Ohio Northern University Law Review

Volume 36 | Issue 2 Article 10

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The Treaty Power and the Supremacy Clause: Rethinking *Reid v. Covert* in a Global Context

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I. INTRODUCTION

In this article I want to consider whether the authority of the United States to enter into treaties in a global environment is limited by constitutional constraints. The issue arises because a reasonable interpretation of the language of Article VI would place the treaty power on the same status-footing as the Constitution of the United States. But if that is the case, then presumably a treaty might be designed that could delegate constitutional powers to bodies like the United Nations, North Atlantic Treaty Organization ("NATO"), International Monetary Fund, World Trade Organization ("WTO"), or other international organizations. Or, a treaty might be designed to reserve particular constitutional rights – like the Sixth Amendment right to trial by jury in criminal cases – from operating within certain contexts as might concern areas over which the United States exercises territorial jurisdiction, for example, Guam, Puerto Rico, and in other contexts where only international agreements apply.

Part Two will deal with the history and interpretation of Article VI. Part Three will then search the deeper meaning of Holmes's *obiter dicta* in *Missouri v. Holland*[2] and the Court's subsequent attempts to resolve the issue, finally with the Justices acknowledging some serious difference of opinion over how the treaty power is constrained in *Reid v. Covert*.[3] Part Four will then focus on the democratic process and the role of background rights in the creation of a democratic society. Part Five will connect the legitimacy of those rights to a rationality requirement that makes certain human rights fundamental. Finally, Part Six will say why the International Court of Justice ("ICJ") might be an appropriate forum for determining questions relating to the authority of the United States to make treaties. Throughout my discussion, I endeavor to show why the law does not always follow a positivist linear path, but it is occasionally constrained by abstract philosophical principles that provide it legitimacy, although it is not itself a principle of natural law since it can only be maintained by the consent of the governed.

II. THE PROBLEM

The supremacy clause of Article of the U.S. Constitution appears paradoxical.. The provision states: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of

[2] 252 U.S. 416 (1920).

[3] 354 U.S. 1 (1957).

the United States, shall be the supreme Law of the Land[.]"[4] A straight-forward reading of the provision suggests that the laws of the United States must be made pursuant to the Constitution, but that treaties are under the Authority of the United States. Does this mean that there are no constitutional constraints on treaties other than the Article II procedure for ratification by the Senate?[5] On the face of the provision, it appears that the Constitution and treaties share a coequal status as supreme law of the land. What would happen if the terms of a treaty conflicted with the Constitution?

Justice Oliver Wendell Holmes's *dicta*, in *Missouri v. Holland*, opens the door to the possibility that the United States could enter into a treaty transferring some of its sovereignty to various international organizations or a world government without constitutional infringement.[6] The paradox is how are *laws made pursuant to the Constitution* and *treaties made under the authority of the United States* BOTH supreme law of the land, if a treaty could create institutions which could then alter rights guaranteed by the Constitution, or if a treaty could delegate to international organizations powers that the Constitution has assigned to specific branches of the government. Put simply: Is the described constitutional order supreme if it might allow for a treaty that would undercut that very order? One imagines that the United States could enter into a treaty in which some international body could direct some of our actions: perhaps, the power to declare war.[7] Under the Constitution that power is reserved to the Congress, but under the Charter of the United Nations, to which the United States is a signatory, the power to go to war is restricted.[8]

The not-too-simple answer to this paradox is that it jointly confuses supremacy with power and authority with sovereignty. It is not the power that is at stake, but the authority that is supreme. If the relations are reversed – supremacy with authority and sovereignty with power – the paradox is removed. A government may have the power, in the sense of the means to do something, but it may not have the authority to do so. By the same token, it may have the authority to do an act but not the means to carry it out. My understanding of authority is that it is related to legitimacy as the public can assent to its use; sovereignty, by contrast, is defined more by control. For instance, a government may have the authority to lease lands over which it is sovereign to a foreign power, such as China leased Hong Kong to Britain on a ninety-nine year lease[9] and Cuba leased Guantanamo Bay to the United States.[10] Here, the authority to enter into the lease is unfettered, though once entered the sovereignty of the lessor over the territory is constrained during the period of the lease. And so, the primary focus to resolve our paradox must be to show that the United States can enter into treaties that constrain its sovereignty without simultaneously limiting its legitimate right to enter into such treaties properly understood. Indeed, it was the failure

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[4] U.S. CONST. art. VI, cl. 2.

[5] *Id.* art. II, § 2, cl. 2.

[6] *See Holland*, 252 U.S. at 432-33.

[7] U.S. CONST. art. I, § 8, cl. 11.

[8] *See* U.N. Charter art. 2, para. 1-5, art. 51.

[9] *See* John H. Henderson, Note, *The Reintegration of Hong Kong into the People's Republic of China: What it Means to Hong Kong's Future Prosperity*, 28 VAND. J. TRANSNAT'L L. 503, 509 (1995).

[10] *See* Captain Christopher M. Schumann, Note, *Bring it on: The Supreme Court Opens the Floodgates with* Rasul v. Bush, 55 A.F. L. REV. 349, 354-55 (2004) (providing information on the 1903 lease agreement between the U.S. and Cuba).

to maintain this delicate balance between sovereignty and authority that underscores the Bush Administration's claim that persons brought into territories outside the United States, but under United States control, are exempt from constitutional due process guarantees.[11] But this claim was no doubt a mistake: once under United States control, constitutional due process applies, as the Supreme Court eventually came to recognize.[12] But what about lands separated from United States control? What about the United States itself becoming a member of an internationally organized community of nations where its control is attenuated? What limitations are there on the authority of the United States to enter into such arrangements? One answer is that the authority of the United States is limited by the Constitution itself.

It seems odd, however, to suggest that all constitutional limitations ought to apply to treaties, as they do with respect to laws; if that were the case, why was Article VI not written "This Constitution and the Laws and Treaties of the United States which shall be made in pursuance thereof shall be the supreme law of the Land," rather than "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land[.]"[13] The Authority cannot be that treaties be made pursuant to the Constitution if the language of Article VI is not to be misleading. By the same token, the phrase "in Pursuance thereof" may engage a more limited notion of legitimacy than the phrase "under the Authority of the United States" allows.[14] If so, the solution to what would and would not be allowed under the Authority of the United States may be broader than the laws that can be made in pursuance of "This Constitution."[15] We must now turn our attention to this difference of interpretation and its implications for future cases.

A less misleading foundation for the "Authority of the United States" and the laws made in pursuance of the Constitution might be shown by not requiring that the former comes out of the latter, i.e., that the former is derived from the latter. Here, the common elements to both arise out of a set of background human rights that simultaneously support much of our constitutional apparatus and also provide an understanding of the limits of the Authority of the United States, while at the same time respecting consent of the governed

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[11] The Supreme Court ruled that Guantanamo prisoners have a constitutional right to challenge their detention at the U.S. military base in civilian courts. *See* Boumediene v. Bush, 128 S. Ct. 2229, 2240 (2008).

[12] In his majority opinion, Justice Kennedy wrote:

> Where a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing. A criminal conviction in the usual course occurs after a judicial hearing before a tribunal disinterested in the outcome and committed to procedures designed to ensure its own independence. These dynamics are not inherent in executive detention orders or executive review procedures. In this context the need for habeas corpus is more urgent. The intended duration of the detention and the reasons for it bear upon the precise scope of the inquiry. Habeas corpus proceedings need not resemble a criminal trial, even when the detention is by executive order. But the writ must be effective. The habeas court must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain.

Id. at 2269.

[13] U.S. CONST. art. VI, cl. 2.

[14] *See id.*

[15] *See id.*

as the only legitimate basis of authority subject to certain limitations necessary to the very possibility of that consent.[16] I want also to suggest that the paradox described above arises only because the legitimacy associated with consent of the governed is often confused with the justification for the consent that makes it a value in the first place. Put another way, it is not the *codification* of "background human rights" in the Constitution that gives rise to the Authority of the United States, but it is the recognition in constitutional law of those background rights as "self-evident" truths of both the Constitution's and the United States' authority, requiring *conformity* to these background rights.[17]

III. HISTORY AND INTERPRETATION

A. The Treaty Power and the Federalist Papers

Article VI, Clause 2, of the United States Constitution states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the 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.[18]

The provision adopted in 1789 served, no doubt among other purposes, to keep enfranchised the Treaty of Paris of 1783, which was ratified under the prior Articles of Confederation Congress for the United States of America and by the Kingdom of Great Britain – in which the latter recognized the original thirteen colonies as free and independent states and relinquished all claims by the British throne to the Government, property, and any territorial rights over the same.[19] Of course, if the provision is treated in this way, then the paradox is solved: the treaty power is constrained by the Constitution. But, before there was the Constitution, it was constrained in a different way. Still, there is nothing in the Constitution's language stating that this was the reason for Article VI's rather odd language. Beyond that, there does not appear to be much evidence from the ratification period concerning how the provision was to be interpreted.

What statements were made at the time of the Constitution's ratification seem to imply the straight-forward textual interpretation that the treaty power was to be treated

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[16] I say "support *much* of the constitution" because the Constitution of 1789 afforded indirect recognition of the institution of slavery. *See* U.S. CONST. art. I, § 2, cl. 3, *amended by id.* amend. XIV, § 2 (counting "other Persons" as only three-fifths for purposes of apportioning the number of seats in the House of Representatives and direct taxes among the several states); *Id.* art. I, § 9, cl. 1 (prohibiting Congress from restricting states from the importation of slaves before 1808); *Id.* art. I, § 9, cl. 4 (limiting taxation of the slave trade); *Id.* art. V (preventing amendment of the aforementioned before 1808).

[17] Here I follow the *Declaration of Independence* in claiming that certain basic "truths [are] self-evident[.]" *See* DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776), *available at* http://www.ushistory. org/Declaration.

[18] U.S. CONST. art. VI, cl. 2.

[19] *See* Definitive Treaty of Peace between Great Britain and the United States signed at Paris, Sept. 3, 1783, *reprinted in* 48 CONSOLIDATED TREATY SERIES 489-495 (Parry Clive ed. & ann. 1969) (english text).

separately, in terms of constitutional constraints, from the laws of the United States. The comments discuss related, but not inconsistent concerns, with the treaty power being separate from more substantial constitutional constraints. For example, in arguing for the reasonableness of entrusting the power of making treaties "to the President, '*by and with the advice and consent of the senate*, . . . PROVIDED TWO THIRDS OF THE SENATORS PRESENT CONCUR,'" John Jay argues that the method of selection for these people combined with the age requirement – thirty-five to be President and thirty to be a Senator – will ensure that the people will "have had time to form a judgment" about those who will be exercising this power.[20] This fact is important especially if one wants to guard ruinous treaties negotiated by the President and ratified by the Senate. Again, it does not speak to the power being separate, but it is consistent with a concern if it were separate.

Perhaps a more direct illustration of the assumption that treaties would operate separately is Jay's comment:

> These gentlemen would do well to reflect that a treaty is only another name for a bargain;..
> and that it would be impossible to find a nation who would make any bargain with us, which should be binding on them *absolutely*, but on us only so long and so far as we think proper to be bound by it. 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 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.[21]

Clearly, the implication of this paragraph is that treaties, unlike legislation, require for their efficacy the good faith of both contracting parties in that each party will do what it says it will do.[22] This requirement would be hard to establish if, notwithstanding the parties themselves, a United States court could subsequently judge a treaty unconstitutional. Since there would be no point in time past which such a determination might be made – the Supreme Court does not issue advisory opinions[23] – the party(ies) on the other side of the

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[20] *See* THE FEDERALIST NO. 64 (John Jay) (emphasis in original). Jay further writes:

> The inference which naturally results from these considerations is this, that the president and senators so chosen will always be of the number of those who best understand our national interests, whether considered in relation to the several States or to foreign nations, who are best able to promote those interests, and whose reputation for integrity inspires and merits confidence. With such men the power of making treaties may be safely lodged.

Id.

[21] *Id.*

[22] *See id.*

[23] *See* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1843 (2001) (providing a discussion of, *inter alia*, Article III's prohibition of advisory opinions).

agreement could find it had performed its obligation only to have the United States not perform hers.

The assumption that treaties are separately part of the supreme law is further supported by a short comment by James Madison in *Federalist* 38 where Madison states:

> Is it an objection against the new Constitution, that it empowers the Senate with the concurrence of the Executive to make treaties which are to be the laws of the land? The existing Congress, without any such controul, can make treaties which they themselves have declared, and most of the States have recognized, to be the supreme law of the land.[24]

Here, Madison is in effect saying that this is nothing new; that even under the Confederation Congress treaties are the law of the land. Still, there is a problem. For a treaty could be the law of the land at the level of a federal statute (which is subject to constitutional constraints), or it could be the law of the land at the level of the Constitution. What Madison points out as new is that the executive, with approval of the Senate, now makes treaties, which brings in a further kind of check. But is this further check one of judgment, or is it that the treaty fails to conform to some specific constitutional provision other than the obvious one involving ratification? The check seems to be aimed at granting treaties greater legitimacy, in that the people having acted through their national representative – the President – have agreed to them.

That the treaty power is not substantively limited by substantial constitutional constraints may underpin Alexander Hamilton's singular defense, in *Federalist* 66, of the Senate being a Court of Impeachment in a case where Senators might be liable for ratifying a potentially ruinous treaty proposed by the Executive.[25] Obviously, if there were constitutional constraints on treaties, then the opportunity for a ruinous treaty would be less. Moreover, the fact that a treaty was unconstitutional would be a protection against abuse by the Executive, in combination with the Senate as a Court of Impeachment; yet, Hamilton says nothing at all about this fact.[26] All Hamilton does is try to justify that Senators acting together can constitute themselves a legitimate Court of Impeachment.[27]

Hamilton, in *Federalist* 69, does acknowledge a constitutional limitation on the power of the Executive to make treaties that is different from that of the King of Great Britain.[28] That limitation is that the President is not:

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[24] THE FEDERALIST NO. 38 (James Madison).

[25] *See* THE FEDERALIST NO. 66 (Alexander Hamilton).

[26] All Hamilton says in *Federalist* No. 66:

> [I]s, that in all such cases it is essential to the freedom and to the necessary independence of the deliberations of the body, that the members of it should be exempt from punishment for acts done in a collective capacity; and the security to the society must depend on the care which is taken to confide the trust to proper hands, to make it their interest to execute it with fidelity, and to make it as difficult as possible for them to combine in any interest opposite to that of the public good.

Id.

[27] *See id.*

[28] *See* THE FEDERALIST NO. 69 (Alexander Hamilton).

> [T]he sole and absolute representative of the nation in all foreign transactions. . . . In this respect therefore, there is no comparison between the intended power of the President, and the actual power of the British sovereign. The one can perform alone, what the other can only do with the concurrence of a branch of the [l]egislature.[29]

But beyond this procedural limitation, which really goes to separation of powers, Hamilton does not venture. In other words, the King of England, at the time Hamilton wrote these words, may have been "the sole and absolute representative of the nation in all foreign transactions."[30] And Hamilton was trying to show that we are not like England, because we split this power between two branches of government. But this point just goes to the way sovereignty is exercised in the two places. It does not go to authority. On that issue, Hamilton expresses the view, in *Federalist* 75, that the constitutional requirement for concurrence between the Executive and two-thirds of the Senate is, alone, enough for us to "infer that the people of America would have greater security against an improper use of the power of making treaties, under the new constitution, than they now enjoy under the confederation[,]" where two members must represent a State, where if only one is present the voice of the people of that state is lost, and there is no representative of the people as a whole.[31] Still, given that Senators can do lots of mischief within the limits set by the Constitution, one might wonder why Hamilton did not *also* suggest court review to ensure treaties do not transverse constitutional limits. Indeed, such a determination by a court might add greater strength to the impeachment process. But Hamilton did not make this suggestion. Could he have been operating under the assumptions that treaties are beyond *substantive* constitutional limits?

Taken together, the passages show that the Framers saw treaties as law-like, but not exactly the same as laws in respect to constitutional limitations. They are law-like in that when considered alongside the Constitution and the laws made in pursuance thereof, they are binding as "the supreme Law of the Land."[32] But they are not exactly laws in the usual sense, in that they have a different etymology. Federal laws generally require approval by a majority of both Houses of Congress unless vetoed by the President, in which case two-thirds of both Houses can then vote to override the veto.[33] In contrast, "[the president alone] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur[.]"[34]

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[29] *Id.*

[30] *Id.*

[31] THE FEDERALIST NO. 75 (Alexander Hamilton). The Articles of Confederation did not provide for a national executive or a national judiciary. *See, e.g.*, ARTICLES OF CONFEDERATION, art. IX (1778), *available at* www.http://ahp.gatech.edu/confederation_1778.htm (providing that the authority to enter into treaties and to send and receive ambassadors lies with the United States in Congress; and that "[t]he United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more States concerning boundary, jurisdiction, or any other cause whatever"). It also required that "[n]o state shall be represented in Congress by less than two, nor more than seven members[.]" *Id.* art. V.

[32] *See* U.S. CONST. art. VI, cl. 2.

[33] *See id.* art. I, § 7, cl. 2.

[34] *Id.* art. II, § 2, cl. 2.

Because the only limitation on the treaty power raised in the *Federalist Papers* is a procedural one, it may be thought that the treaty power is unrestricted, leaving the President and Senate free to undermine important constitutional safeguards or rights by entering into particularly ruinous treaties. However, I do not think that the Framers meant the treaty power to be that open. Indeed, the comments by Jay and Hamilton, concerning who should bear this trust, what their age should be, and how the people should know them, suggests that they saw some limitations in the good faith of those elected.[35] However, exactly what those limitations are, or where they are to be found, remains a mystery.

Because none of what the *Federalist* writers said goes to the subject matter of a treaty, the only apparent constitutional limitation discussed is the *formal* one specified in Article II, Section 2.[36] And that limitation has no *substantial* component. It implies no content restriction whatsoever regarding either the subject matter or how extensive treaties might be.[37] Does that mean there is no substantial limitation? And, if there were a substantial limitation, where is it to be found?

Perhaps the best answer is not that no substantial content restriction emanates directly from the Constitution, but rather that there are content restrictions originating in the same source that gives life to the Constitution itself. I will explore this issue shortly, but, for now, it might be worth examining how an early case, interpreting the Supremacy Clause to give dominance to the Federal Government over the states, opens up the broader question of the scope of the treaty power.[38]

B. Missouri v. Holland

Prior to this case, Congress had passed laws regulating the hunting of migratory birds on the ground that such birds naturally migrated between several states and, thus, no single state or set of states could claim exclusive jurisdiction to regulate their harvesting.[40] Several states objected to these laws on the ground that Congress had no enumerated power under the Constitution to regulate the hunting of migratory birds and, thus, any regulation

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[35] *See* THE FEDERALIST NO. 64 (John Jay); THE FEDERALIST NO. 66 (Alexander Hamilton).

