THE INTERRELATIONSHIP BETWEEN INTERNATIONAL LAW AND CONSTITUTIONAL THEORY

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INTRODUCTION

In May 2004, the International Court of Justice "ordered American courts to review death sentences imposed on 51 Mexicans in the United States, saying their rights under international law had been violated." Governor Rick Perry, who succeeded President Bush in Texas, said that the "International Court of Justice does not have jurisdiction in Texas."[1]

This news story is just one twist in the tumultuous debate over the nature of the relationship between domestic and international law. Recently, the U.S. Supreme Court has begun to cite international law more frequently in support of its decisions.[2] This prompted the House of Representatives to pass two resolutions "condemning references to foreign and international law by the judiciary."[3] These non-binding resolutions echo the statements and sentiments of some of the Supreme Court justices, who argue that international law should—as a general rule—not play a role in the American adjudicatory system.[4]

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1. Marlise Simons & Tim Weiner, *World Court Rules U.S. Should Review 51 Death Sentences*, N.Y. TIMES, Apr. 1, 2004, at A1.

2. *See*, *e.g.*, Roper v. Simmons, 543 U.S. 551, 575-76 (2005) (citing international law in support of banning the juvenile death penalty); Lawrence v. Texas, 539 U.S. 558, 573-576 (2003) (citing decisions of the European Court of Human Rights to support its decision that homosexual sex cannot be penalized); Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002) (citing European Union's amicus brief to support that executions of the mentally retarded is a "cruel and unusual punishment" prohibited by the Eighth Amendment). In a February 2006 speech at the American Enterprise Institute, Justice Scalia cited a list of Supreme Court cases that used International law as an aid in reaching a decision. Justice Antonin Scalia, International Law in American Courts: Remarks Before the American Enterprise Institute (Feb. 21, 2006), *available at* http://www.joink.com/homes/users/ninoville/aei2-21-06.asp.

3. H.R. Con. Res. 568, 108th Cong. (2004) (enacted); H.R. Con. Res. 446, 108th Cong. (2004) (enacted). Representative Tom Feeney even suggested that judges should be impeached if they persist in using international law to define constitutional norms. *See also* Tom Curry, *A Flap Over Foreign Matter at the Supreme Court*, MSNBC.com, Mar. 11, 2004, http://www.msnbc.msn.com/id/4506232/html.

4. *See*, *e.g.*, *Atkins*, 536 U.S. at 324-5 (Rehnquist, C.J., dissenting) (arguing that international law should not be used to provide support for the Court's constitutional determinations).

The debate over whether international law is relevant to domestic court decisions is only getting more heated and vociferous.[5] The two previous presidential elections demonstrate how bitter and close the divide is in American society, and these divisions are reflected on the closely divided Supreme Court. Therefore, issues surrounding the relevance of international laws in U.S. courts will likely continue to dominate the debate surrounding the judiciary.

The outcome of this judicial, academic and political battle is unforeseeable. Accordingly, this article will determine whether either side of the debate has an objectively identifiable advantage in terms of constitutional interpretation.

Parts I and II of this article delineate three contentious legal issues within this debate. First, can treaties or customary international law override the U.S. Constitution? Second, even if they cannot, is customary international law nevertheless an "authoritative guide"[6] for constitutional or statutory interpretation? Third, is it constitutional to consider customary international law a part of the federal common law, thereby enabling it to override the contrary laws of a state?[7] Part III connects this debate to the larger debate between the "originalists" and the "living constitutionalists." Namely, it seems apparent that a pro-internationalist perspective necessitates adherence to the living constitutionalist position. Conversely, the anti-internationalist position can only be maintained by following the precepts of originalism. Lastly, Parts IV and V demonstrate the weaknesses in both the originalist and living constitutionalist approaches, and the concomitant effect these weaknesses have on the debate regarding the relevance of international law to domestic decision-making.

This article is primarily a criticism of both sides of the debate, and, though "[i]t may be said that it is easier to criticize than to create; that one can't beat even a bad theory with *no* theory,"[8] I would argue that there can never exist an objectively moral and legally defensible set of rules for constitutional interpretation.

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5. In April 2005, Justices Scalia, O'Connor and Breyer appeared on C-SPAN and heatedly clashed over the role of international law. Guy Taylor, *Justices Argue International Law,* WASH. TIMES, Apr. 25, 2005, at A04; Curry, *supra* note 3 (opining that Justice Sandra Day O'Connor "added fuel to the controversy over foreign precedents, predicting that 'over time we will rely increasingly, or take notice at least increasingly, of international and foreign courts in examining domestic issues'").

