the federal and state governments, this plenary popular power in all fields of governmental regulation displaces the narrowly defined dynamic of competing federal and state governmental claims to exclusive authority in particular fields. No longer should the Tenth Amendment’s threshold question be whether the federal or state government is overreaching its respective powers. Instead, the issue of whether the Tenth Amendment is being violated turns on whether either the federal or

background checks on prospective handgun purchasers in order to prevent the unlawful possession of handguns by convicted felons and fugitives who foreseeably would commit homicides. Customary international law allows intergovernmental bodies lawfully exercising their authority under their constitutive treaties to “commandeer” state authorities in order to ensure state compliance with their international legal obligations. The UN Security Council repeatedly has done so in implementing the *UN Charter*.

300. See Bradley & Goldsmith, *Federal Common Law*, *supra* note 21 (arguing that customary international law is merely federal common law unenforceable in United States courts).

301. *Cf.* *United States v. Spencer*, 160 F.3d 413 (7th. Cir. 1998) (rights must not violate federal law to be guaranteed by Ninth Amendment).

state government is breaching the powers reserved to the American people. To determine whether the American people's authority is being unconstitutionally undermined turns on whether their Ninth Amendment rights (including those recognized by international law) are being violated. As Ninth Amendment rights, these rights are enforceable in American courts.³⁰² By conceptualizing federalism in terms of the Preamble's and Tenth Amendment's recognition of American popular sovereignty, the principle of federalism restrains both federal and state governments when Ninth Amendment rights are enforced. The answer to the *koan* of federalism is not discovered by trying to figure out what is the sound of one hand of authority clapping, where federal power ends and state power begins. The answer is the sound of the body's pulse, the American body politic's sinews contracting in the performance of its international legal obligations.

6. The Constitutional Challenges Posed by Globalization

Like it or not, globalization is here to stay. National frontiers have been effectively eroded by the internet and other global telecommunications systems. States have become increasingly interdependent for maintaining international peace and security resulting in the multiplication of multilateral approaches to global problems, such as terrorism, world hunger, nuclear weapons proliferation, the AIDS pandemic, regional ethnic and religious conflicts, and global warming.³⁰³ The constitutional challenge is how to ensure the American people's rights are not eroded by these globalizing forces because our Constitution is primarily designed to protect American interests. However, the solution is not to isolate constitutional construction from international law. That approach is not only unrealistic given the momentum of these globalizing forces, it is also a disservice to the American people because many of these

302. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to privacy enforceable in federal court); *In re Sherol*, 581 P.2d 884 (Okla. 1978) (Ninth Amendment right to respect for family integrity enforceable in state court); *Voichahoske v. City of Grand Island*, 194 Neb. 175 (1975) (Ninth Amendment right to marry enforceable in state court).

303. Just a few illustrations of such multilateral approaches in these areas include programs and operations undertaken by the UN Food and Agricultural Organization (UN FAO), World Health Organization (WHO), International Atomic Energy Agency (IAEA), UN Office for Drug Control and Crime Prevention (UN ODCCP), UN Environment Programme, North Atlantic Treaty Organization (NATO), and UN Protection Force (UNPROFOR).

forces increasingly bestow transnational benefits on the American people. The observance of international legal norms can minimize any deleterious effects of globalization because international law, by definition, places restraints on international activities. Even if specific international legal norms seemingly legitimate globalization forces that are harmful to the American people, international law itself can provide the means of invalidating these bad norms because international law creates a hierarchy of norms with human rights taking primacy over other norms.³⁰⁴

Conclusion: Transubstantiating the Constitution into Treaty

The Constitution's success as a constitutive legal instrument for maintaining the unification of the states while confirming the legality of the new federal government through the American people is to be attributed to its nature as a treaty. Only by means of a treaty could the states remain states. Only by a treaty could the federal government of the Articles of Confederation legally have been replaced by a new federal government. Only as a treaty governed by international law recognizing the original locus of sovereignty residing in the people could the Constitution legally preclude the possibility that the replacement of the Articles was illegal. But most importantly, recognizing the Constitution as a treaty will enable the United States to adapt to a New World challenged by the forces of globalization, prominent among these being the internationalization of legal norms. And, only by recognizing the Constitution as a treaty can we be assured that the Constitution will always demand compliance with these norms because as a treaty, the Constitution primarily must be construed with customary international law.

However, customary international law will not always provide an answer to many mysteries of constitutional faith. In those situations, we will have to continue allowing courts to use extra-constitutional authorities in order to construe the Constitution according to the principles that they have and will develop on a case-by-case manner and extrapolated from the Constitution's text and structure. New mysteries of constitutional faith, no doubt, will reveal themselves, and new theories of constitutional interpretation will emerge.

Nevertheless, ILC provides some important practical, methodological, and systemic advantages. First, ILC provides a mandatory interpretive method that is deduced from the

304. See *supra* text accompanying notes 201-204.

Constitution's text – in both senses of language and legal instrument. Second, ILC provides better definitional limits on the powers of the President and Congress in their foreign affairs and domestic capacities, and on the federal judiciary's lawmaking, while at the same time securing the fundamental rights of the American people. Third, ILC provides the advantage of integrating international law into the overall constitutional legal scheme in a more internally and externally consistent manner as well as resolving many of the internal contradictions that result from construing the Constitution only according to its text and structure.

We can transcend many mysteries of constitutional faith and recover the Constitution's transubstantial essence as treaty if we view the Constitution from an international legal perspective³⁰⁵ and if we release ourselves from the constraints of an American exceptionalism that jingoistically views international law with moral incredulity. However, to release ourselves may require a leap of faith – believing that peoples in other countries share our values – that they, too, believe in the rights to life, liberty, and the pursuit of happiness.

305. International perspectives on the Constitution previously have provided important, previously unrecognized constitutional insights. *See, e.g.*, ALEXIS DE TOQUEVILLE, *DEMOCRACY IN AMERICA* (1831) (French political theorist recognizing Constitution's success as based on its system of checks and balances).