[36] *See* U.S. CONST. art. II, § 2, cl. 2.

[37] *See id.*

[38] Here I would note that:

> [a]lthough the Constitution does not mention executive agreements, it is well established that such agreements are constitutional. Indeed, executive agreements can be used for any purpose; that is, anything that can be done by treaty can be done by executive agreement. Never in American history has the Supreme Court declared an executive agreement unconstitutional as usurping the Senate's treaty approving function. Even major foreign policy commitments have been implemented through executive agreements. . . . In *United States v. Pink* [315 U.S. 203 (1942)] and *United States v. Belmont* [301 U.S. 324 (1937)] the Supreme Court upheld an executive agreement, the Litvinov Agreement, whereby the United States recognized the Soviet Union in exchange for the Soviet Union assigning to the United States its interests in a Russian insurance company in New York. . . . Justice Douglas, writing for the Court in *Pink*, explained: "A treaty is a 'Law of the Land under the supremacy clause [of Article VI] of the Constitution. Such international compacts and agreements as the Livinov Assignment have a similar dignity."

ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 368-69 (3d ed. 2006).

[40] *Holland*, 252 U.S. at 432.

must be left to the states concerned under the Tenth Amendment.[41] The lower federal courts agreed and declared unconstitutional a federal statute attempting to regulate such hunting.[42] Subsequently, the United States entered into a treaty with the United Kingdom, which at the time also handled the foreign relations of Canada, to protect migratory birds.[43] As part of the implementation of that convention, Congress passed the Migratory Bird Treaty Act of 1918.[44] The Act "prohibited the killing, capturing or selling any of the migratory birds included in the terms of the treaty except as permitted by regulations compatible with those terms, to be made by the Secretary of Agriculture."[45] A challenge by several states, that claimed this treaty violated their Tenth Amendment rights, went to the United States Supreme Court.[46] Although primarily a case about federalism, the language of the opinions provide alternative understandings of the treaty power in respect to constitutional constraints.

The Supreme Court, per Justice Holmes, held that the power of the United States to enter into treaties was broad and was not limited by the Tenth Amendment.[47] Holmes noted that Article II, Section 2 specifically delegates the power to make treaties to the Federal Government.[48] He also noted that, under "Article VI treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land."[49] He further noted that "[i]f the treaty is valid there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government."[50]

It had been argued "that a treaty cannot be valid if it infringes the Constitution, that there are limits, therefore, to the treaty-making power, and that one such limit is that what an act of Congress could not do unaided, in derogation of the powers reserved to the States, a treaty cannot do."[51] Without answering the objection, Holmes stated:

> 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. We do not mean to imply that there are no qualifications to the treaty-making power: but they must be ascertained in a different way. 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

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[41] *Id.*

[42] *See id.* at 432 (citing United States v. Shauver, 214 F. 154 (1914); United States v. McCullagh, 221 F. 288(1915)).

[43] *Id.* at 430-31.

[44] *See id.* at 430-31.

[45] *Holland*, 252 U.S. at 431-32.

[46] *Id.* at 431.

[47] *Id.* at 434-35.

[48] *Id.* at 432.

[49] *Id.*

[50] *Holland*, 252 U.S. at 432.

[51] *Id.*

> with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, "a power which must belong to and somewhere reside in every civilized government" is not to be found.[52]

Holmes's suggestion, that the Authority of the United States may be broader than the constitutional power of Congress to legislate, provided the impetus for his response to the proposed test that a treaty cannot do what Congress could not do unaided. Here, Holmes clearly disagrees, finding the test far too narrow. Specifically with respect to the proposed test, Holmes adds:

> [W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation.[53]

Holmes's language is of particular note for the three separate meanings it indulges. The first meaning is that the treaty power originates in Article II, Section 2.[54] The second is that treaties are made under the authority of the United States whereas laws are made pursuant to the Constitution, and that the former may encompass a greater freedom of action given that the only constitutionally specified restriction is the formalism of ratification. The third separate meaning is that constituent acts, arising under the "Authority of the United States," like the Constitution itself – whether treated separately or as part of the broader Constitution – may take on a separate life of their own.[55] This new life may evolve to meet new and unforeseen circumstances.[56] This potential evolution raises a panoply of questions: Does the Constitution beget the Authority of the United States? Does the Constitution merely acknowledge the Authority that is already there? Are there any constitutional constraints, other than formal ones, on the Authority of the United States? Holmes's comment that "[w]e do not mean to imply that there are no qualifications to the treaty-making power["] is evocative.[57] If there are no direct constraints, are there indirect constraints created perhaps by some norms underlying the Constitution and the Authority? Obviously, the Constitution is itself an authority for the laws made pursuant to it. But, here, interesting questions are whether the authority of the Constitution and the Authority of the United States are different and, even if they are different in their application, whether they might have a common origin.

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[52] *Id.* at 433 (quoting Andrews v. Andrews, 188 U.S. 14, 33 (1903)).

[53] *Id.*

[54] *See id.* at 432.

[55] *See Holland*, 252 U.S. at 432.

[56] *See id.* at 433.

[57] *Id.*

C. United States v. Curtis-Wright Export Corp.

Subsequent to *Missouri v. Holland* and prior to *Reid v. Covert*, the United States Supreme Court upheld, in *United States v. Curtis-Wright Export Corporation.*,[58] the constitutionality of a 1934 Joint Resolution by Congress, which authorized the President to stop arms and munitions sales to Bolivia and Paraguay, which were at war. President Roosevelt immediately imposed an embargo.[59] Curtis-Wright, who was indicted for conspiracy to sell arms to Bolivia, challenged the constitutionality of the Joint Resolution.[60] Although the case primarily concerns the role of the Congress in matters of foreign policy, it is worth quoting at length some of the language of Justice Sutherland's opinion, upholding the constitutionality of the Joint Resolution, for what it says about the *concurrent but different* powers of the Federal Government in its dealings with the states from its engagement with other nations.[61] It is here that Justice Sutherland sees much wider constitutional latitude for the treaty power over legislation. But, he also sees a limitation: that the treaty power not impact federalism. Holmes seems to have rejected this latter view in *Holland*. Nevertheless, Justice Sutherland wrote:

> It will contribute to the elucidation of the question if we first consider the differences between the powers of the federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs. That there are differences between them, and that these differences are fundamental, may not be doubted.
>
> The two classes of powers are different, both in respect of their origin and their nature. The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true *only in respect of our internal affairs*. In that field, the primary purpose of the Constitution was to carve from the general mass of legislative powers *then possessed by the states* such portions as it was thought desirable to vest in the federal government, leaving those not included in the enumeration still in the states. That this doctrine applies only to powers which the states had, is self evident. And since the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source. During the colonial period, those powers were possessed exclusively by and were entirely under the control of the Crown. 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, and as such to have "full Power to levy War, conclude

[58] 299 U.S. 304 (1936).
[59] *Id.* at 311-14.
[60] *Id.* at 311.
[61] *See id.* at 315-17.

> Peace, contract Alliances, establish Commerce and to do all other Acts and Things which Independent States may of right do."
>
> 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. Even before the Declaration, the colonies were a unit in foreign affairs, acting through a common agency – namely the Continental Congress, composed of delegates from the thirteen colonies. That agency exercised the powers of war and peace, raised an army, created a navy, and finally adopted the Declaration of Independence. Rulers come and go; governments end and forms of government change; but sovereignty survives. A political society cannot endure without a supreme will somewhere. Sovereignty is never held in suspense. When, therefore, the external sovereignty of Great Britain in respect of the colonies ceased, it immediately passed to the Union. That fact was given practical application almost at once. The treaty of peace, made on September 3, 1783, was concluded between his Brittanic Majesty and the "United States of America."
>
> The Union existed before the Constitution, which was ordained and established among other things to form "a more perfect Union." Prior to that event, it is clear that the Union, declared by the Articles of Confederation to be "perpetual," was the sole possessor of external sovereignty and in the Union it remained without change save in so far as the Constitution in express terms qualified its exercise.[62]

It is important to notice Justice Sutherland's comment that the sovereignty of the United States passed from England to the colonies *united*. He wrote that the sovereignty was something quite different from the authority of the Federal Government over the states: as it existed under the Articles of Confederation, it remained fully intact when the Constitution was adopted, except as the latter *expressly* qualified it.[63] Juxtaposing, then, this statement alongside the earlier statement that federal power is constitutionally limited "*only in respect of our internal affairs*[,]" the conclusion is obvious: the Federal Government is much freer when engaging other nations than when engaging states of the union or even its own citizens.[64]

D. Reid v. Covert

It may be thought that Justice Black's plurality opinion in *Reid v. Covert* resolved, once and for all, the question of the Authority of the United States in treaty-making by placing it firmly under constitutional constraints.[66] But, as I hope to show, first appearances may not be what they seem. The issue in that case arose from a habeas corpus

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[62] *Id.* at 315-17 (first emphasis added) (alteration in original) (citations omitted).

[63] *See Curtis-Wright*, 299 U.S. at 315-17.

[64] *See id.* at 316 (emphasis added).

[66] *See Reid*, 354 U.S. at 3-41.

proceeding in which overseas civilian dependents of members of the armed services challenged a federal statute consonant with a United States treaty that made them subject to court-martial jurisdiction for crimes committed abroad.[69] An important constitutional issue in both cases was whether Congress could "expose civilians to trial by military tribunals, under military regulations and procedures, for offenses against the United States thereby depriving them of trial in civilian courts, under civilian laws and procedures and with all the safeguards of the *Bill of Rights*."[70]

In both cases, the defendants were wives who had killed their military husbands but alleged that, at the time, they were insane.[71] Mrs. Covert killed her Air Force Sergeant husband at an air base in England; Mrs. Smith killed her Army officer husband at a military post in Japan.[72] Both were brought before a military tribunal pursuant to Article 118 of the Uniform Code of Military Justice ("UCMJ"), where they were charged with capital murder and sentenced to life imprisonment.[73]

In holding for a divided Court that these women could not be tried by military tribunal, Justice Black, in his opening remarks, took a very limited view of the treaty power noting that:

> [W]e reject the idea that when the United States acts against citizens abroad it can do so free of the *Bill of Rights*. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution.[74]

He then went on to distinguish two different types of cases that the Court previously decided in the opposite direction: the early "Consular Case" of *In re Ross*,[75] and the "'Insular Cases,' which arose at the turn of the century."[76] The latter:

> involved territories which had only recently been conquered or acquired by the United States. These territories, governed and regulated by Congress under Art. IV, § 3, had entirely different cultures and customs from those of this country. This Court, although closely divided, ruled that certain constitutional safeguards were not applicable to these territories since they had not been "expressly or impliedly incorporated" into the Union by Congress. While conceding that "fundamental" constitutional rights applied everywhere, the majority found that it would disrupt long-

[69] *See idid.* at 3-5, 15-16 n.29.
[70] *Id.* at 3.
[71] *Id.* at 4.
[72] *Id.* at 3-4.
[73] *Reid*, 354 U.S. at 3-4.
[74] *Id.* at 5-6 (footnotes omitted).
[75] *Id.* at 10 (citing *In re* Ross, 140 U.S. 453 (1891)).
[76] *Id.* at 12-13.

> established practices and would be inexpedient to require a jury trial after an indictment by a grand jury in the insular possessions. [77]

Finding the present case to be different from these other two types of cases, because now American *citizens* were involved, Justice Black noted that, "[a]t the time of Mrs. Covert's alleged offense, an executive agreement was in effect between the United States and Great Britain which permitted United States' military courts to exercise exclusive jurisdiction over offenses committed in Great Britain by American servicemen or their dependents."[78] A similar situation existed "in Japan when Mrs. Smith killed her husband."[79] The Government argued that:

> Art. 2 (11) of the UCMJ, insofar as it provides for the military trial of dependents accompanying the armed forces in Great Britain and Japan, can be sustained as legislation which is necessary and proper to carry out the United States' obligations under the international agreements made with those countries.[80]

However, Justice Black wrote: "[N]o agreement with a foreign nation can confer power on Congress, or on any other branch of Government, which is free from restraints of the Constitution."[81] His rationale was that:

> There is nothing in [the language of the Constitution] which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution. Nor is there anything in the debates which accompanied the drafting and ratification of the Constitution which even suggests such a result.[82]

His further explanation for why, under the language of the Constitution, "treaties were not limited to those made in 'pursuance' of the Constitution was so that agreements made by the United States under the Articles of Confederation, including the important peace treaties which concluded the Revolutionary War, would remain in effect."[83] As for Justice Holmes's *dicta* in *Missouri v. Holland*, Justice Black had this to say:

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[77] *Id.* at 13 (footnotes omitted).

> The "Insular Cases" can be distinguished from the present cases in that they involved the power of Congress to provide rules and regulations to govern temporarily territories with wholly dissimilar traditions and institutions whereas here the basis for governmental power is American citizenship . . . . If our foreign commitments become of such a nature that the Government can no longer satisfactorily operate within the bounds laid down by the Constitution, that instrument can be amended by the method which it prescribes.

Reid, 354 U.S. at 14 (footnotes omitted).

[78] *Id.* at 15 (footnotes omitted).

[79] *Id.* at 15-16 (footnotes omitted).

[80] *Id.* at 16.

[81] *Id.*

[82] *Reid*, 354 U.S. at 16.

[83] *Id.* at 16-17 (footnote omitted).

> There is nothing in *Missouri v. Holland* which is contrary to the position taken here. There the Court carefully noted that the treaty involved was not inconsistent with any specific provision of the Constitution. The Court was concerned with the Tenth Amendment which reserves to the States or the people all power not delegated to the National Government. To the extent that the United States can validly make treaties, the people and the States have delegated their power to the National Government and the Tenth Amendment is no Barrier.[84]

Justice Black's plurality opinion is remarkable for the perceived strength of its assertions, given the lack of support it received on the Court.[85] To begin, Black's claim that

> the treaty provision in Article VI make[s] it clear that the reason treaties were not limited to those made in "pursuance" of the Constitution was so that agreements made by the United States under the Articles of Confederation, including the important peace treaties which concluded the Revolutionary War, would remain in effect[,]

is internally contradictory.[86] If the Treaty of Paris remains in effect because Article VI recognizes that not all treaties must be made in conformity with the Constitution, then why need any treaties be made in conformity with the Constitution? Neither can it be said that it was only the Treaty of Paris that was to remain in effect; the Framers could have easily written: "The founding Treaty of Paris, this Constitution, and the laws *and treaties* of the United States which shall be made in Pursuance thereof, shall be the supreme Law of the Land." They obviously did not choose to do this. Moreover, as was shown, the *Federalist* papers never even suggested that treaties were subject to the Constitution beyond the Article II procedural requirement of who would make them and how they are made.[87] Additionally, it cannot be overlooked, because it is so present here, that Black misunderstands Holmes's controversial statement in *Missouri v. Holland*, that "[i]t is open to question whether the authority of the United States means more than the formal acts

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> It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the *Bill of Rights*—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V. The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined.

Id. at 17 (footnote omitted).

[84] *Id.* at 18 (footnote & citation omitted).

[85] *See id.* at 3 (the opinion delivered by Justice Black was a plurality opinion, garnering the support of only three other justices on the court).

[86] *See Reid*, 354 U.S. at 16-17.

[87] *See supra* notes 19-30 and accompanying text.

prescribed to make the convention."[88] At this point in the opinion, Holmes had not yet turned to discussing the particular Tenth Amendment issue that brought the case before him.[89]

That said, Black's plurality point of view in *Reid v. Covert* did not garner a majority of those Justices who concurred in the judgment.[90] Justice Frankfurter, in his concurring opinion, noted with regard to the "Insular cases," that, had the right to trial been a fundamental right, it could not have been avoided. [91] The fact that the Court had avoided requiring it in those cases shows that trial by jury is not constitutionally mandated, such that it must be imposed on those who have no experience with such a practice, provided that they have an established "method of fair and orderly trial."[92]

Frankfurter does limit the impact of his jury trial statement by noting: "The results of the cases that arose by reason of the acquisition of exotic 'Territory' do not control the present cases, for territorial cases rest specifically on Art. IV, s[.] 3, which is a grant of power to Congress to deal with 'Territory' and other [g]overnment property."[93] Still, Article IV, Section 3 does no more than confer a power. It does not indicate any limitation on that power by the Constitution, and, yet, it is from this conference of power that Justice

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[88] *Holland*, 252 U.S. at 433.

[89] *See id.* at 433-34 (Holmes later begins his discussion of the Tenth Amendment issue by stating, "[t]he only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment.").

[90] *Reid*, 354 U.S. at 3 (Justice Black delivered the opinion and was joined by Chief Justice Warren, Justice Douglas, and Justice Brennan).

[91] *Id.* at 52 (Frankfurter, J., concurring) (quoting Dorr v. United States, 195 U.S. 138, 148 (1904))

> If the right to trial by jury were a fundamental right which goes wherever the jurisdiction of the United States extends, or if Congress, in framing laws for outlying territory belonging to the United States, was obliged to establish that system by affirmative legislation, it would follow that, no matter what the needs or capacities of the people, trial by jury, and in no other way, must be forthwith established, although the result may be to work injustice and provoke disturbance rather than to aid the orderly administration of justice.

Id. at 52 (quoting *Dorr*, 195 U.S. at 148).

[92] *Dorr*, 195 U.S. at 148.

> If the United States, impelled by its duty or advantage, shall acquire territory peopled by savages, and of which it may dispose or not hold for ultimate admission to statehood, if this doctrine is sound, it must establish there the trial by jury. To state such a proposition demonstrates the impossibility of carrying it into practice. Again, if the United States shall acquire by treaty the cession of territory having an established system of jurisprudence, where jury trials are unknown, but a method of fair and orderly trial prevails under an acceptable and long-established code, the preference of the people must be disregarded, their established customs ignored and they themselves coerced to accept, in advance of incorporation into the United States, a system of trial unknown to them and unsuited to their needs. We do not think it was intended, in giving power to Congress to make regulations for the territories, to hamper its exercise with this condition.

Reid, 354 U.S. at 52 (quoting *Dorr*, 195 U.S. at 148).

[93] *Reid*, 354 U.S. at 53.