6. Joan F. Hartman, *"Unusual" Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty*, 52 U. CIN. L. REV. 655, 657, 694 (1983) (contending that international law be may used as a guide for interpreting domestic laws).

7. All federal law overrides contrary state law by virtue of the Supremacy Clause, which says that "the laws of the United States . . . shall be the supreme Law of the Land." U.S. CONST. art. VI, cl. 2.

8. Laurence H. Tribe, *Comment, in* A MATTER OF INTERPRETATION 65, 73 (Amy Gutmann ed., 1997).

PART I

The Constitution declares that any and all treaties "made . . . under the Authority of the United States, shall be the supreme Law of the Land."[9] A treaty is valid if it is signed by the President with the "Advice and Consent" of two-thirds of the U.S. Senate.[10] The text of the Constitution does not on its own terms "expressly impose prohibitions or prescribe limits on the Treaty Power."[11] Furthermore, the States are not given a say in treaty-making.[12] Therefore, it would seem that the limitations on the treaty power are purely procedural; that is to say, there are no substantive limitations on the treaty power.[13]

This supposition raises the specter of valid treaties being enacted in otherwise unconstitutional areas of legislation. Does the treaty power trump the Constitution itself; is procedural validity *ipso facto* proof of substantive validity, notwithstanding that the treaty violates some constitutional provision?[14]

This issue was dealt with in the two seminal cases in this area: *Missouri v. Holland*[15] and *Reid v. Covert*.[16] The Court in *Missouri* was forced to determine whether the Migratory Bird Treaty Act[17] passed constitutional muster. Skepticism arose regarding the treaty's validity because the treaty was

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

10. U.S. CONST. art. II, § 2, cl. 2.

11. LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 137 (1972).

12. "No State shall enter into any Treaty, Alliance, or Confederation . . . ." U.S. CONST. art. I, § 10, cl. 1. The Court has gleaned from this and other constitutional provisions that the States lack power in the area of foreign affairs. *See*, *e.g.*, United States v. Belmont, 301 U.S. 324, 331 (1937) (holding that state lines disappear in the area of foreign relations); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 317 (1936) (asserting that the States have no power at all in the area of foreign relations); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 228 (1824) (maintaining that "[t]he States are unknown to foreign nations").

13. *See* HENKIN, *supra* note 11, at 383 n.33 (quoting William Rawle's view that "[i]n our present Constitution no limitations [on the treaty power] were held necessary") (citation omitted). However, even though many scholars are of the opinion that treaties can be made on matters of serious domestic concern, they nevertheless admit that treaties can only be made on subjects "appropriate for negotiation and agreement among states." David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1090 (2000). Professor Louis Henkin enunciated this point with a theorem, "A treaty is an international agreement on a matter of international concern. It may not deal with a matter which is not of international concern; there is no matter which is of international concern with which it may not deal." Louis Henkin, *The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations*, 107 U. PA. L. REV. 903, 907 (1959).

14. It was posited that the treaty power be used like the amending power of Article V. *See infra* notes 15-22 and accompanying text.

15. 252 U.S. 416 (1920). This case is "perhaps the most famous and most discussed case in the constitutional law of foreign affairs." HENKIN, *supra* note 11, at 144.

16. 354 U.S. 1 (1957).

17. 16 U.S.C. § 703 (2000) (amending the Act to include treaties with Mexico, Japan, and Russia).

essentially an attempt to avert the problems that the congressional legislation had encountered when Congress had previously attempted to regulate migratory birds[18]—namely that the congressional statutes had twice been deemed unconstitutional.[19] Therefore, the question before the Court was whether the President could—with the "advice and consent" of two-thirds of the Senate—sign a treaty that would not be constrained by the limits of the Commerce Clause.[20] Missouri contended that a treaty cannot do what an act of Congress cannot do, meaning that the treaty power of the United States is limited to Congress's legislative powers.[21]

However, the Court—speaking through Justice Holmes—emphatically disagreed with Missouri's assertions. Holmes explained:

> To answer this question it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States, because by Article II, § 2, *the power to make treaties is delegated expressly*, and by 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. . . .
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> . . . *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.*[22]

Treaties—as opposed to congressional legislation—are valid as long as they follow the Constitution's procedural guidelines. Therefore, the allowable scope of a treaty must necessarily be broader than the constitutionally permitted scope of federal legislation, as the latter need also be consistent with the Constitution.[23]

However, if treaties are not bound by normative constitutional constraints, it raises the question of whether there are in fact *any* limits on the treaty-making power. Holmes insinuated that the limits on the treaty-making power

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18. The problem was that these birds were of "great value as a source of food and in destroying insects injurious to vegetation, but were in danger of extermination through lack of adequate protection." *Missouri,* 252 U.S. at 431.