Frankfurter notes that not all the constraints of the Constitution may apply to the territories.[94] Furthermore, Frankfurter also notes:

> The constitution can have no operation in another country. When, therefore, the representatives or officers of our government are permitted to exercise authority of any kind in another country, it must be on such conditions as the two countries may agree, the laws of neither one being obligatory upon the other.[95]

Justice Frankfurter goes on to discuss consular jurisdiction as a way "Christian" countries sought to protect the rights of their citizens in countries that did not recognize the same rights.[96] In these cases, the United States sought to protect the rights of Americans elsewhere in the world, where it had a freer hand to work out the best deal. Still, it is clear from Frankfurter's discussion of the Consular and Insular cases that the treaty authority of the United States, at least in those practical respects concerning structures of operation, is broader than the law making power of the Congress under the Constitution.

Following in the same direction, Justice Harlan, in his concurring opinion, places himself between Justice Frankfurter and Justice Black: "I shall not repeat what my brother FRANKFURTER has written on [the historical context behind the old consular and territorial court cases], with which I agree. But I do not go as far as my brother BLACK seems to go on this score."[97] Further, Justice Harlan provided the following:

> As I have already said, I do not think that it can be said that these safeguards of the Constitution are never operative without the United States, regardless of the particular circumstances. On the other hand, I cannot agree with the suggestion that every provision of the Constitution must always be deemed automatically applicable to American citizens in every part of the world. For Ross and the Insular Cases do stand for an important proposition, one which seems to me a wise and necessary gloss on our Constitution. The proposition is, of course, not that the Constitution "does not apply" overseas, but that there are provisions in the Constitution which do not necessarily apply in all circumstances in every foreign place. [98]

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[94] *See id.* at 53-54 ("This court considered the particular situation in each newly acquired territory to determine whether the grant to Congress of power to govern 'Territory' was restricted by a specific provision of the Constitution.").

[95] *Id.* at 55 (quoting Ross v. McIntyre, 140 U.S. 453, 464 (1891)).

[96] *See id.* at 56-57.

[97] *Id.* at 67 (Harlan, J., concurring).

[98] *Reid*, 354 U.S. at 74 (Harlan, J., concurring).

> I think the above thought is crucial in approaching the cases before us. Decision is easy if one adopts the constricting view that these constitutional guarantees as a totality do or do not 'apply' overseas. But, for me, the question is which guarantees of the Constitution should apply in view of the particular circumstances, the practical necessities, and the possible alternatives[,] which Congress had before it. The question is one of judgment, not compulsion.

Id.

Finally, it is worth noting that two justices in *Reid*, Clark and Burton, dissented.[99] In their dissent, Justice Clark wrote: "These cases do not involve . . . the legal relationship between treaties and the Constitution[,]" which itself suggests that the plurality view on this matter was one of pure *dicta.*[100] For the Dissenters, the real question is "whether this enactment is reasonably related to the power of Congress 'To make Rules for the Government and Regulation of the land and naval Forces.'"[101] So, by the end of *Reid*, Holmes's question is no more settled than when Black's plurality opinion first began. The issue of whether the Authority of the United States to make treaties is constitutionally constrained and, if so, how and to what it degree remains. Perhaps the best place to begin to answer these questions is with an elaboration of the concept of authority in general.

My point for going in this direction is to suggest that, when we ask the question, "What is the Authority of the United States?" we are not merely in search of what the United States is constitutionally permitted do. Rather, we are in search of what Americans would view as authorized actions of the United States in light of their traditions and history. We are in search of a roadmap for how our Government can legitimately operate beyond its own borders today. This roadmap is particularly important given that the Framers of the Constitution probably never conceived much of what America does internationally in the global twenty-first century. Still, because we must make sense of it in context of our own values, we cannot confine ourselves to any one judge's thoughts or the thinking that might have prevailed during any historical period.

III. THE AUTHORITY OF THE UNITED STATES

A. The Concept of Authority

Both power and authority are species of the genus "ways of regulating behavior," in which regulating behavior includes "the power over relation."[102] The power over relation reflects the fact that power itself has an interesting genesis. On the one hand, power can be defined, assuming a certain amount of circularity, as the ability to cause effects.[103] This definition is the "power to" relation. In this sense, X causes Y can be understood to be either the sufficient condition "if X occurs, then Y occurs," or the necessary condition "if X does not occur, then Y does not occur."[104] David Hume took this point further to suggest that a force or energy was behind the cause.[105] Certainly, the power to do something like play the piano is distinguishable from the power over other persons. In the former case, power is strictly instrumental or, as Thomas Hobbes says,

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[99] *Id.* at 78 (Clark, J., dissenting).

[100] *Id.* at 79.

[101] *Id.* at 79-80 (quoting U.S. CONST. art. I, § 8, cl.14).

[102] Professor Alan Gewirth, Lecture in Political Philosophy given at the University of Chicago (DATE); *see also* ALAN GEWIRTH, THE COMMUNITY OF RIGHTS 1 (1996). The conceptual analysis of the power relation in this article, I owe to Gewirth.

[103] DAVID HUME, A TREATISE OF HUMAN NATURE 313 (L.A. Selby-Bigge ed., Oxford University Press 1978).

[104] *See* IRVING M. COPI & CARL COHEN, INTRODUCTION TO LOGIC 513 (Prentice Hall 13th ed. 2009) .

[105] HUME, *supra* note 102, at 156.

"[t]he [p]ower of a [m]an, (to take it [u]niversally,) is his present means, to obtain some future apparent [g]ood."[106] If we approve of the use, as when we say the Constitution gives Congress the power to raise and support armies, power takes on an evaluative quality.

Again, in contrast to the "power to" or instrumental power relation is the "power over" relation. As a necessary condition, a person *A* has power over another *B* when, if *A* wants *B* to do something, *B* does it. As a sufficient condition, a person *A* has power over another *B* when *B* does not want to do *X*, but *A* can overcome *B*'s resistance such that *B* does *X*. Usually, this ability to overcome means that, if *B* does not do *X*, *A* will do *Y*, and *B* prefers *X* to *Y*, where *Y* might mean violence, coercion, rule-making, love, or whatever.

We distinguish power from authority by the means or characteristics of both. Power usually involves force, threats, and incentives. Issuing pronouncements, making decisions, and giving commands usually shows authority. R. S. Peters notes that "Hobbes was impressed by the fact that a civil society is not a natural whole like a rook or a beehive; yet it is not merely a multitude of men. A multitude of men becomes an artificial person when each man *authorizes* the actions of a representative."[107]

> "Of persons artificial, some have their words and actions owned by those whom they represent. And then the person is the *actor*; and he that owneth his words is the AUTHOR: in which case the actor acteth by authority . . . and as the right of possession, is called dominion; so the right of doing any action is called AUTHORITY. So that by authority, is always understood a right of doing any act; and *done by authority*, done by commission, or license, from him whose right it is."[108]

Peters goes on to distinguish two kinds of authority: *de facto* and *de jure*.[109] The former "proclaims that someone has a *right* to do something."[110] The latter "means 'done by commission or license from him whose right it is.'"[111] Peters contrasts this view with that of de Jouvenel, who adopts the *de facto* approach, describing authority as "the *ability* of a man to get his proposals accepted."[112] "The *de jure* concept of authority presupposes a system of rules which determine who may legitimately take certain types of decision, make certain sorts of pronouncements, issue commands of a certain sort, and perform certain types of symbolic acts."[113]

"Authority" comes from the Latin "*auctor*" and "*auctoritas*."[114] The former refers to "'he that brings about the existence of any object, or promotes the increase or prosperity of it, whether he first originates it, or by his efforts gives greater permanence or continuance

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[106] THOMAS HOBBES, LEVIATHAN 150 (Penguin Books 1985) (1651).

[107] R.S. Peters, *Authority*, *in* POLITICAL PHILOSOPHY 83 (Anthony Quinton ed., Oxford University Press 1970) (1967) (emphasis in original).

[108] *Id.* (quoting HOBBES, *supra* note 105, at 218).

[109] *Id.* at 84.

[110] *Id.* (emphasis in original).

[111] *Id.*

[112] Peters, *supra* note 106, at 84 (emphasis in original).

[113] *Id.* at 85.

[114] *Id.*

to it.'"[115] Maintaining the distinction between *de facto* and *de jure*, Peters explains de Jouvenel's notion of authority as "either a set of rules which determine who shall be the *auctor* and about what, or, in its *de facto* sense, a reference to a man whose word in fact goes in these spheres."[116]

Similarly, Max Weber distinguishes *rational-legal authority* from other types of authority, in which the right derives from personal history, personal credentials, and personal achievements.[117] According to Weber, "rational-legal authority" "rest[s] on a belief in the legality of enacted rules and the right of those elevated to authority under such rules to issue commands[.]"[118] "Traditional authority" "rest[s] on an established belief in the sanctity of immemorial traditions and the legitimacy of those exercising authority under them[.]"[119] Finally, "charismatic authority" "rest[s] on devotion to the exceptional sanctity, heroism or exemplary character of an individual person, and of the normative patterns or order revealed or ordained by him[.]"[120]

Contrasting R. S. Peters's view of authority is that of Peter Winch. Winch says:

> Much of Peters' argument turns on his belief that "it is very important to distinguish the kind of entitlement implied in being *in* authority from that implied in being *an* authority[.]" His Weberian idea of "natural" authority, depending on purely personal qualities, commits him to a denial of my assertion that the notion of an established way of doing things is essential to the notion of authority as such. I am saying, in a sense, however, that someone who is *in* authority is always an authority *on* something.[121]

Winch's point is that to be in authority, as opposed to just having power, is to be recognized as an authority in some matter over those to whom the authority applies. As will be later seen from my discussion of the Authority of the United States,[122] to be *in authority* to make treaties that could possibly deviate from constitutional requirements, requires that the United States operate as *an authority* on human rights.

Weber's distinctions between rational-legal and traditional authority also provide a helpful tool here – which is not inconsistent with Winch's view – by showing not only how authority is understood in legal thought, but also by showing how an established way of doing things, all else being equal, might be seen as a right that they continue to be done that way. By "all else being equal" I mean to imply that there be no human rights violations and that in all other formal respects – both domestic and international – the treaty comport with the usual ways treaties come about. This understanding is important because, if the "Authority of the United States" is understood only in the more purely legal sense as arising

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[115] *Id.*

[116] *Id.* at 86.

[117] *See* MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 215 (Guenther Roth & Claus Wittich eds., 1968) (1978).

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] Peter Winch, *Authority in* POLITICAL PHILOSOPHY, 101 (Anthony Quinton ed., 1967) (1970) (emphasis in original).

[122] *See infra* notes 127-38 and accompanying text.

out of consent of the governed, its relation to treaty making versus constitutional constraint is left unanswered.

This is made clear with regard to rational-legal authority *in general* when Weber notes that in its pure form:

> Legal authority rests on the acceptance of the validity of the following mutually inter-dependent ideas.
> 1. That any given legal norm may be established by agreement or by imposition, on grounds of expediency or value-rationality or both, with a claim to obedience at least on the part of the members of the organization. . . .
> 2. That every body of law consists essentially in a consistent system of abstract rules which have normally been intentionally established. . . .
> 3. That thus the typical person in authority, the "superior," is himself subject to an impersonal order by orienting his actions to it in his own dispositions and commands. . . .
> 4. That the person who obeys authority does so, as it is usually stated, only in his capacity as a "member" of the organization and what he obeys is only "the law.". . .
> 5. In conformity with point 3, it is held that the members of the organization, insofar as they obey a person in authority, do not owe this obedience to him as an individual, but to the impersonal order[.][123]

The "inter-dependent ideas" setting out rational-legal authority puts the focus on membership in a group – as might come about, for example, from residing within or, even more, being a citizen of a nation – where there are very specific determinants for what the law is. This form of authority contrasts sharply with traditional authority and charismatic authority, both of which are far less formal and much broader.

Traditional authority results when "legitimacy is claimed for it and believed in by virtue of the sanctity of age-old rules and powers."[124] Long-standing customs and practices are the norm. These norms and customs can also be constraining, although they need not turn on formal membership in a group as much as identification with a set of ideals. Under traditional authority:

> Obedience is owed not to enacted rules but to the person who occupies a position of authority by tradition or who has been chosen for it by the traditional master. The commands of such a person are legitimized in one of two ways:
>
> > a) partly in terms of traditions which themselves directly determine the content of the command and are believed to be valid within certain limits that cannot be overstepped without endangering the master's traditional status;

[123] WEBER, *supra* note 116, at 217-18.

[124] *Id.* at 226.

> b) partly in terms of the master's discretion in that sphere which tradition leaves open to him; this traditional prerogative rests primarily on the fact that the obligations of personal obedience tend to be essentially unlimited.[125]

Traditional authority also contrasts with charismatic authority. "The term 'charisma' [is] applied to a certain quality of an individual personality by virtue of which he is considered extraordinary and treated as endowed with supernatural, superhuman, or at least specifically exceptional powers or qualities."[126] Charismatic authority is much more personal than traditional authority, in that it results from seeing the one who "is treated as 'leader'" and as possessing qualities or powers that are considered divine or, at least, exemplary.[127]

B. The Authority of the United States

As a starting point, the "Authority of the United States" described in Article VI of the Constitution does not fit Weber's concept of charismatic authority. Although there have been persons in American history who have possessed various degrees of charisma (for example, Abraham Lincoln), the authority of the United States has never, in any substantial way, depended upon anyone possessing exceptional powers or qualities.[128] On the other hand, the Weberian concepts of rational-legal authority and traditional authority each independently may play a role in establishing the authority of the United States. The former might operate in the field of international law, since, as sovereign, the United States must be able to operate within the community of nations according to recognized rules. The latter can be seen to operate domestically as arising out of the right of the people to self-determination. Here, I must presume a right of the people to self-determination because the operative "traditional" sense of authority is prior to any specific governmental arrangement. The authority underlying adoption of the Constitution of 1789, thus, fits Weber's traditional authority view well. It will be noted that the delegates to the Constitutional Convention in Philadelphia framed that document to provide, in Article V, for its own ratification when three-quarters of the states agreed, notwithstanding that this would purposely skirt the amendment process provided for under the Articles of Confederation.[129] It is in this latter sense that the authority of the United States under

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[125] *Id.* at 227.

[126] *Id.* at 241.

[127] *Id.*

[128] Note the contrast here with the authority of, for example, the Christian church, which seems highly centered on the purported divinity of Jesus of Nazareth, or the authority of Moses in Judaism or Mohammad in Islam who God it is said had afforded supernatural powers.

[129] Article XIII of the Articles of Confederation provides:

> Every State shall abide by the determinations of the United States, in Congress assembled, on all questions which by this confederation are submitted to them. And the articles of this confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.

domestic law and, specifically, the authority of the Constitution is closer to Weber's traditional sense, in that it presupposes certain age-old values, but not an already existing legal structure.

It is important to note two different levels of authority for the United States, because Article VI of the Constitution speaks both to laws made in pursuance of the Constitution and separately to "[t]reaties made, or which shall be made, under the Authority of the United States."[130] First, treaties are recognized under international law as "establishing rules expressly recognized by the contesting states[.]"[131] Second, and separate from recognition under international law, a treaty must be recognized as falling under Article II of the Constitution, which provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur[.]"[132] That procedural restriction in Article II is the only expressed constitutional constraint on the treaty-making power. But this fact just begs the question: When Article VI recognizes "[t]reaties made, or which shall be made, under the Authority of the United States[,]" together with the Constitution and the laws made pursuant thereto, as "the *supreme Law* of the Land,"[133] must not the intention have been to set treaties aside from any other constitutional constraint, other than the procedural one prescribed in Article II?[134] Otherwise, why not require that treaties, like the laws of the United States, be made

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ARTICLES OF CONFEDERATION, art. XIII (1778), *available at* www.http://ahp.gatech.edu/confederation_1778.htm. This requirement of unanimous agreement among the states contrasts sharply with Article V of the U.S. Constitution, which states:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

U.S. CONST. art. V. Since the delegates to the Philadelphia Convention were originally assigned the task fixing the Articles of Confederation to make them more helpful in resolving national problems, the change of direction by the delegates totally away from the Articles toward something was revolutionary.

[130] U.S. CONST. art. VI, cl. 2.

[131] Statute of the International Court of Justice, art. 38(1)(a) (2010).

[132] U.S. CONST. art. II, § 2, cl. 2.

[133] *Id.* art. VI, cl. 2 (emphasis added).

[134] *Id.* art. II, § 2, cl. 2 provides:

> He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Id.

pursuant to the Constitution? Again, it is not clear that the Framers were not requiring that treaties be made in accord with the Constitution, once that document was adopted. But even that conclusion need not cause us too much concern for we have to think of where the United States is today, not where it was in 1789.

Here it seems following Weber that Article VI's deliberate use of the phrase "[a]uthority of the United States"[135] was meant to meant to suggest normative constraints buried in the idea of the President and Senate being together *an authority*, which when properly set out would establish some *substantive* limits to the treaty-making power. This is because for the American people to accept a treaty as following out of the "[a]uthority of the United States"[136] they need to know more than that it had had the right pedigree under Article II.[137] They also need to believe that it is not inconsistent with values they hold dear. That is because it is Americans who are being asked to accept a certain and to some extent novel interpretation of Article VI, as they become part of a larger and more interdependent global community of nations. These values, which are also exhibited in constitutional authority, are the background political norms (or Weberian traditional authority) that Americans already accept as a way of living together in society.[138] Indeed, given the wide scope of what treaties can do, the constraints that apply to treaties must be very similar to the constitutional constraints that apply to laws once we get beyond mere formalities. For both the values exhibited by constitutional constraints on laws like the values setting out the Authority of the United States are a normative creation, and as such, are meant to bind as a matter of right. Moreover, because these values are meant to bind over time, the values that have come to be understood as embodied in the Constitution must also be part of the background rights that the Authority of the United States in making treaties must also uphold.[139] Consequently, treaties like the Constitution and laws themselves must appear to the America people as legitimate against the existing background traditional norms that are already accepted.

C. The Rights of Englishmen and Other Markers of U.S. Authority

Among the most important rights recognized at the time of the founding of the United States was the right to property. "[T]he [F]ramers of the Constitution said that the protection of property was a (or the) fundamental purpose for submitting to the authority of government[.]"[140] This purpose was because, "by the late eighteenth century, property had come to be related to" and "every legitimate title to 'real' property derived ultimately

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[135] *Id.* art. VI, cl. 2.

[136] U.S. CONST. art. VI, cl. 2.

[137] *See id.* art. II, § 2, cl. 2.

[138] I will discuss these in fuller detail in the next section.

[139] Here I would note changes to constitutional law—such as the recognition of a right to privacy and personal liberty, and sex equality—that have arisen over time by Court interpretations of the Constitution. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (recognizing the right of married persons to use contraceptives and physicians to advise on their use that was later extended to unmarried persons and minors); Lawrence v. Texas, 539 U.S. 558 (2003) (recognizing the right of adult gay persons to a noncommercial, personal sexual relationship in the home); Craig v. Boren, 429 U.S. 190 (1976) (agreeing that to avoid discrimination, courts should apply intermediate scrutiny to classifications based on gender).

[140] FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 10 (1985).

from a grant by the king[.]"[141] From earlier but long-standing English law, Americans took the further notion that "personal liberty and private rights to property were normally beyond the reach of the king[.]"[142] The thirteenth century *Magna Carta* and fourteenth century enactment by parliament made it clear that no free man could be imprisoned or disseized except upon lawful judgment of his peers.[143] In the 1604 *Semayne's Case*,[144] Lord Coke recognized a joint-tenant's refusal to admit the sheriff where there had been no prior notice of his arrival.[145]

By the time of the founding, several of the colonies had incorporated this idea of *private* property into their laws, including Maryland, Massachusetts, New Jersey and New York.[146] Still, a right to property was not thought to be absolute, and property could be taken by forfeiture for violations of law or by a taking for public purpose.[147] In the latter case, New England colonies compensated the landowners for the taking of real property.[148] Because the most significant form of taking was thought to be taxation, the various colonial governments followed their English precedent and established some legislative house (usually the lower) to be representatives of the people.[149] Beyond this public involvement, it was also widely believed "that the safety of all rights to liberty and property depended[]" upon maintaining the jury system.[150]

Except for Rhode Island, where complete religious freedom existed for all Christians and tolerance for others prevailed, limitations were imposed on various sects, with no colony affording full rights to Catholics and Jews.[151] Most colonies also provided for "tax-supported denominational establishments."[152] New Hampshire, Connecticut, Massachusetts, South Carolina, and partially Maryland had "tax-supported established churches."[153] There were also various limits on freedom of speech and freedom of the press; the former being considered less of a right than a parliamentary privilege, in which

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[141] *Id.* at 11-12.

[142] *Id.* at 12.

[143] *See id.*; *see also* SAMUEL E. THORNE ET AL., THE GREAT CHARTER: FOUR ESSAYS ON MAGNA CARTA AND THE HISTORY OF OUR LIBERTY 132 (1965).

[144] 77 Eng. Rep. 194 (K.B. 1604).

[145] Lord Coke based his decision on the ground:

> That the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose; and although the life of a man is a thing precious and favoured in the law; so that although a man kills another in his defence, or kills one *per infortun'* without any intent, yet it is a felony, and in such case he shall forfeit his goods and chattels, for the great regard which the law has to a man's life; but if thieves come to a man's house to rob him, or murder, and the owner of his servants kill any of the thieves in defence of himself and his house, it is not a felony, and he shall lose nothing[.]

Id. at 196.

[146] MCDONALD, *supra* note 139, at 12-13.

[147] *See id.* at 14.

[148] *Id.* at 23.

[149] *See generally id.* at 38-39.

[150] *Id.* at 40.

[151] MCDONALD, *supra* note 139, at 42.

[152] *Id.*

[153] *Id.* at 43.

"neither Parliament nor the colonial assemblies extended the privileges to nonmembers[,]" to criticize legislative bodies or royal officials.[154] Still, liberty of the press, as Blackstone had noted, did consist of "'laying no *previous* restraints upon publications.'"[155] However, there was no exemption for criminal censure following publication.[156] Slavery was generally allowed and most Americans of the period were indifferent to it.[157] Notwithstanding the slavery issue, ideas about equality were coming to have greater currency during this period, perhaps the most known view deriving from John Locke's "all men are equal in the sense that none has a natural or God-given right to rule over another."[158] Another view deriving from the Scottish Common Sense school of philosophy, which abhorred slavery, "held that all adult human beings are endowed with a moral sense – an innate knowledge of what is right and what is wrong[.]"[159]

During this period too, Americans had begun to engage the political writings of such natural-law theorists as Grotius, Pufendorf, Rutherforth, Burlamaqui, and Vattel.[160] Foremost among these was Locke, whose political theory begins with the idea of a state of nature where "all men are free and equal."[161] "They are free, that is, 'to order their Actions and dispose of their Possessions[.]'"[162] And, that in this state, every person has a property right to "[t]he *Labour* of his Body, and the *Work* of his Hands."[163] Also, that "government can have no powers except such as are compatible with the end for which it is established; and cannot act arbitrarily[.]"[164] Here, one finds the crux of limited government, where legitimate government's role is to protect basic rights.[165] An important constraining element in the Lockean understanding was the proviso:

> [A]ll specific property rights derive from the laws of the political society, not from nature; but this does not mean either that civil laws can permit any individual to appropriate endless amounts of property to himself, as has sometimes been argued, or that civil laws can permit the emergence of a propertyless proletariat, as has also been argued.[166]

As Locke saw it, "[T]he law of nature decrees that no man can have such a 'Portion of the things of this World' as to deprive 'his needy Brother a Right to the Surplusage of his Goods[.]'"[167]

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[154] *Id.* at 45-47.

[155] *Id.* at 48 (emphasis in original).

[156] MCDONALD, *supra* note 139, at 48.

[157] *Id.* at 50-51.

[158] *Id.* at 53.

[159] *Id.* at 54.

[160] *Id.* at 60.

[161] MCDONALD, *supra* note 139, at 63.

[162] *Id.* (quoting JOHN LOCKE, TWO TREATISES OF GOVERNMENT 287 (Peter Laslett ed., Cambridge Univ. Press 1967) (1690)).

[163] *Id.* (quoting LOCKE, *supra* note 161, at 305-306, 308) (emphasis in original).

[164] *Id.* at 65.

[165] *See id.*

[166] MCDONALD, *supra* note 139, at 65.

[167] *Id.* at 66 (quoting LOCKE, *supra* note 161, at 375, 188).

Additionally, Americans during this period were beginning to develop the notion of ideological republicanism, which took as its most vital principle "*public virtue*" as entailing "firmness, courage, endurance, industry, frugal living, strength, and above all, unremitting devotion to the weal of the public's corporate self, the community of virtuous men."[168] This movement to public virtue, in turn, begot republican liberty with landownership as its "natural preservative."[169] "American republican ideologues could recite the central points of Montesquieu's doctrine" of separations of powers, in which neither the legislative, executive or judicial branches exercised the other's powers.[170] Americans at this time also began to adopt, in their new state constitutions, the British idea that the executive should not hold more than one office to avoid corruption.[171] Annual elections became the primary check on the legislature in most states, and there was also the feeling of a "reserved right in the people of the states, severally, to alter or abolish their governments."[172] The Declaration of Independence would adopt many of these values when it proclaimed:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. – That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, – That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.[173]

The Declaration's now famous language embodies just some of the most important background values in the period leading up to the founding. Similarly, the Constitution of 1789 would soon gain acceptance and legitimacy because it was able to encompass many of the Declaration's values, though not without various conflicts, debate, and compromises – as illustrated by whether slavery would be allowed to continue in those states that desired it.[174] And, although it took a fair effort for the Constitution to be ratified – including a

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[168] *Id.* at 70.

[169] *Id.* at 74-75.

[170] *Id.* at 81; *see* MONTESQUIEU, *The Spirit of the Laws*, *reprinted in* SELECTED POLITICAL WRITINGS 182-92 (Melvin Richter trans., Hackett Pub. Co., 1990).

[171] *See* MCDONALD, *supra* note 139, at 86.

[172] *Id.* at 87.

[173] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[174] The sociologist Max Weber has noted:

> Conceptions of the "rightness of law" are sociologically relevant within a rational, positive legal order only in so far as they give rise to practical consequences for the behavior of law makers, law practitioners, and social groups interested in the law. In other words, they become sociologically relevant only when practical legal life is materially affected by the conviction of the particular "legitimacy" of certain legal maxims, and of the directly binding force of certain principles which are not to be disrupted by any concessions to positive law imposed by mere power. Such a situation has repeatedly existed in the course of history, but quite particularly at the beginning of modern times and

promised Bill of Rights to be added as among the first orders of business for the new Congress – it is fair to say that, without this normative background, the Constitution would have been quite different in form and content, had it even come to pass.

D. How Traditional Authorities Constrain the Treaty Power

What has been said of the support provided by the background rights of Englishmen and related American interpretations applies also to how the treaty power is constrained. Of course, since now we are not focusing on a single moment of history, but on the treaty power as it emerges through time, the background principles that need to be taken into account when deciding whether a particular treaty is within the Authority of the United States include all those constitutional principles reached by the Supreme Court that can be rationally tied both to our human nature and our understanding of human rights. Still, because what has been said of background rights has a kind of patchwork feel to it, we need a more general way – by adopting some kind of methodology out of political morality – to capture what rights there are. The idea is that this methodology will then serve as a useful tool for determining background rights. And, although no one moral scholar's work has final say on the matter, a good starting point – because it speaks to legitimacy – is John Rawls's notion of public reason.

Rawls's conception of public reason serves background democratic principles.[175] Rawls's conception neither ordains nor claims that its authority is derived from any one political doctrine, but it seeks its persuasiveness in the desire of human beings, with very different conceptions of the world, to find common ground over matters of mutual concern.[176] According to Rawls:

> The idea of public reason . . . belongs to a conception of a well-ordered constitutional democratic society. The form and content of this reason – the way it is understood by citizens and how it interprets their political relationship – are part of the idea of democracy itself. This is because a basic feature of democracy is the fact of reasonable pluralism – the fact that a plurality of conflicting reasonable comprehensive doctrines, religious, philosophical, and moral, is the normal result of its culture of free institutions. Citizens realize that they cannot reach agreement or even approach mutual understanding on the basis of their irreconcilable comprehensive doctrines. In view of this, they need to consider what kinds of reasons they may reasonably give one another when fundamental political questions are at stake. I propose that in public reason comprehensive doctrines of truth or right be replaced by an idea of the politically reasonable addressed to citizens as citizens.

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during the Revolutionary period, and in America it still exists. The substantive content of such maxims is usually designated as "Natural Law."

WEBER, *supra* note 116, at 866.

[175] John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765 (1997), *reprinted in* JOHN RAWLS: COLLECTED PAPERS 573 (Samuel Freeman ed., 1999).

[176] *Id.* at 573-74.

> Central to the idea of public reason is that it neither criticizes nor attacks any comprehensive doctrine, religious or nonreligious, except insofar as that doctrine is incompatible with the essentials of public reason and a democratic polity. The basic requirement is that a reasonable doctrine accepts a constitutional democratic regime and its companion idea of legitimate law. [177]

The quoted passage shows that public reason serves both to provide reasons for democratic decision-making as well as constraints on the kind of reasons accepted by democratic societies for their decisions. It does not provide reasons or constraints in an absolutist or universalistic way. Instead, the public reasons that one democratic society finds influential may be less influential in another democratic society, because the same specific doctrines will not be equally influential in different societies.[178] However, this difference is good, if it means both that constraints emerge from the already existing public values of the society while, at the same time, allowing those constraints to change or alter as different values come to interact. For in this way, the persuasiveness of the reasons will be tied to what the people of the society already believe as a matter of the "politically reasonable."[179]

I do not mean to suggest that societies ought to remain stagnant in the values they hold or that social values ought not to be rethought. To the contrary, I believe Rawls's view of public reason encourages the development of mechanisms for how this change should occur, but requires, in the first instance, that these mechanisms must themselves be part of the social ordering. Provided the mechanisms center on the search for what is politically possible within democratic societies, as best that can be reasonably ascertained, there should be little departure from Rawls's notion of the politically reasonable. Moreover, it seems to me that democratic societies are particularly suited to such inquiries for reasons John Stuart Mill offers for the justification of freedom of expression.

Mill makes essentially four arguments for freedom of expression.[180] The first is that a suppressed opinion might be true and to assume that is not the case is to assume our own infallibility.[181] The second is that, even if the suppressed opinion were an error, it might be partly true and that only through rigorous debate will we be able to separate the truth from the falsity.[182] The third argument is that "even if the received opinion be not only true, but the whole truth[,]" unless it is earnestly contested, one will not come to appreciate its rational grounds.[183] Fourth, unless the opinion be contested, it maybe "lost or enfeebled[,] . . . preventing the growth of any real and heartfelt conviction, from reason or personal experience."[184] In short, Mill proposes the maintenance of a marketplace of

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[177] *Id.*

[178] *Id.* at 574.

[179] *See id.* at 578.

[180] John Stuart Mill, *On Liberty*, *in* ESSENTIAL WORKS OF JOHN STUART MILL 249, 301-02 (Max Lerner ed., 1961).

[181] *Id.* at 302; *see also* JOSEPH RAZ, THE MORALITY OF FREEDOM ch. 14, 15 (1986) (arguing that personal freedom presupposes value-pluralism which should be promoted by political action).

[182] Mill, *supra* note 179, at 302.

[183] *Id.*

[184] *Id.*

ideas, in which those opinions that are true will likely win the respect of all serious thinkers. In essence, I take these arguments by Mill to reflect his deeper belief that democratic institutions are the best supports of liberty, diversity and individuality.

In similar fashion, Rawls shows his support for mechanisms that allow democratic institutions to evolve, when he states:

> A citizen engages in public reason, then, when he or she deliberates within a framework of what he or she sincerely regards as the most reasonable political conception of justice, a conception that expresses political values that others, as free and equal citizens might also reasonably be expected reasonably to endorse.[185]

There will be different political conceptions of what justice is, and Rawls admits his view of "justice as fairness" is but one such conception.[186] Still, Rawls believes that:

> The limiting feature of these forms is the criterion of reciprocity, viewed as applied between free and equal citizens, themselves seen as reasonable and rational. Three main features characterize these conceptions:
>
> First, a list of certain basic rights, liberties, and opportunities (such as those familiar from constitutional regimes);
>
> Second, an assignment of special priority to those rights, liberties, and opportunities, especially with respect to claims of the general good and perfectionist values; and
>
> Third, measures ensuring for all citizens adequate all-purpose means to make effective use of their freedoms.[187]

If these features are provided for, Rawls believes, society will develop as a fair system of social cooperation over time.[188] One important common aspect of these features is that they are not derived from an existing constitution, but rather serve as background conditions under which constitutional authority itself arises.[189] In this sense, they fit Weber's traditional notion of authority while, at the same time, allowing for changes to that authority as new values obtain currency in political – including international human rights and domestic constitutional – debates.

Still, Rawls acknowledges that as "these ideas can be interpreted in various ways, we get different formulations of the principles of justice and different contents of public

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[185] Rawls, *supra* note 174, at 581.

[186] *Id.*

[187] *Id.* at 581-82.

[188] *Id*. at 582.

[189] As stated by Rawls:

> Justice as fairness starts from this idea as one of the basic intuitive ideas which we take to be implicit in the public culture of a democratic society. In their political thought, and in the context of public discussions of political questions, citizens do not view the social order as a fixed natural order, or as an institutional hierarchy justified by religious or aristocratic values.

Rawls, *supra* note 174, at 388, 396.

reason."[190] In this sense, political liberalism, as Rawls describes, "admits Habermas's discourse conception of legitimacy (sometimes said to be radically democratic rather than liberal), as well as Catholic views of the common good and solidarity when they are expressed in terms of political values."[191] Here, one might wonder if such views could usurp Rawls's requirement that his public reason be open to what "free and equal citizens might also reasonably be expected reasonably to endorse."[192] At this point, I would like to suggest that the rationality requirement behind Rawls's political liberalism needs further development beyond where Rawls takes it, but, when properly understood, it can set forth certain further constraints on the types of rights views public reason can admit.

IV. HUMAN RIGHTS AS BOTH A SUPPORT FOR AND A CONSTRAINT ON PUBLIC REASON

A. What Rationality Demands As Reasonable

One type of constraint on public reason is a rationality requirement, which Rawls says must be present.[193] Although rationality can operate in different ways, including just means/end reasoning, Rawls wants the rationality that determines public reason to include that the ends themselves are reasonable in the sense that "all who cooperate must benefit, or share in common burdens[.]"[194] This notion of reciprocity or mutuality, which Rawls takes to be part of the political conception of justice, should be obtained in the "discourse of judges in their decisions, and especially of the judges of a supreme court; the discourse of government officials, especially chief executives and legislators; and finally, the discourse of candidates for public office and their campaign managers, especially in their public oratory, party platforms, and political statements."[195] Once the "reasonable" is part of the discourse, Rawls believes, we can begin to figure out what goods are primary.[196]

At this stage, I believe that Alan Gewirth's justification for human rights puts forth a particularly helpful construction of which rights are necessary for public reason to be reasonable. Here, rights, like those that Rawls would expect public reason to uphold, are actually found to be constituents of that reason properly understood. By "necessary," as will be made clear shortly, I mean to suggest that one cannot be without these rights and still be able to act, especially in the political realm. Gewirth starts his argument by trying to answer three distinct questions: "Why should one be moral[?]"; "Whose interests other than his own should the agent favorably consider in action?"; "Of which interests should favorable account be taken?"[197]

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[190] Rawls, *supra* note 174, at 582.

[191] *Id.* at 582-83.

[192] *Id.* at 581.

[193] *Id.* at 609.

[194] John Rawls, *Kantian Constructivism in Moral Theory* (1980), *reprinted in* JOHN RAWLS: COLLECTED PAPERS 303, 316 (Samuel Freeman ed., 1999).

[195] Rawls, *supra* note 174, at 575.

[196] *See id.* at 609; *see also* John Rawls, *Distributive Justice: Some Addenda* (1968) *in Collected Papers*, *supra* note 174, at 158 (noting that the primary goods are "things which rational persons may be presumed to want whatever else they want[,]" and certainly include "liberty and opportunity, income and wealth, health and educated intelligence.").

[197] ALAN GEWIRTH, REASON AND MORALITY 3 (1978).

According to Gewirth, every moral theory, because it is prescriptive, begins from the point of view that the persons it addresses are voluntary, purposive agents capable of determining their actions based on their own unforced choice with knowledge of relevant circumstances.[198] From this modest beginning, Gewirth claims that any action an agent undertakes is, from his own point of view, based on the belief that his purpose serves him and, thus, is good in some sense.[199] That is not to say that the agent believes his purpose necessarily to be a moral good.[200] It suffices that the purpose satisfies some pro-attitude or reason for his action.[201] Obviously, if the purpose were not good in any sense, the agent would have no reason to act.[202]

From this step, Gewirth draws the conclusion that freedom and well-being are necessary goods, whereby "necessary" he means that the agent must have these goods if he is to act.[203] Here, freedom comes in as a procedural condition of voluntariness under which the agent is able to act.[204] Well-being comes in as a substantive condition.[205] Both must be present for the agent to be able to act for some purpose he regards as good.[206] The theory takes a "rights turn" where Gewirth's next step requires that the agent, in acting, necessarily claims a right to freedom and well-being.[207] The step may appear controversial – why should any claim to action necessarily correlate with a rights claim?