19. *See*, *e.g.*, United States v. McCullagh, 221 F. 288, 292 (D. Kan. 1915); United States v. Shauver, 214 F. 154, 160 (E.D. Ark. 1914) (holding that the congressional legislation exceeded Congress's Commerce Clause powers).

20. James A. Deeken, Note, *A New* Miranda *for Foreign Nationals? The Impact of Federalism on International Treaties that Place Affirmative Obligations on State Governments in the Wake of* Printz v. United States, 31 VAND. J. TRANSNAT'L L. 997, 1009 (1998) (explaining that *Missouri* "raised the question of whether the federal government can act outside its Article I powers via international treaty").

21. *Missouri*, 252 U.S. at 432.

22. *Id.* at 432-33 (emphasis added).

23. Jay Loyd Jackson, *The Tenth Amendment Versus the Treaty-Making Power Under the Constitution of the United States*, 14 VA. L. REV. 441, 442 (1928) (understanding *Missouri* as paving the way for the federal government to act—in what would otherwise be an unconstitutional manner—through the exercise of the treaty power).

are purely procedural, specifically that the President's signature and ratification by two-thirds of the Senate are required.[24] Hence, *Missouri* stands for the proposition that the treaty power is enormous. After *Missouri*, legislation that would otherwise be unconstitutional might very well pass muster if passed as a treaty.[25]

However, thirty years later[26] the Court returned to these issues in *Reid v. Covert*.[27] Justice Black—speaking for the *plurality*[28]—held that no treaty[29] could "confer power on the Congress, or on any other branch of Government, *which is free from the restraints of the Constitution*."[30] Unlike *Missouri*, the Court in *Reid* held that the treaty power is limited by

> [Constitutional] restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States. . . .[31]

The *Reid* Court viewed these limitations as necessary because

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24. *See Missouri*, 252 U.S. at 433 (opining that a valid treaty may not require "more than [adherence to] the formal acts prescribed to make the convention"); *but see* Henkin, *supra* note 13 (assuming there nevertheless is a separate subject matter restriction on the treaty power).

25. Carlos Manuel Vázquez, Breard*,* Printz*, and the Treaty Power*, 70 U. COLO. L. REV. 1317, 1337 (1999) (suggesting that under *Missouri* "there might not be any substantive limits to the treaty power"); Martin S. Flaherty, *Are We to Be a Nation? Federal Power vs. "States Rights" in Foreign Affairs*, 70 U. COLO. L. REV. 1277, 1298 (1999) (stating that after *Missouri*, "treaties need only comport with the Constitution's procedural rather than substantive requirements"); *but see* Golove, *supra* note 13, at 1083 (arguing that *Missouri* held that "treaties, like all other governmental acts, are subject to the [prohibitions contained in the] Constitution").

26. *Missouri's* constitutional loophole was not taken advantage of because the Court during the New Deal Era expanded the meaning of the Commerce Clause, thus rendering exercise of the treaty power superfluous. Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 857 (1995). However, *Missouri* again rose to controversial prominence in the 1950s, when the United States had begun to sign controversial human rights treaties that segregationists thought could constitutionally be used to ease the plight of Blacks under *Missouri*. This instigated Senator Bricker and others to embark on a seven year crusade to limit the treaty power by amending the U.S. Constitution. One reason why Bricker's Amendment failed was the Court's decision in *Reid*. Golove, *supra* note 13, at 1273-75; *see* Deeken, *supra* note 20, at 1009 (explaining how the Court's decision "quieted fears that it would allow international treaties to circumvent constitutional limits on the federal government").

27. 354 U.S. 1 (1957).

28. *See infra* note 35 and accompanying text for a discussion on the significance of the fact that the opinion was only a plurality.