Gewirth explains the need for the agent's implied claim of rights on the ground that, if the agent did not do so, he would have no basis to object if others interfered with or removed his freedom and well-being.[208] But this theory means that the agent must accept that he might not have freedom and well-being.[209] Still, since the agent must have freedom and well-being to perform some action, he contradicts himself if he accepts that he may not have these necessary goods but still claims to act.[210] So, freedom and well-being are "prudential" claims that every agent makes from his own point of view by virtue of being a prospective, purposive agent.[211]

The agent's prudential rights claim converts into a moral one because: first, the sufficient reason for his rights claim to freedom and well-being was that he needed these generic features of action in order to act; second, every other prospective, purposive agent would be in the same position to make the same claim.[213] Thus, if the agent denied to his fellow agent rights that, on the same basis he asserts for himself, he would contradict

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[198] *Id.* at 26-27.
[199] *Id.* at 48-49.
[200] *Id.* at 49.
[201] *See id.* at 49-50.
[202] *See* GEWIRTH, *supra* note 196, at 49-50.
[203] *Id.* at 51-53, 57.
[204] *Id.* at 52.
[205] *Id.* at 51.
[206] *See id.* at 61-62.
[207] GEWIRTH, *supra* note 196, at 63.
[208] *Id.* at 80.
[209] *Id.*
[210] *Id.*
[211] *See id.* at 71.
[213] *See* GEWIRTH, *supra* note 196, at 110, 112.

himself.[214] Because this claim is now a *reciprocity* claim, it has moral standing. Moreover, since every agent must grant to his fellow agent the same rights that he would claim for himself, if the agent is to be rational and the action morally justified, he must take favorable account of the equal rights of others.[215] Set out as a principle: Every agent should "*[a]ct in accord with the generic rights* [i.e., the rights to freedom and well-being] *of his recipients as well as of yourself.*"[216] Gewirth calls this principle the Principle of Generic Consistency, or "PGC" for short.[217] For him, it is the supreme principle of morality.[218] In effect, Gewirth has adopted a kind of Kantian standard in which the universalizabilty of equal human rights is the foundation of his moral claim because it is what every person, from his own point of view, must admit if he is not to contradict himself.[219]

Thus, Gewirth is able to answer the three questions posed at the outset of his investigation as follows: Regarding "[w]hy should one be moral?", Gewirth's answer is that "'not to do so is to contradict that one is a [prospective purposive agent].'"[220] Regarding, "[w]hose interests other than his own should the agent favorably consider in action?", Gewirth's answer is "'[t]he interests of all [prospective purposive agents].'"[221] Finally, regarding, "[o]f which interests should favorable account be taken?", he answers, "'[t]heir [referring to all other relevant prospective purposive agents] interests in freedom and well-being.'"[222]

My reason for setting out Gewirth's view is not to suggest that it is ultimately the correct answer, but to show how rationality, when properly considered in context to human conduct, necessarily entails limitations if one is to be reasonable, i.e., if one is not to contradict oneself in the implicit claims to conduct one makes. This avoidance of a contradiction is the foundation of a moral principle that can be seen to have universal validity, in the sense that it provides a logical limit on justified human conduct. It, of course, does not demean the imposition of further moral principles that operate within the sphere that the PGC tolerates. It does mean that the PGC provides a kind of outer boundary for what is and is not justified. An agent cannot operate so as to deny the equal freedom or well-being of another and claim her action is morally reasonable.

The implication for a pluralistic society is to allow for different groups to have different principles according to which they will structure their lives, provided that certain basic rights to freedom and well-being are recognized. This idea is similar to what Rawls said earlier of public reason: that it requires that no one "attacks any comprehensive doctrine, religious or nonreligious, except insofar as that doctrine is incompatible with the

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[214] *Id.*at 112.

[215] *Id.* at 134.

[216] *Id.* at 135 (emphasis in original).

[217] *Id.*

[218] *See* GEWIRTH, *supra* note 196, at 135.

[219] For some comparison and contrast between the two philosophers, *see* DERYCK BEYLEVELD, *Gewirth and Kant on Justifying the Supreme Principle of Morality in* GEWIRTH: CRITICAL ESSAYS ON ACTION, RATIONALITY, AND COMMUNITY 97-117 (Michael Boylan ed., Rowman & Littlefield, 1999).

[220] DERYCK BEYLEVELD, THE DIALECTICAL NECESSITY OF MORALITY: AN ANALYSIS AND DEFENSE OF ALAN GEWIRTH'S ARGUMENT TO THE PRINCIPLE OF GENERIC CONSISTENCY 17 (University of Chicago Press, 1991).

[221] *Id.*

[222] *Id.*

essentials of public reason and a democratic polity."[223] The reason for the latter limitation is that there must be limits on the restrictions that can be imposed, insofar as all citizens are recognized as operating within, what Rawls calls, "a fair system of equal social cooperation."[224]

Rawls explains this approach using a variation on the old adage, "I slice, you choose." Rawls postulates a hypothetical "original position" in which self-interested, representative citizens do not know any particulars about themselves; nevertheless, they have to choose standards of justice or fairness for how their society will operate, and these standards will affect them once they become aware of their own interests.[225] So, the principles they choose will, with respect to the basic rights, recognize equality and include such rights as the right to life, freedom of speech, press and assembly, vote, own property, and procedural due process before being convicted of any crime.[226] The principles would also likely include some social and economic inequalities, so long as the inequalities work to benefit those least advantaged and attach to positions and offices open to all.[227] Gewirth's system, starting from what every agent logically must accept on pain of contradiction, would affirm pretty much the same basic rights to life; freedom of speech, press, and assembly; vote and hold office; and procedural due process before being convicted of any crime, while allowing for some private property and some differences in wealth and culture.[228] Although the methodology is different as to the rights it protects, and more importantly the way it makes those rights central to what it means to be a rational agent, the PGC provides more certain ground for a nearly similar set of constraints on government when compared to Rawls's more intuitionist view.[229]

B. Providing Legitimacy to Background Rights

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[223] RAWLS, *The Idea of Public Reason Revisited in* COLLECTED PAPERS, *supra* note 174, at 574.

[224] RAWLS, *Justice as Fairness: Political Not Metaphysical in* COLLECTED PAPERS, *supra* note 174, at 403.

[225] *Id.* at 400-401.

[226] *See* RAWLS, *Social Utility and the Primary Goods, in* COLLECTED PAPERS, *supra* note 174, at 362.

[227] *See id.*

[228] *See* ALAN GEWIRTH, COMMUNITY OF RIGHTS 29 (Chicago: University of Chicago Press, 1996) (noting that "[f]or the most part, the generic rights based on the PGC coincide extensionally with the UN declaration's human rights, including its social and economic rights as well as its political and civil rights.").

[229] In a sense, the PGC's rationality requirement operates on voluntary purposive human behavior analogously to H.L.A. Hart's claim:

> [I]f there are any moral rights at all, it follows that there is at least one natural right, the right of all men to be free. By saying that there is this right, I mean that in advance of certain special conditions which are consistent to the right being an equal right, any adult human being capable of choice (1) has the right to forbearance on the part of all others from the use of coercion or restraint against him save to hinder coercion or restraint and (2) is at liberty to do (i.e., is under no obligation to abstain from) any action which is not coercing or restraining or designed to injure other persons."

H.L.A. Hart, *Are There Any Natural Rights?*, 64 PHILOSOPHICAL REVIEW 175, Apr. 1955. The right, Hart claims, is a natural right because it "is one which all men have if they are capable of choice" and "is not created or conferred by voluntary action[.]" *Id.* For a discussion on the differences between Rawls and Gewirth regarding "the least advantage" in the social and economic area, *see* GEWIRTH, *supra* note 196, at 112-14.

In the previous two sections, I argued, both from the standpoints of Rawlsian legitimation and Gewirthian justification, in favor of ascribing content to background rights that would simultaneously make sense of what the Constitution provides and the Authority of the United States ought to encompass. In this section, I again take up the legitimation question, this time borrowing from the Discourse Theory of Jürgen Habermas. My point is not just to show that several distinct methodologies converge on a similar set of rights, but, especially with Habermas, to further explain why these rights ought to be viewed as part of well-functioning democratic societies.

Habermas argues from what he calls an "ideal speech situation" in which people dedicate themselves to truth and reject force, deception, and irrelevant emotions.[230] Habermas explains this situation as adopting the moral point of view that persons "*transcend* the social and historical context of their particular form of life and particular community and adopt the *perspective* of all those possibly affected."[231] Here, the commitments to truth and nonviolence open a dialectic that can encompass other discourses, including legal discourse.

Habermas's move from ethical to legal discourse, including constitutional interpretation, encompasses a system of rights that "should contain precisely the rights citizens must confer on one another if they want to legitimately regulate their interactions and life contexts by means of positive law."[232] The difference between ethical and legal discourse is that, in the former, "the discourse principle takes the form of a universalization principle," which, then, as a "moral principle, functions as a rule of argumentation."[233] Whereas, in the latter, "the democratic principle states that only those statutes may claim legitimacy that can meet with assent (*Zustimmung*) of all citizens in a discursive process of legislation that in turn has been legally constituted."[234] Since constitutional rights will,

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[230] *See* JÜRGEN HABERMAS, LEGITIMATION CRISIS 107-14 (Thomas McCarthy trans., 1973).

[231] JÜRGEN HABERMAS, JUSTIFICATION AND APPLICATION: REMARKS ON DISCOURSE ETHICS 24, (Ciaran P. Cronin trans., MIT Press 1993) (emphasis in original).

[232] JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 122 (William Rehg trans., MIT Press, 1996).

[233] *Id.* at 109.

[234] *Id.* at 110. So, in effect, "the principle of democracy already presupposes the possibility of valid moral judgments. Indeed, it presupposes the possibility of *all* the types of practical judgments and discourses that can supply laws with their legitimacy. The principle of democracy thus does not answer the question whether and how political affairs in general can be handled discursively; that is for a theory of argumentation to handle." *Id.* (emphasis in original). Here I note two important distinctions Habermas makes between moral and legal discourse:

> One way we can distinguish the principles of democracy and morality is by their different levels of reference. The other is by the difference between legal norms and other action norms. Whereas the moral principle extends to any norm for whose justification moral arguments are both necessary and sufficient, the democratic principle is tailored to legal norms . . . . In contrast to naturally emergent rules, whose validity can be judged solely from the moral point of view, legal norms have an artificial character; they constitute an intentionally produced layer of action norms that are reflexive in the sense of being applicable to themselves. Hence the principle of democracy must not only establish a procedure of legitimate lawmaking, it must also *steer the production of the legal medium itself*. The democratic principle must specify, in accordance with the discourse principle, the conditions to be satisfied by individual rights in general, that is, by any rights suitable for the construction of a legal community and capable of providing the medium for the

in fact, often constrain consent of the majority statutory policies, it is precisely important to see how these rights cohere in democratic theory.

The place where the discourse principle applies to stabilize "behavioral expectations" in democratic society and, thus, meet with citizen assent, Habermas describes as his "concept of the 'legal forum.'"[235] Central to the legal forum is a legal code "defining the status of legal persons[.]"[236] To arrive at that status legitimately, the code must itself be arrived at from three separate categories of recognized rights:

> 1. Basic rights that result from the politically autonomous elaboration of the *right to the greatest possible measure of equal individual liberties.*
> These rights require the following necessary corollaries:
> 2. Basic rights that result from the politically autonomous elaboration of the *status of a member* in a voluntary association of consociates under law.
> 3. Basic rights that result immediately from the *actionability* of rights and from the politically autonomous elaboration of individual *legal protection*.[237]

A fourth category is then added to move from what Habermas calls a "horizontal association of free and equal persons[''] to each person becoming the *author* of the legal order:

> 4. Basic rights to equal opportunities to participate in processes of opinion- and will-formation in which citizens exercise their *political autonomy* and through which they generate legitimate law.[238]

This latter category might be thought of as Habermas's giving recognition to those aspects that Immanuel Kant takes as central to legitimacy: "freedom of choice, external relation, and authorized coercion."[239] In so doing, persons are affirmed in their self-respect as they pursue cooperative relations with others.

In summary, Habermas says, "we can say that the general right to equal liberties, along with the correlative membership rights and guaranteed legal remedies, establishes

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> community's self-organization. Thus, along with the system of rights, one must also create the *language* in which a community can understand itself as a voluntary association of equal consociates *under law*.

Id. at 111 (emphasis in original).

[235] HABERMAS, *supra* note 173, at 122.

[236] *Id.*

[237] *Id.* (emphasis in original).

[238] *Id.* at 123.

[239] *Id.* at 130. For instance, in his third version of the categorical imperative, Kant makes use of these three ideas when he implies that one should "[a]ct as if you were by your maxims in every case a legislating member in the universal Kingdom of Ends." ETHICS: THE BIG QUESTIONS 8 (James P. Sterba ed., 1998) (Sterba's phrasing of the third version of the categorical imperative seems to most closely capture Kant's idea.).

the legal code as such."[240] These basic rights must, of course, be given a political interpretation to meet changing circumstances.[241]

> In this sense, the classical liberal rights – to personal dignity; to life, liberty, and bodily integrity; to freedom of movement, freedom in the choice of one's vocation, property, the inviolability of one's home, and so on – are interpretations of, and ways of, working out, what we might call a 'general right to individual liberties,' however, these may be specified. Similarly, the prohibition against extradition, the right to political asylum, and everything pertaining to the rights and duties of citizens (i.e., their material legal status) specify membership in a voluntary association of free and equal persons. Finally, the guarantees of equal protection and legal remedies are interpreted through procedural guarantees and basic legal standards. These include the prohibition against retroactive punishment, double jeopardy, and ad hoc courts, as well as the guarantee of an independent judiciary, and so on.[242]

The first three categories of rights operate independently of any specific history and tradition of the medium of law: "more like principles that can guide the framers of constitutions."[243] Up to this point, Habermas has allowed the political theorist to propose the discourse principle as the means by which to create a legal form.[244] However, once created, "[citizens] achieve autonomy only by both understanding themselves as, and acting as, authors of the rights they submit to as addressees."[245] This category is the fourth category of rights. From this application, Habermas believes that legitimacy in the sense of "self-legislation" is thus "realized in the medium of the law itself."[246]

For Habermas, "[t]his system of rights, however, is not given to the framers of a constitution in advance as a natural law."[247] Rather, it is in the context of constitutional interpretation, including interpretation of such phrases as "the Authority of the United States," that these rights arise.[248] Here, "citizens interpret the system of rights in a manner congruent with their situation," by "explicat[ing] the performative meaning of precisely the enterprise they took up as soon as they decided to legitimately regulate their common life through positive law."[249] It is also here that:

> [W]e can see how the individual bearer of rights and beneficiary of liberties is simultaneously related to a public use of communicative freedom: these

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[240] HABERMAS, *supra* note 231, at 125.
[241] *Id.*
[242] *Id.* at 125-26.
[243] *Id.* at 126.
[244] *See id.*
[245] HABERMAS, *supra* note 231, at 126.
[246] *Id.*
[247] *Id.* at 128.
[248] *See id.* at 128-29.
[249] *Id.* at 249.

> entitlements encourage one to make use of them in an other-regarding attitude, but they must *also* be such that one *can* take them at face value, that is, understand them merely as granting individual liberties.[250]

Thus, the paradox of "legitimacy from legality" is resolved by seeing the legal system not as a circular process that recursively feeds back into and legitimates *itself*, but is constantly regenerated from "traditions and preserved in associations of a liberal political culture."[251]

C. Human Rights as the Intermediaries Between Principle and Judgment

It is appropriate now to state more precisely what the last few sections have been implying: that legal discourse is partially analogous to moral discourse at least for any advanced legal system – once we see legitimacy as bound to legal authority. Here, we might describe three levels of relevant inquiry.[252] The highest and most abstract level is the *standard* under which any claim to legal authority must attest. It itself is extralegal in the way Habermas's first three categories suggest, or Rawls's original position may be seen to operate, or Gewirth's PGC is derived. The second level is the level of legal principles. Here, I mean to include constitutional principles as well as human rights. It is here that types or classes of action are legally evaluated;, i.e., that a class is one of expression or exercise of religion or personal privacy. The most concrete level is the level of legal judgment where the principles, as interpreted under the standard, are applied to particular cases.

Since my concern is with the middle or principle level, given broad agreement on background values, the question can now be asked: What principles or rights that Americans adopt – which are also instantiated by the various theoretical frameworks suggested by Rawls, Gewirth, and Habermas – have been recognized among members of the global community of nations? The point here is not to suggest, going back to *Missouri v. Holland*, that Holmes recognized the kinds of limitations suggested by Rawls, et al.[253] Nor is it to argue that whether he was thinking of these limitations, that he should have been or that the Framers were or should have been thinking of these.[254] The point is to suggest that these same values find necessary application on the world stage, if the various countries of the world are to operate as a socially cooperative community of nations.

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[250] HABERMAN, *supra* note 231, at 130 (emphasis in original).

[251] *Id.* at 130-31. Legal discourse is disanalogous from moral discourse in that the former presumes the moral legitimacy of the legal system. But, for our purposes, where that higher legitimacy may not be in question due to broad agreement on background values, the issues become more a matter of determining the proper legal interpretation or forum in which the matter should be decided.

[252] For the point about different levels of moral theory, *see* C. E. HARRIS, JR., APPLYING MORAL THEORIES 57-58 (Wadsworth, 2d ed. 1996). Regarding the distinction between primitive and advanced legal systems, I am relying on H.L.A. Hart's description that advanced legal systems are characterized a set of rules whose validity is determined by another, prior set of rules, *see* H.L.A. HART, THE CONCEPT OF LAW 91-94 (Oxford University Press, 2d ed. 1994), or following Dworkin principles, *see* Ronald Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967).

[253] Here I adopt a phrasing by Professor Mark Strasser of Capital University Law School.

[254] *Id.*

One caveat exists. The principles set forth should not be thought to be exhaustive, nor their interpretations completely estranged from all history and tradition. Obviously, different societies may have different ways of structuring out these values as illustrated by the difference between a constitutional monarchy with a parliament and a democratic republic, or by the reservations in the name of culture, tradition, or religion that various nations have made when signing onto particular international human rights accords.[255] For my purposes, it suffices to point out how the principles would fit within the background traditions of United States constitutional law, though, in the first instance, they need not be seen as, nor need they necessarily be, constitutional principles.

Indeed, for the sake of this broader understanding, I will select these principles from the Universal Declaration of Human Rights and the United Nations Charter to compare to their first cousins in the United States Constitution, which preceded them. In so doing, I hope to suggest the commonness of background values that gave them rise. Needless to say, there may be times when we depart from our own values when venturing into the international arena as, for example, when we support political regimes that are not democratic. But, those instances may be less a crisis of values for us than they are a failure to live up to what we claim to believe when the cost of doing so – either economically or politically – is high.

Taking these documents, then, as the starting point, a comparison can be made of the values we find in the Constitution, Bill of Rights and subsequent amendments with the values we have affirmed in these various international agreements. Our First Amendment rights to freedom of speech, press, assembly, association, and religious liberty[256] have correlates in Articles 18, 19, and 20 of the Universal Declaration[257] and Articles 18, 19, 21, and 22 of the International Covenant on Civil and Political Rights ("ICCPR").[258] Our

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[255] For example, the United States has reserved the right in signing onto the ICCPR, subject to constitutional constraints, "to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment[.]" 138 CONG. REC. S4781, S4783 (Apr. 2, 1992) (entitled "U.S. Reservations, Understandings and Declarations to Its Ratification of the International Covenant on Civil and Political Rights").

[256] U.S. CONST. amend. 1.

[257] Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc A/810 at 71 (1948), *available at* http://www1.umn.edu/humanrts/instree/b1udhr.htm [hereinafter "Universal Declaration"]. Article 18 states: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance." *Id.*§ 18. Article 19 states: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." *Id.* § 19. Article 20 states: "1. Everyone has the right to freedom of peaceful assembly and association. 2. No one may be compelled to belong to an association." *Id.* § 20.

[258] International Covenant on Civil and Political Rights, GA Res. 2200A (XXI), 21 UN GAOR Supp. No. 16, UN Doc. A/6316 (1966); 999 U.N.T.S. 171; 6 I.L.M. 368 (Mar. 23, 1976), *available at* http://www1.umn.edu/humanrts/instree/b3ccpr.htm [hereinafter "International Covenant"]. Article 18 states:

> 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
>
> 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

Fourth Amendment right against unreasonable searches and seizures has correlates in Article 9 of the Universal Declaration[259] and ICCPR.[260] Our Fifth Amendment right not to

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> 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
> 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Id. § 18. Article 19 states:

> 1. Everyone shall have the right to hold opinions without interference.
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Id. § 19. Article 21 states: "The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others." *Id.* § 21. Article 22 states:

> 1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
> 2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.
> 3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

Id. § 22.

[259] Universal Declaration, *supra* note 256. Article 9 states: "No one shall be subjected to arbitrary arrest, detention or exile." *Id.* § 9.

[260] International Covenant, *supra* note 257. Article 9 states:

> 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
> 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
> 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

suffer double jeopardy or a loss of life liberty or property without due process of law[261] finds correlates in Article 11 of the Universal Declaration[262] and Article 14 of the ICCPR.[263] There we can also find a presumption of innocence. Our Sixth Amendment

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4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Id. § 9.

[261] U.S. CONST. amend. V.

[262] Universal Declaration, *supra* note 256. Article 11 states:

1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.
2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Id. § 11.

[263] International Covenant, *supra* note 257. Article 14 states:

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
    (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
    (b) To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing;
    (c) To be tried without undue delay;
    (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
    (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
    (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
    (g) Not to be compelled to testify against himself or to confess guilt.
4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

right to a fair, impartial, and speedy trial, to be able to confront witnesses, and to have benefit of counsel[264] has correlates in Article 10 of the Universal Declaration[265] and Article 14 of the ICCPR.[266] Our Eighth Amendment right against cruel and unusual punishment[267] has correlates in Article 5 of the Universal Declaration[268] and Article 10 of the ICCPR.[269] Our Thirteenth Amendment right against slavery or involuntary servitude[270] finds correlates in Article 4 of the Universal Declaration[271] and Article 8 of the ICCPR.[272] Our

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> 5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
> 6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
> 7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Id. § 14.

[264] U.S. CONST. amend. VI.

[265] Universal Declaration, *supra* note 256. Article 10 states: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." *Id.* § 10.

[266] International Covenant, *supra* note 257.

[267] U.S. CONST. amend. VIII.

[268] Universal Declaration, *supra* note 256. Article 5 states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." *Id.* § 5.

[269] International Covenant, *supra* note 257. Article 10 states:

> 1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
> 2.
>> (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;
>> (b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.
>
> 3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Id. § 10.

[270] U.S. CONST. amend. XIII.

[271] Universal Declaration, *supra* note 256. Article 4 states: "No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms." *Id.* § 4.

[272] International Covenant, *supra* note 257. Article 8 states:

> 1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.
> 2. No one shall be held in servitude.
> 3.
>> (a) No one shall be required to perform forced or compulsory labour;
>> (b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance

Fourteenth Amendment right to equality before the law[273] correlates to Articles 6 and 7 of the Universal Declaration[274] and Articles 14 and 17 of the ICCPR.[275] Additionally, United States Constitution Article I's limitation of ex post facto criminal laws[276] finds expression in Article 11 of the Universal Declaration[277] and Article 15 of the ICCPR.[278] In addition, there are corresponding protections for the right to life – as implied in the Fourth, Fifth, and Fourteenth Amendments of the United States Constitution[279] – under Article 3 of the Universal Declaration[280] and Article 6 of the ICCPR.[281] The right to vote regardless of sex,

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> of hard labour in pursuance of a sentence to such punishment by a competent court;
> (c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:
> (i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;
> (ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;
> (iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;
> (iv) Any work or service which forms part of normal civil obligations.

Id. § 8.

[273] U.S. CONST. amend. XIV.

[274] Universal Declaration, *supra* note 256. Article 6 states: "Everyone has the right to recognition everywhere as a person before the law." *Id.* § 6. Article 7 states: "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination." *Id.* § 7.

[275] International Covenant, *supra* note 257. Article 17 states: "1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks." *Id.* § 17.

[276] U.S. CONST. art. I, § 9.

[277] Universal Declaration, *supra* note 256.

[278] International Covenant, *supra* note 257. Article 15 states:

> 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.
> 2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Id. § 15.

[279] U.S. CONST. amends. IV, V, XIV.

[280] Universal Declaration, *supra* note 256. Article 3 states: "Everyone has the right to life, liberty and security of person." *Id.* § 3.

[281] International Covenant, *supra* note 257. Article 6 states:

> 1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

protected under the Nineteenth Amendment,[282] is also acknowledged in Articles 2 and 21 of the Universal Declaration[283] and Articles 25 and 26 of the ICCPR.[284] The right to own

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2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or communication of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed commutation of the sentence of death may be granted in all cases for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Id. § 6.

[282] U.S. CONST. amend. XIX.

[283] Universal Declaration, *supra* note 256. Article 2 states:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Id. § 2. Article 21 states:

(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

(2) Everyone has the right of equal access to public service in his country.

(3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Id. § 21.

[284] International Covenant, *supra* note 257. Article 25 states:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.

Id. § 25. Article 26 states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any

property, affirmed by the Fifth and Fourteenth Amendments[285] is recognized in Article 17 of the Universal Declaration.[286] Making the right to property compulsory under the ICCPR would have been more difficult at a time when several United Nations signatories were communist states.

There are many other rights stated in these international documents, but these rights represent some of the most important in respect to their correspondence with United States constitutional doctrine. These rights also represent the values that the United States and other Western democracies were responsible for drafting into the Universal Declaration and ICCPR, and they have generally been relied upon when these countries ventured out into the world and tried to form part of the firmament of world values. What these international documents show, then, is that the Authority of the United States is intermeshed with Constitution-like values not just because they are codified in the Constitution, but a fortiori because they are an essential part of the legal traditions of many nations. Their common presence in the theories of Rawls, Gewirth and Habermas (and among other theorists like Locke, Kant, and Rousseau)[287] reflect how, even at the theoretical level, those who have very different systematic positions can find much common agreement on the intermediate principles that guide everyday political life. This agreement does not mean that there will be no theoretical (let alone practical) disagreements as clearly there are, for example between libertarians and egalitarian liberals, but it does suggest that more unites us than divides us. And even among what divides us, those differences are also present at the constitutional level.[288]

D. Why Should any of This Matter?

I suspect by now the reader is asking, if the constraints on our domestic laws as provided in the Constitution are similar to those provided by the background values – indeed, the former to some extent derive from those background values – why should the origin of the constraints matter? Why should anyone care if the Authority of the United States is constrained because certain values are codified in the Constitution, if those same values are in the background and would, presumably, be equally constraining

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> ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Id. § 26.

[285] U.S. CONST. amends. V, XIV.

[286] Universal Declaration, *supra* note 256. Article 17 states: "(1) Everyone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property." *Id.* § 17.

[287] Locke was after all the inspiration for Thomas Jefferson's Declaration of Independence; Rousseau an inspiration of the French Revolution, and Kant we have already mentioned. For Rousseau, what marks a state as legitimate is that the citizens collectively enact their own laws. William Uzgalis, *The Influence of John Locke's Works*, http://plato.stanford.edu/entries/locke/influence.html.

Another footnote should be added after 'Revolution.' *The History of the French Revolution*, http://www.allsands.com/history/events/thefrenchrevol_wws_gn.htm; *see generally* Rousseau, *The Social Contract or Principles of Political Right*, *in* ROUSSEAU'S POLITICAL WRITINGS, (Julia Conaway Bondanella trans., Alan Ritter & Julia Conway Bondanella ed.s, Norton 1988).

[288] The recent debates over health care reform and government bailouts of the financial markets and automobile industry illustrate, among other issues, the tensions between libertarian and egalitarian liberal views.

notwithstanding their codification? The problem is not strictly theoretical; it has an important substantive component.

Not everything in the Constitution concerns values. The Constitution also contains structural features for the design of government, including specified roles for and procedures of operation for the legislative, executive, and judicial branches.[289] It also includes a procedure for treaty ratification.[290] No doubt these roles and functions are consistent with the Constitution's values and, to an extent, operationalize them in a concrete way. But presumably other formulations of these roles and procedures of operation would also be consistent with these values. That the Framers chose one set of consistent structures does not denigrate the possibility that there may be other ones that they or others could have chosen still consistent with our basic values. This fact is important because the Authority of the United States could – and to some extent already has – been used to delegate what are otherwise constitutional powers to, for example, the United Nations, to which the United States is a member.

Article 2 of the United Nations Charter states:

> The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.
>
> 1. The Organization is based on the principle of the sovereign equality of all its Members.
> 2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.
> 3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.
> 4. All Members shall refrain in their 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.
> 5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.[291]

What is particularly significant about this article is that it, to some extent, undermines the constitutional authority of Congress, under Article I, Section 8 of the United States Constitution to "declare war."[292] That is not to say that this authority has been removed from the Congress, but rather that the judgment of Congress is now confined,

[289] *See* U.S. CONST. art. I-III.

[290] *Id.* art. II, § 2 cl. 2.

[291] U.N. Charter, art. 2, paras. 1-5.

[292] U.S. CONST. art. 1, § 8.

at least internationally and by our own good faith as a signatory nation, not to make war except under the auspices of the United Nations. This change is significant from the position where Congress, or Congress and the Executive, made this judgment alone. Nor is the delegation offset by the fact that Article 51 of the Charter provides:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security. [293]

The fact that the self-defense actions have to be reported to the Security Council and Members cannot "affect the authority and responsibility of the Security Council . . . to take any action as it deems necessary" certainly diminishes the range of action Congress can *legitimately* take under its power to declare war.[294] The Congress and the Executive are no longer the solely authorized bodies to make this judgment. Even the absolute veto power of the United States on the United Nations Security Council does not restore the Constitution's original delegation of this power. [295] The United States could veto a resolution to go to war, but, absent such a veto, it would still be legally bound – even if it could not be forced to comply – as a signatory to the Charter, which was ratified by the United States Senate.[296] Again, the important issue to keep separate is not the power to compel, but the fact that the United States would be legally and morally bound under the terms of the agreement.

Another example worth pursuing, because it involves a very different power of government, concerns the United States' obligations within the World Trade Organization ("WTO").

> Essentially, the WTO is a place where member governments go, to try to sort out the trade problems they face with each other. The first step is to talk. The WTO was born out of negotiations, and everything the WTO does is the result of negotiations.
>
> . . . .
>
> Where countries have faced trade barriers and wanted them lowered, the negotiations have helped to liberalize trade. But the WTO is not just about liberalizing trade, and in some circumstances its rules support

[293] *Id.* art. 51.

[294] *See id.*

[295] Although the veto power is not explicitly mentioned in the *Charter*, because article 27 requires the concurring votes of all five of the permanent members to any '"substantive" Security Council decision, it is effectively there and is so recognized. *See id.* art. 27.

[296] U.S. CONST. art. II, § 2.

> maintaining trade barriers – for example to protect consumers or prevent the spread of disease.
>
> [The WTO is] a set of rules. . . . . At its heart are the WTO agreements, negotiated and signed by the bulk of the world's trading nations. These documents provide the legal ground-rules for international commerce. They are essentially contracts, binding governments to keep their trade policies within agreed limits. Although negotiated and signed by governments, the goal is to help producers of goods and services, exporters, and importers conduct their business, while allowing governments to meet social and environmental objectives.[297]

Under Article I, Section 8 of the United States Constitution, Congress is granted the power "[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes."[298] Yet, that power has now been attenuated by the various international agreements that bind the United States and other countries "to keep their trade policies within agreed limits."[299] Of course, this does not mean that the United States could not announce that it was pulling out of an agreement. It does mean, however, that the United States is constrained, at least until it makes such an announcement, and even after that, by the fact that it may be abrogating its responsibilities to the WTO. Again, what is at stake is a question of the authority of the United States to act in certain ways, not just the power of the United States to act in those ways. And so with regard to the question of legitimate authority, it seems clear that the United States is bound beyond whatever constitutional constraints might apply to a certain form of conduct with regard to the WTO.

Having thus illustrated instances where the Authority of the United States has altered the constitutional delegation of power, at least to the extent of making the delegation a composite of what Congress wants with agreements within an international organization, we might now ask whether this alteration is a good thing. Regarding the authority to declare war, Congress is now limited in what it can do extraterritorially by the United States' membership in the United Nations. Perhaps, this limitation will lead to fewer wars and more cooperation among nations toward ending wars. In the WTO case, Congress's authority to exercise its commerce power outside the United States is constrained by certain membership agreements. Perhaps, large industrialized countries need to cooperate both for the sake of increasing world trade and to assist developing countries.[300] Thus, we should understand the Authority of the United States, in the global environment in which it operates, to be substantially broader than constitutional authority which governs in the domestic context.

Two separate routes to this understanding might be as follows. The first is a domestic route constituting the United States' constitutional authority. The second is an extraterritorial route, although not specifically just an international law route, for arriving

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[297] *World Trade Organization*, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm.

[298] U.S. CONST. art. I, § 8.

[299] World Trade Organization, *supra* note 296. The various agreements that bind the United States and other signatory parties to the WTO can be found at WTO legal texts, *available at* http://www. wto.org/english/ docs_e/legal_e/legal_e.htm.

[300] I realize that there is much debate over how well the WTO achieves the latter.

at the authority of the United States. I put aside a strictly international law route, for I am concerned with seeing how our external obligations apply internally in decision-making.

The first "constitutional law" route – suggested by "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof"[301] – is a completely theorized scheme of values and structures for the operation of government.[302] Following this route, one engages background values giving rise to legitimacy as well as specific structures, agreed to by the Founders, for both how those values will be practically realized and institutionally guaranteed in the operations of government.[303] By structure, I mean, the institutionalized instantiation of those values as understood by the Founders. Structure includes everything from large-scale institutional separations of power into legislative, executive, and judicial branches (to prevent corruption and provide for majority consent), to smaller scale institutions such as jury trials for criminal offenses and constitutional limitations on police investigations.[304] Structure is separate from values – like justice, fairness, personal liberty, and consent – even though structures are determined, at least in part, by the compromises that arise from various understandings of particular values.[305] Although I call this a fully-theorized scheme because I see the various structures manifesting agreements concerning the application of the background values, the agreements could have been different.[306] Article V of the Constitution itself provides that

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[301] U.S. CONST. art. VI, cl. 2.

[302] I make no distinction here between federal and state government, for I mean to include within the scope of the constitutional requirements federalism and its various alterations under the Fourteenth Amendment.

[303] Here the difficulties associated within the Articles of Confederation were apparent. The problem for the founders was to devise an alternative structure of government that wouldn't have the same problems, yet would be consistent with the values of the newly formed nation. Here, structure is the institutionalization of those values as understood by the founders. Structure is separate from values though it is determined, at least in part, by values and the compromises that arose from various understandings of what those values required.

[304] For example, the U.S. Constitution, in Articles I to III respectively, creates three separate branches of government including a bicameral Congress, an executive, and a federal judiciary headed by the Supreme Court. The Fifth Amendment guarantees a jury trial in criminal cases. The Fourth and Fourteenth Amendments put restraints on the police power to investigate crimes. *See* U.S. CONST. art. 1, 2, 3, amends. IV, V, XIV.

[305] Here it is important to take note of the fact that many of these structures are the object of legal and human rights. Indeed, to the extent that they are essential to human rights, as I discuss for example in context to Gewirth's PGC or the Universal Declaration, they must be maintained against alternatives. However, to the extent that they represent one of a set of alternative instantiations, there should be allowance for alternative right-structures provided there are good practical reasons for adopting an alternative structure and, further, provided that such an adoption won't degrade the application of the fundamental values. The Convention on Civil and Political Rights seems to fit this universal standard and is legally binding. The International Covenant on Economic, Social, and Cultural Rights, International Covenant, supra note 257, is more aspirational in that it sets out obligations to provide labour rights, heath and education, and a decent standard of living. In this sense, it is more open to alternative structures for those countries that have, or with the help of the more industrialized nations have, the economic capability to carry it out its provisions for the benefit of their own peoples. Even its binding character is by virtue of its provisions more subject to the Kantian dictum "ought implies can," given the available economic possibilities, than the International Convent on Civil and Political Rights.

[306] In Federalist 64, John Jay writes specifically in response to the criticism that Article VI would provide that a treaty would have the force of law though not made by legislative authority. In response, Jay implies that the division of powers is not written in stone, but arises from the peoples' choice:

these provisions might be changed in the future through the amendment process.[307] Moreover, at least, one historian of constitutional change has suggested a less formal way domestic constitutional change can occur. The shift from a minimalist/libertarian view of the responsibilities of government to protect primarily property rights at the end of the nineteenth century, to the view that the people are entitled to government providing large-scale economic relief and broad-based civil liberties protections by the middle to late twentieth century, is illustrative of this less formal approach.[308] Indeed, Bruce Ackerman has described this change as an extra-constitutional process that the Great Depression manifested at the ballot box when the public was forced into a deeper reflection of its constitutional structure and values.[309]

The second extraterritorial route – suggested by "and all Treaties made, or which shall be made, under the Authority of the United States"[310] – represents a partially theorized scheme of values with very few structures.[311] No doubt, part of the reason for so few structures would be the difficulty of achieving international agreement as to what they should be. And this difficulty would be a consequence of the fact that not all in the international community, at least not at any one particular historical period, may share enough common values. Therefore, keeping the door open to different international agreements would be needed to change historical circumstances, encouraging the Framers

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> All constitutional acts of power, whether in the executive or in the judicial departments, have as much legal validity and obligation as if they proceeded from the Legislature, and therefore whatever name be given to the power of making treaties, or however obligatory they may be when made, certain it is that the people may with much propriety commit the power to a distinct body from the legislature, the executive or judicial. It surely does not follow that because they have given the power of making laws to the Legislature, that therefore they should likewise give them power to do every other act of sovereignty by which the citizens are to be bound and affected.

THE FEDERALIST No. 64 (John Jay).

[307] Article V of the U.S. Constitution provides:

> The Congress, whenever two thirds of both houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

U.S. CONST. art V. An interesting question is whether there may not be certain values the Article V amendment cannot change. *See*, *e.g.*, Vincent J. Samar, *Can a Constitutional Amendment Be Unconstitutional*?, 33 OKLA. CITY U. L. REV. 667 (2008).

[308] *See* ACKERMAN, *supra* note 307, at 43.

[309] *See id.* at 47-50.

[310] U.S. CONST. art. VI, cl. 2.

[311] One structure would be the constitutional requirement that two-thirds of the Senate must ratify a treaty. However, even that structural provision is attenuated by the fact that executive agreements are granted "a similar dignity." United States v. Pink, 315 U.S. 203, 230 (1942).

to put in this second route.[312] Consequently, in this more pragmatic-American approach, the certain truth of adopting specific structures is pushed aside so that each generation could create, as needed, its own institutional arrangements to engage in a changing world.[313]

That said, what keeps the two routes consistent is the need to comply with background values, even if those values will occasionally need reinterpretation to meet changing circumstances. This need is as true domestically as it is internationally, as indicated by the Supreme Court's constitutional reconsideration, during the New Deal period, of its earlier substantive due process protection of property rights to allow for broader government involvement to help the economy.[314] Indeed, it is the engagement with either long-established or highly-rational principled values that keeps both the Constitution's authority and the Authority of the United States in check. Thus, as the Insular cases illustrate, the particular instantiation of a jury trial – while important to our Anglo-American culture – may not, in every instance be necessary, provided that the well-

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[312] Take, for example, the problems associated with proliferation of nuclear weapons or global warming, which would not have been recognized by enough nations at the time the Constitution was adopted to warrant common approaches. It should be recalled that at the time of the founding nation states having rights to engage one another was still a relatively new appearance under international law. The first real recognition of this reality was the Treaty of Westphalia ending the 30 year war in 1648, only a hundred and thirty years before adoption of the Articles of Confederation. Treaty of Westphalia, *available at* http://avalon.law.yale.edu/17th_century/westphal.asp.

[313] In *The Federalist No. 64*, John Jay writes:

> They who have turned their attention to the affairs of men, must have perceived that there are tides in them. Tides, very irregular in their duration, strength, and direction, and seldom found to run twice exactly in the same manner or measure. To discern and to profit by these tides in national affairs, is the business of those who preside over them; and they who have had much experience on this head inform us, that there frequently are occasions when days, nay even when hours are precious.

THE FEDERALIST No. 64 (John Jay). In essence, the idea being expressed here and elsewhere in American culture would be well-summed up by William James in his discussion of pragmatism. James writes:

> *Theories thus become instruments, not answers to enigmas, in which we can rest.* We don't lie back on them, we move forward, and, on occasion, make nature over again by their aid. Pragmatism unstiffens all our theories, limbers them up and sets each one at work. Being nothing essentially new, it harmonizes with many ancient philosophic tendencies. It agrees with nominalism for instance, in always appealing to particulars; with utilitarianism in emphasizing practical aspects; with positivism in its disdain for verbal solutions, useless questions and metaphysical abstractions.

WILLIAM JAMES, PRAGMATISM 28-29 (Bruce Kuklick ed., 1981) (emphasis in original). Putting aside the broader question of whether pragmatism as a theory of truth may be incomplete, its relevance with respect to fixing interpretations for intermediate principles of action seems pretty well-established. Even the metaphysician has to acknowledge that for a theory to be effective in peoples' lives it has to be related to what will motivate them as matters of common concern.

[314] The so-called "[s]witch in time, saved nine" represents the Supreme Court's reconsideration of its earlier more libertarian view of the Constitution's protection of property rights following the depression of the 1930s and public popularity supporting President Franklin Roosevelt's efforts to reform the economy, even possibly to the point of expanding the numbers of justice seats on the Supreme Court. *Compare* Lochner v. New York, 198 U.S. 45 (1905) (striking down a New York law limiting the number of hours bakers could work as a violation of the constitutional right to freedom of contract), *with* W. Coast Hotel v. Parrish, 300 U.S. 379 (1937) (upholding the constitutionality of minimum wage legislation by the state of Washington).

established background values of fairness and orderliness are preserved.[315] What is necessary, then, is that well-recognized understandings of fairness and democracy, as illustrated by the theories of both Rawls and Habermas, and highly rational understandings of freedom and well-being as discussed by Gewirth (to name just three of the theorists worth considering), should potently manifest themselves in interpretations of basic human rights document. It is these understandings, when found in the scholarship of the international arena, in particular, that will provide a further credible foundation for common agreement and legitimation.[316]

VI. WHO DECIDES AND HOW, "WHAT IS THE AUTHORITY OF THE UNITED STATES?"

In this final section, I want to suggest that, for the Authority of the United States to be fully actualized, it is sufficient if the Federal Government is able to get beyond the Constitution via treaty. Traditionally, under the Supremacy Clause, state courts, which can decide state and federal matters, have final say over matters of state law; the federal courts have final say over matters of federal law, including the efficacy of international treaties. If there is a conflict between state and federal law, federal law wins, assuming no constitutional fault. Under my revised understanding of the Authority of the United States, state courts continue to decide matters of state law and federal courts federal law, except if the matter involves a question of international law – including discerning the meaning of a treaty, application of customary international law, *jus cogens* principles, and related rules of law and equity – when an international court might make the final determination. This change does not prevent state courts of general jurisdiction or federal courts with limited jurisdiction from also rendering decisions on these matters. But, assuming the matter is brought before an international court of proper competence, an implicit – if not explicit – understanding of those signing the treaty (or possibly a *Marbury*-like understanding of the Court's authority[317]) might be that the International Court of Justice ("ICJ"), and not any state or federal court, including the United States Supreme Court, ought to be the *final* decider of the matter.

One caveat: in any decision the ICJ or other international court might render, it would be expected that basic rights be preserved, although the ICJ would likely be the ultimate arbiter of which rights were basic. Still, it would be incumbent on the ICJ – for the sake of its own legitimacy – to take account of the human rights found in the Universal Declaration and The Convention on Civil and Political Rights in the same way that it is incumbent on the United States Supreme Court to take account of fundamental rights found in the Bill of Rights. Provided that the ICJ fulfilled this obligation, its legitimacy would be enhanced not only among members of the international community, but also among members of the American legal establishment. Indeed, any treaty that would empower the ICJ to make decisions should manifest this requirement as part of its intention. (The United Nations Charter, that includes The Statute of the ICJ, can be seen to manifest this intention after the fact, since most United Nations members adopted the Universal Declaration and The Convention on Civil and Political Rights.) I have been operating under the assumption

[315] Reid v. Covert, 354 U.S. at 52 (Frankfurter, J., concurring) (citation omitted).

[316] International law is still in a youthful stage in which the need for making more concrete various human rights is ever present.

[317] *See generally* Marbury v. Madison, 5 U.S. 137 (1803).

that the Authority of the United States is separate from constitutional authority for reasons previously set forth. If I am correct in this assumption, then it would seem to follow, given a proper treaty, that the final arbitrator of the Authority of the United States would be an international forum, like the ICJ, provided it recognized basic human rights standards. Moreover, if the ICJ were recognized to be the final arbitrator of international law, then the only further question would be how far its authority extended.

Under a more robust interpretation of my view of the Authority of the United States, the authority of the ICJ, would include – assuming an appropriate treaty foundation or principle of customary international law – the determination of whether a treaty was self-executing. Under a weaker version, it would not include this power. Let us discuss the stronger version first, seeing where that takes us by considering what difference it might have made to the United States Supreme Court's 2006 decision in *Medellin v. Texas*.[318]

Under Article 36 of the Statute of the International Court of Justice, the ICJ can hear cases either referred to it, by United Nations members who are parties to the dispute, or provided for in the United Nations Charter or other treaties and conventions.[319] What the statute does not provide is any specific domestic enforcement mechanism to ensure that its decisions are carried out. By contrast, Restatement (Third) of Foreign Relations Law states that any state court may exercise jurisdiction over any person or thing, provided it has a close enough relationship to the person or thing.[320] The close enough relationship requirement is satisfied if the person or thing is non-transitorily present within the state; is domiciled there; is a resident or national of the state; is a corporation under the laws of the state; is a vehicle registered there; is a thing used there; is a natural or juridical person that has consented to the jurisdiction, carries on business or some activity in the state, or whose action has substantial, direct and foreseeable consequences in the state.[321] In addition, state courts usually have at their disposal post-judgment enforcement procedures.[322]

In *Medellin*, a Mexican national under death sentence for capital murder, sought a writ of habeas corpus in federal court after the ICJ's decision in *Case Concerning Avena and Other Mexican Nationals* (*Mex. v. U.S.*).[323] *Avena* held:

> [B]ased on violations of the Vienna Convention, 51 named Mexican nationals were entitled to review and reconsideration of their state-court convictions and sentences in the United States. This was so regardless of any forfeiture of the right to raise Vienna Convention claims because of a failure to comply with generally applicable state rules governing challenges to criminal convictions.[324]

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[318] 552 U.S. 491 (2006).

[319] Statute of the International Court of Justice § 36, 3 Bevans 1179; 59 Stat. 1031; T.S. 993; 39 AJIL Supp. 215 (1945).

[320] Restatement (Third) of Foreign Relations Law § 421 (2009).

[321] *Id.*

[322] Domestic law is vertical in the sense that legislatures enact binding law which courts interpret; international law is horizontal in the sense that each state is treated as an equal and thereby can accept as binding or not any international legal decision.

[323] *Medellin*, 552 U.S. at 497-98; *Avena* and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Judgment of Mar. 31).

[324] *Medellin*, 552 U.S. at 497-98.

The Texas Court of Criminal Appeals dismissed Medellin's application for failure to raise the Vienna claim in a timely manner.[325] "Medellín first raised his Vienna Convention claim in his first application for state postconviction relief."[326] Thereafter, the United States Supreme Court granted Petitioner's request for certiorari to decide two questions.[327] The first: "[I]s the ICJ's judgment in *Avena* directly enforceable as domestic law in a state court in the United States?"[328] The second: Does President Bush's Memorandum indicating that the United States would "discharge its international obligations under *Avena*," by requiring "the States [to] provide review and reconsideration of the claims of the 51 Mexican nationals" usurp a power that the Constitution does not assign to the President?[329]

For our purposes, under the more robust view and assuming that the ICJ also had ruled on the question of self-execution, the only aspects of this case we need to consider are, regarding the first question, whether there should have been anything further for the federal court to decide once the ICJ had rendered its decision in *Avena*. Regarding the second question, one of the justifications President Bush offered for his decision to force state court review was that the Optional Protocol and United Nations Charter authorized his Memorandum.[330] The question here is whether that argument should have sufficed before the Supreme Court. The two issues will be treated seriatim.

The state trial court held that Medellin's claim was procedurally defaulted, because Medellín had failed to raise it at trial or on direct review.[331] As a result, the Supreme Court sought to determine whether the ICJ's judgment was enforceable domestically, based on its understanding of Article 94 of the United Nations Charter. [332] There was no question that the ICJ had authority to render the judgment.[333] The Majority, however, did not think

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[325] *Id.* at 498.

[326] *Id.* at 501.

[327] *Id.* at 498.

[328] *Id.*

[329] *Medellin*, 552 U.S. at 503, 498.

[330] *Id.* at 538.

[331] *Id.* at 501. The question arose because the Vienna Convention provides, in pertinent part that "if a person detained by a foreign country 'so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State' of such detention, and 'inform the [detainee] of his righ[t]' to request assistance from the consul of his own state." *Id.* at 499. (quoting Vienna Convention art. 36(1)(b), Apr. 24, 1963, 21 U.S.T. 77).

[332] *Id.* at 508. As to the question from where derives the obligation to comply with the ICJ, Roberts writes:

> The obligation on the part of signatory nations to comply with ICJ judgments derives not from the Optional Protocol, but rather from Article 94 of the United Nations Charter-the provision that specifically addresses the effect of ICJ decisions. Article 94(1) provides that "[e]ach Member of the United Nations *undertakes to comply* with the decision of the [ICJ] in any case to which it is a party."

Medellin, 552 U.S. at 508 (quoting Vienna Convention art. 36(1)(b), Apr. 24, 1963, 21 U.S.T. 77) (emphasis in original).

[333] *See id.* at 499. The ICJ had jurisdiction to hear Medellin's case because an optional protocol to the Vienna convention provides for "'compulsory jurisdiction of the International Court of Justice for the resolution of disputes arising out of the interpretation or application of the Vienna Convention'" if "any

the Vienna Convention or Optional Protocol made ICJ decisions self-executing.[334] Neither the Vienna Convention nor the Protocol speaks directly to domestic enforcement of ICJ judgments.[335o]

Medellin had claimed "that the ICJ's judgment in *Avena* constitutes a 'binding' obligation on the state and federal courts of the United States" because, under the Supremacy Clause, treaties requiring compliance with ICJ judgments like *Avena* "are *already* the 'Law of the Land.'"[336] However, a five-member majority of the United States Supreme Court, lead by Chief Justice Roberts, did not agree.[337] In his majority opinion, Roberts wrote:

> This Court has long recognized the distinction between treaties that automatically have effect as domestic law, and those that – while they constitute international law commitments – do not by themselves function as binding federal law. . . . [W]hile treaties "may comprise international commitments[,] . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms."[338]

Roberts's position here is clearly to afford deference to Congress's intention when ratifying a treaty, even to the extent of requiring Congress to expressly declare a treaty to be self-executing when, on its face, the treaty is not so clear.[339] But more than that, Roberts's opinion ignores the ICJ's prior judgment, which might have been read as effectively resolving the issue because, assuming the treaty is self-executing, it in effect required review and reconsideration of the fifty-one convictions by the relevant state courts.[o]

Roberts went on to state, essentially, that the problem in *Medellin* was that Congress had not manifested an intention through ratification or in any other way that this treaty should be self-executing.[340] To the contrary, Roberts found that "[t]he remainder of Article 94," which he takes to be the source of Medellin's claim, "confirms that the U.N. Charter

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party to the dispute [is] a Party to the present Protocol," which the United States and Mexico were. *Id.* (quoting Vienna Convention art. I, 21 U.S.T. at 326).

[334] *Id.* at 505.

[335] *See id.* at 506.

[336] *Medellin*, 552 U.S. at 504 (quoting Reply Brief for Petitioner at 1, Medellin v. Texas, 552 U.S. 491 (No. 06-984)).

[337] *Id.*

[338] *Id.* at 504-05 (quoting Igartua-De La Rosa v. United States, 417 F.3d 145, 150 (1st Cir. 2005) (en banc) (alteration not in original) (citations omitted).

[339] *See id.*

[340] *See id.* at 507-08. Here the Chief Justice notes:

> The most natural reading of the Optional Protocol is as a bare grant of jurisdiction. It provides only that "[d]isputes arising out of the interpretation or application of the [Vienna] Convention shall lie within the compulsory jurisdiction of the International Court of Justice" and "may accordingly be brought before the [ICJ] . . . by any party to the dispute being a Party to the present Protocol." The Protocol says nothing about the effect of an ICJ decision and does not itself commit signatories to comply with an ICJ judgment. The Protocol is similarly silent as to any enforcement mechanism.

Medellin, 552 U.S. at 507-08 (alteration in original) (citations omitted).

does not contemplate the automatic enforceability of ICJ decisions in domestic courts."[341] Roberts concludes by noting the Court's willingness to afford great deference to the political branches that, in the future, may need to alter existing treaties.[342] Indeed, it seems that the Majority will treat their presumption of affording deference to Congressional intent as overcome *only if* a further act of the President and the Senate announces that this deference is their intention as well.[343] And, even then, this Majority might hesitate if it sees such an announcement as unconstitutionally binding future Presidents and Congresses.

Justice Stevens, in his concurring opinion, picks up on the parochial stance of the Majority to maintain all the decision-making locally; he sets out a more international view when he writes:

> [T]he text and history of the *Supremacy Clause*, as well as this Court's treaty-related cases, do not support a presumption against self-execution. I

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[341] *Id.* at 509. "Article 94(2)--the enforcement provision--provides the sole remedy for noncompliance: referral to the United Nations Security Council by an aggrieved state." *Id.* Noting that the Executive Branch itself treats "the phrase '*undertakes to comply*'" only as "'a *commitment* on the part of U.N. Members to take *future* action through their political branches,'" Roberts construes Article 94 not to be a directive to domestic courts "that the United States 'shall' or "must" comply with an ICJ decision." *Id.* at 508 (citing Brief for the United States as Amicus Curiae Supporting Petitioner, Medellin v. Texas, 552 U.S. 491(No. 06-984)) (emphasis in original). Neither does he find from the Senate's ratification of the U.N. Charter, that it "intended to vest ICJ decisions with immediate legal effect in domestic courts." *Id.* "'The words of Article 94 . . . call upon governments to take certain action.'" *Id.* at 508 (quoting Comm. of United States Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 938 (C.A. D.C. 1988). The Chief Justice is saying that the Court *presumes* a treaty to be non-self-executing, unless on the face of its language or by way of an implementing statute passed by Congress it is made to appear otherwise. *See id.* at 504-05. In the former case, the Congress would *by ratification* have intended it as well; in the latter, congressional intent is expressly stated. *Medellin*, 552 U.S. at 504-05.

[342] *Medellin*, 552 U.S. at 516. Here the Court seems to be affording a rather strained meaning to a possible sanctioning provision of the UN Charter as affording deference to Member nations to noncompliance with ICJ judgments. *See id.* What Article 94(2) in fact says is the following:

> If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

U.N. Charter art. 94, para. 2.

[343] *See Medellin*, 552 U.S. at 511.

> Medellín's view that ICJ decisions are automatically enforceable as domestic law is fatally undermined by the enforcement structure established by Article 94. His construction would eliminate the option of noncompliance contemplated by Article 94(2), undermining the ability of the political branches to determine whether and how to comply with an ICJ judgment. Those sensitive foreign policy decisions would instead be transferred to state and federal courts charged with applying an ICJ judgment directly as domestic law. And those courts would not be empowered to decide whether to comply with the judgment--again, always regarded as an option by the political branches--any more than courts may consider whether to comply with any other species of domestic law. This result would be particularly anomalous in light of the principle that "[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative-'the political' Departments."

Id. (alterations in original).

> also endorse the proposition that the Vienna Convention on Consular Relations, "is itself self-executing and judicially enforceable." Moreover, I think this case presents a closer question than the Court's opinion allows. In the end, however, I am persuaded that the relevant treaties do not authorize this Court to enforce the judgment of the International Court of Justice (ICJ)[.][344]

Here, Stevens disagrees with the Majority by stating that the Vienna Convention obligation to notify the consular post of Medellin's arrest was enforceable on domestic courts.[345] However, Stevens joins the Majority in the final decision because he believes that the language of Article 94(1), regarding decisions of the ICJ, is not self-executing and, presumably, would not be understood to be self-executing if that matter had been considered by the ICJ.[346] Stevens does not challenge that it should be the United States Supreme Court, and not the ICJ, making this decision.

Justice Breyer, joined by two other members of the Court, dissented, explaining that he believed that the ICJ treaty was "self-executing," based on a reading of other treaties that had gone into effect and were understood to be self-executing without additional Congressional action.[347] Specifically, Justice Breyer wrote, "I would find that the United States' treaty obligation to comply with the ICJ judgment in *Avena* is enforceable in court in this case without further congressional action beyond Senate ratification of the relevant treaties."[348] Taking the approach of granting deference to the language and context of the

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[344] *Id.* at 533 (Stevens, J., concurring) (citations omitted).

[345] *See id.*

[346] *Medellin*, 552 U.S. at 533. Justice Stevens writes:

> The source of the United States' obligation to comply with judgments of the ICJ is found in Article 94(1) of the United Nations Charter, which was ratified in 1945. Article 94(1) provides that "[e]ach Member of the United Nations *undertakes to comply* with the decision of the [ICJ] in any case to which it is a party." In my view, the words "undertakes to comply"--while not the model of either a self-executing or a non-self-executing commitment--are most naturally read as a promise to take additional steps to enforce ICJ judgments.

Id. at 533 (citations omitted) (emphasis in original).

[347] *Id.* at 551 (Breyer, J., dissenting).

[348] *Id.* at 562. Justice Breyer bases his judgment that the treaty is self-executing on seven reasons:

> First, the language of the relevant treaties strongly supports direct judicial enforceability, at least of judgments of the kind at issue here. The Optional Protocol bears the title "Compulsory Settlement of Disputes," thereby emphasizing the mandatory and binding nature of the procedures it sets forth . . . .
>
> Moreover, in accepting Article 94(1) of the Charter, "[e]ach Member . . . undertakes to comply with the decision" of the ICJ "in any case to which it is a party." And the ICJ Statute (part of the U.N. Charter) makes clear that, a decision of the ICJ between parties that have consented to the ICJ's compulsory jurisdiction has " *binding force* . . . between the parties and in respect of that particular case." (emphasis added) . . . .
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> . . . .
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> The upshot is that treaty language says that an ICJ decision is legally binding, but it leaves the implementation of that binding legal obligation to the domestic law of each signatory nation. In this Nation, the Supremacy Clause, as long and consistently

treaties themselves, Justice Breyer earlier writes:

> The Constitution's Supremacy Clause provides that "all Treaties . . . 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." The Clause means that the "courts" must regard "a treaty . . . as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision."[349]

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interpreted, indicates that ICJ decisions rendered pursuant to provisions for binding adjudication must be domestically legally binding and enforceable in domestic courts at *least sometimes* . . . .

Second, the Optional Protocol here applies to a dispute about the meaning of a Vienna Convention provision that is itself self-executing and judicially enforceable . . . .

. . . .

Third, logic suggests that a treaty provision providing for "final" and "binding" judgments that "settl[e]" treaty-based disputes is self-executing insofar as the judgment in question concerns the meaning of an underlying treaty provision that is itself self-executing . . . .

. . . .

Fourth, the majority's very different approach has seriously negative practical implications. The United States has entered into at least [seventy] treaties that contain provisions for ICJ dispute settlement similar to the Protocol before us. Many of these treaties contain provisions similar to those this Court has previously found self-executing--provisions that involve, for example, property rights, contract and commercial rights, trademarks, civil liability for personal injury, rights of foreign diplomats, taxation, domestic-court jurisdiction, and so forth . . . .

. . . .

Fifth, other factors, related to the particular judgment here at issue, make that judgment well suited to direct judicial enforcement . . . .

Sixth, to find the United States' treaty obligations self-executing as applied to the ICJ judgment (and consequently to find that judgment enforceable) does not threaten constitutional conflict with other branches; it does not require us to engage in nonjudicial activity; and it does not require us to create a new cause of action . . . .

Seventh, neither the President nor Congress has expressed concern about direct judicial enforcement of the ICJ decision.

Id. at 551-62.

[349] *Medellin*, 552 U.S. at 538 (quoting Foster v. Neilson, 27 U.S. 253 (1829). Justice Breyer's rationale, which is worth quoting at length, was based on a much earlier Supreme Court decision. *See id.* at 541-42. One of the opinions to that earlier decision referenced Justice Iredell, who attended the North Carolina Ratifying Convention for the Constitution of 1789, and who specifically expressed an understanding of the treaty provisions as distinct from structural constitutional limitations *unless* specifically limited by Congress. *See id.* at 542.

It is difficult to know what Justice Breyer may have thought regarding President Bush's claim that a source of the authority for his Memorandum was the treaties themselves, because Justice Breyer finds the President's power to be based on his Article II authority to conduct foreign affairs:

> In my view, that second conclusion has broader implications than the majority suggests. The President here seeks to implement treaty provisions in which the United States agrees that the ICJ judgment is binding with respect to the Avena parties. Consequently, his actions draw upon his constitutional authority in the area of foreign affairs. In this case, his

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> Supreme Court case law stretching back more than 200 years helps explain what, for present purposes, the Founders meant when they wrote that "all Treaties . . . shall be the supreme Law of the Land." In 1796, for example, the Court decided the case of *Ware v. Hylton.* A British creditor sought payment of an American's Revolutionary War debt. The debtor argued that he had, under Virginia law, repaid the debt by complying with a state statute enacted during the Revolutionary War that required debtors to repay money owed to British creditors into a Virginia state fund. The creditor, however, claimed that this state-sanctioned repayment did not count because a provision of the 1783 Paris Peace Treaty between Britain and the United States said that "'the creditors of either side should meet with no lawful impediment to the recovery of the full value . . . of all *bona fide* debts, theretofore contracted'"; and that provision, the creditor argued, effectively nullified the state law. The Court, with each Justice writing separately, agreed with the British creditor, held the Virginia statute invalid, and found that the American debtor remained liable for the debt.
>
> The key fact relevant here is that Congress had not enacted a specific statute enforcing the treaty provision at issue. Hence the Court had to decide whether the provision was (to put the matter in present terms) "self-executing." Justice Iredell, a member of North Carolina's Ratifying Convention, addressed the matter specifically, setting forth views on which Justice Story later relied to explain the Founders' reasons for drafting the Supremacy Clause.
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> Justice Iredell pointed out that some treaty provisions, those, for example, declaring the United States an independent Nation or acknowledging its right to navigate the Mississippi River, were "*executed*," taking effect automatically upon ratification. Other provisions were "*executory*," in the sense that they were "to be carried into execution" by each signatory nation "in the manner which the Constitution of that nation prescribes." *Before* adoption of the U.S. Constitution, all such provisions would have taken effect as domestic law *only if* Congress on the American side, or Parliament on the British side, had written them into domestic law.
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> But, Justice Iredell adds, *after* the Constitution's adoption, while further parliamentary action remained necessary in Britain (where the "practice" of the need for an "act of parliament" in respect to "any thing of a legislative nature" had "been constantly observed," further legislative action in respect to the treaty's debt-collection provision *was no longer necessary* in the United States. The ratification of the Constitution with its Supremacy Clause means that treaty provisions that bind the United States may (and in this instance did) also enter domestic law without further congressional action and automatically bind the States and courts as well.
>
> "Under this Constitution," Justice Iredell concluded, "so far as a treaty constitutionally is binding, upon principles of *moral obligation,* it is also by the vigour of its own authority to be executed in fact. It would not otherwise be the *Supreme law* in the new sense provided for."

Medellin, 552 U.S. at 542-44 (citing Ware v. Hylton, 3 U.S. 199 (1796) (Chase, J., opinion)) (citations omitted) (emphasis in original).

> exercise of that power falls within that middle range of Presidential authority where Congress has neither specifically authorized nor specifically forbidden the Presidential action in question. [350]

What is of interest in this case, from my point of view, is not that the Justices disagree over the question of self-execution, or even that only the five-member majority seems to take issue with treaties as a possible source of presidential power. Perhaps the judges of the ICJ might have also disagreed among themselves, at least on the first question, had they directly considered the matter. My interest in this case is that, had the ICJ been understood to be empowered to decide the question of self-execution, the decision would have been decided at the international and not the local level. Would the ICJ have decided differently than the Supreme Court? Perhaps they would have, given that the language of its *Avena* decision would seem to place treaty obligations ahead of state procedural rules. But, that issue is of less interest than the fact that the decision would have been decided in an international forum, by a process that would have been established by the Authority of the United States in signing onto not only Article 94(1) of the of the United Nations Charter, but also by signing onto both the Vienna Convention and the Optional Protocol. Moreover, had the final decision come from the ICJ, it might have further established the reliability of the United States in keeping its word when signing onto the Vienna Convention and Optional Protocol within the community of nations.

Indeed, it is in this respect that one might view President Bush's claim of authority for his Memorandum to require states to review and reconsider the fifty-one cases under the Vienna Convention and Optional Protocol. Surely, Americans visiting or residing in other countries would no doubt want to be assured, at least as much as reciprocity might allow, that their consulate would be informed should they be arrested and charged with a crime. Ordering the states to comply with the *Avena* decision was a means the Administration thought would help assure similar treatment for Americans in other countries. However, the Roberts Court would have none of this more internationalist focus:

> The United States maintains that the President's Memorandum is authorized by the Optional Protocol and the U.N. Charter. That is, because the relevant treaties "create an obligation to comply with Avena," they "*implicitly* give the President authority to implement that treaty-based obligation." As a result, the President's Memorandum is well grounded in the first category of the Youngstown framework.
>
> We disagree. The President has an array of political and diplomatic means available to enforce international obligations, but unilaterally converting a non-self-executing treaty into a self-executing one is not among them. The responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress.[351]

While Roberts is correct to think that President Bush's Memorandum is not

[350] *Id.* at 564 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (citations omitted)) .

[351] *Id.* at 525-26 (citing *Youngstown*, 343 U.S. at 579) (emphasis in original)).

authorized under a direct grant of power under Article II of the Constitution (although it may have been implicit in his ability to conduct foreign affairs), it nevertheless may have been authorized, if my more robust view is correct, under the Treaty Power of the United States. If so, then the President's authority to enforce the provisions of a treaty may be broader than what Article II would allow, provided this authority would not endanger basic rights. That, of course, is a question that, in the first instance, would have to be determined by the ICJ, but, in the final instance, would bear on the legitimacy of that Court.[352] But, that is the same legitimacy that supported adoption of the Constitution itself over the Articles of Confederation. It is also a legitimacy that seems to be gaining increasing international recognition based on the aforesaid international human rights documents many nations have signed.

Toward the beginning of this section, I suggested that the above outcomes would be the result if the ICJ were given a robust interpretation of the power granted to it under the Authority of the United States by treaty or customary international law. But, what if the power granted is interpreted to be less robust? Suppose, for example, that the ICJ held that it did not have the power to determine that a treaty was self-executing within a particular nation, i.e., that it only has been given the power to decide the meaning of a treaty. And, let us further say that, like in *Avena*, it decides on a meaning that causes the United States to want to pull out of the ICJ. Obviously, under the weaker interpretative stance, the United States could simply decide not to enforce the ICJ judgment, since the question of whether such a judgment was self-executing would still be decided locally.

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[352] *See* ACKERMAN, *supra* note 307, at 58-65. The idea that a re-understanding of constitutional doctrine is not confined to passing amendments but can manifest itself in reflective reevaluations by the People of what principles they want to live by is reflected in Bruce Ackerman's *We the People: Foundations*. *Id.* There, Bruce Ackerman adopts what he describes as a "Regime Perspective" in which the old view that the Founding period "was creative both in process and substance," the Reconstruction period "only substantively", and the New Deal "not creative at all[]" gets replaced by a view that all were equally creative in process and substance. *Id.* at 58. That "[a] re-vision along these lines will have large practical consequences, for it will change the way judges decide a host of concrete cases." *Id.* Moreover:

> it provides new resources [from political science, history, and philosophy] for the resolution of classic problems of legal doctrine. . . . Against the monists, I deny that judicial review is presumptively antidemocratic merely because it deprives Congress of plenary authority to make any statute it likes. Against the foundationalists, I denied that the [Supreme] Court is properly in the business of using the methods of philosophy to elaborate fundamental human rights valid for all times and all places. Instead its the job to preserve the higher law solutions reached by the People against their erosion during periods of normal politics.

Id. at 60. But, at the same time, we cannot just hold to the myth of rediscovery that makes the New Deal period either a *mistake* because no constitutional amendment passed in the 1930s to create the supportive state or the period before was a mistake for interpreting the old doctrines primarily to protect property rights. *See* ACKERMAN, *supra* note 307, at 66. As Ackerman puts it,

> [o]nly when we question the myth of rediscovery may we seriously entertain a third interpretative option. Once we recognize that the Democrats of the 1930's successfully led the American people to accept new activist principles and practices into their higher law, we can deal with *Lochner* in the same legally detached way we deal with *Dred Scott* [the pre-Civil War case that upheld the constitutionality of a congressional statute that required that return of escaped slaves from the Southern slave states who were found in the Northern free states].

Id. at 66.

But, perhaps for international political reasons, the United States might not like the criticism that decision would bring. Could the United States withdraw from the United Nations Charter or other international agreement that does not specifically provide for withdrawal? Certainly, the United States could exercise its veto power in the Security Council to avoid any sanctions for non-enforcement. But, could it withdraw?

Under my view, given that entry into the agreement was determined under the Authority of the United States, and the agreement did not violate or cause to be violated basic rights, the United States could only legitimately withdraw if the agreement so provided or if, under customary international law, such withdrawal was allowable. In any event, a determination of the legality of such a withdrawal would have to lie with the ICJ and not the domestic courts of the United States, not even the United States Supreme Court. In essence, we would be, by our own agreement, part and parcel of a *super-federalist* system, and any question of withdrawal would have to be determined within the legal framework of that system. To simply opt-out of an agreement properly executed under the Authority of the United States, because we do not like some decision of the ICJ, would imply either that the *exercise* of the authority meant nothing, or perhaps that there was not the authority in the first place. Under either interpretation, it could not be good for gaining respect for the United States' treaty commitments among the community of nations or among our own people. It seems difficult to imagine that the Framers would have meant for Article VI to be this open-ended. Consequently, both to further a better domestic understanding of Article VI, as well to continue to be internationally viewed as reliable, the United States should support the contention that any such determination of a right to withdraw be made by the ICJ.

VII. CONCLUSION

In this article, I have taken up an issue that has been lurking in the background of our constitutional jurisprudence since the dawning of the republic. Because Article VI provides that both the laws made pursuant to the Constitution and treaties made under the Authority of the United States are both the *supreme* law of the land, the background question has been: Could a treaty be used to undermine various constitutional guarantees? Justice Black's plurality opinion in *Reid v. Covert* did not put to rest this question, which originally came to the floor concerning the rights of the states under the Tenth Amendment in *Missouri v. Holland.* However, a close reading of *Reid* and the background leading up to it, suggests less agreement over how the issue was to be resolved than that the issue would be taking on greater significance in the future.

Today, the United States plays a somewhat different role on the world stage than it did in 1789 when relations between countries were largely defined by bilateral treaties. In the new world order of regional multilateral agreements and global international organizations, the United States takes on the dual role of being both a petitioner, while at the same time a significant player (because of its military and economic power), in what globally may be the infancy of a new world order marked by international organizations that do everything from authorizing the use of force, to setting standards for trade, and protecting public health and environment worldwide. In this climate, where international organizations become particularly important and multilateral treaties must be agreed to by many states with very different ratification procedures, the significance of any

commitments by the United States should be afforded great deference absent either a specific congressional limitation or violation of background rights held dear.

Medellin v. Texas illustrates just one example of why it is so important that the Authority of the United States be clarified: so that other countries – indeed, the international community as a whole – can rely on it. By the same token, it is understandable that Americans might be loath to enter into a global community uncertain whether rights that they have long cherished would have to be given up.

In this article, I have tried to resolve this latter problem by noting that the global community of nations has been largely influenced by the kind of values, such as justice, fairness, due process, and liberty, to which Americans are so attached. I have also suggested that a mechanism for delineating these values could be established, using, among other works, writings by Rawls, Gewirth, and Habermas, without having to force the rest of the world, which may have different traditions for engaging these same values, to adopt the specific institutional structures common to Americans. The only proviso throughout has been that whatever international structures are agreed to should support basic human rights. And, I have suggested that starting from this beginning has both the benefit of being consistent with our own constitutional jurisprudence, as illustrated by the Insular cases, along with the further benefit of allowing America to go forward in becoming an ever-increasing part of a larger *community* of nations. The novel but brilliant vision of the Founders of our Constitution here manifests itself on the world stage in the creation of a new world order Americans can recognize.