29. Justice Black used the word "treaty" in disposing of the case, even though the international agreement was not a treaty, but rather an executive agreement. *See* Reid v. Covert, 354 U.S. 1, 16 (1957).

30. *Id.* at 16 (emphasis added).

31. *Id.* at 17-18 (quoting De Geofroy v. Riggs, 133 U.S. 258, 267 (1890)) (alterations in original).

> [i]t 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.[32]

Reid overturned provisions of the Uniform Code of Military Justice because those provisions did not conform to the Fifth and Sixth Amendments.[33] *Reid* also limited the scope of the treaty-making power, holding that no treaty may abridge the Constitution.[34] Hence, if a law enacted as legislation would violate the Constitution, it cannot be ratified as a treaty as a way of subverting the Constitution.

Nevertheless, issues remain unresolved. The principal reason for this is that *Reid* was only a plurality opinion, which means that *Missouri* is ostensibly still good law.[35] Moreover, Justice Black added to the confusion by attempting to show how his plurality opinion was in consonance with *Missouri*, while unmistakably altering *Missouri*'s holding.[36] Finally, the Court framed the limitations on the treaty power in ambiguous language, such that definitive principles are not easily ascertainable.[37] The Court has not revisited this issue

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32. *Reid*, 354 U.S. at 17. Henry St. George Tucker's inimitable words make this point very well:

> If the establishment of an "unlimited" treaty power is to be the ultimate conclusion of this great question, it must be admitted that the incorporation of the treaty-making power into the Constitution of the United States was the introduction into our governmental citadel of a Trojan horse, whose armored soldiery, for years concealed within it, now step forth armed *cap-à-pie*, shameless in their act of deception, eager and ready to capture the citadel upon which they pretended to bestow their gift. If such construction be possible it would be of interest to know for what purpose the Tenth Amendment was ever demanded and incorporated into the Constitution.

HENRY ST. GEORGE TUCKER, LIMITATIONS ON THE TREATY-MAKING POWER UNDER THE CONSTITUTION OF THE UNITED STATES 339 (1915).

33. *Reid*, 354 U.S. at 19, 39-40.

34. *Id* at 39-40.

35. Professor Flaherty contends that *Reid* was a majority decision. Flaherty, *supra* note 25, at 1300. However, close consideration of Justice Frankfurter's concurrence in *Reid*, arguably yields a different result. Frankfurter said, "I therefore conclude that, in *capital cases*, the exercise of court-martial jurisdiction over civilian dependents *in time of peace* cannot be justified." *Reid*, 354 U.S. at 49 (Frankfurter, J., concurring) (emphasis added). Seemingly, Frankfurter might agree with the plurality, but only in certain limited circumstances. Thus, it is incorrect to say that a majority in *Reid* thoroughly limited the treaty power. Many commentators support the view that *Reid* was a plurality opinion. *See*, *e.g.*, Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 425 (1998); Golove, *supra* note 13, at 1277.

36. *See supra* notes 27-34 and accompanying text for a discussion of these points.

37. For example, the Court said, "*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

since *Reid*;[38] nevertheless, it seems likely that the Senate continues to believe that the treaty power is "Missouriesque" in its proportions.[39]

However, as the Court has begun to renew its support of federalism,[40] it may very well decide to re-examine its original "anti-states' rights" holding in *Missouri*.

To recapitulate: (1) *Missouri* broadens the treaty power, while *Reid* attempts to curb it; and (2) The exact parameters and scope of the treaty power remain unclear.[41]

PART II

This section deals with customary international law.[42] The habitual actions and inactions of states create customary international law ("CIL") when those actions or inactions are undertaken out of a sense of legal duty.[43] Currently, there is an intense debate as to whether CIL has binding power on the United States, and if it does have binding power, how extensive it is.[44] This section

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the Tenth Amendment is no barrier." *Reid*, 354 U.S. at 18 (emphasis added). But the term "extent" is left undefined.

38. Bradley, *supra* note 35, at 426.

39. This is a logical inference deduced from the fact that the U.S. Senate often attaches to treaties a boilerplate set of reservations, understandings, and declarations (RUDs). RUDs include a statement to the effect that the federal government will only implement the treaty to the extent that it possesses the normative constitutional power to do so. *Id.* at 428. Seemingly, RUDs are only necessary because the Senate believes that the treaty power is incredibly enormous, which necessitates the creation of a condition precedent—RUDs—for ratification, to minimize the ostensible effect of the treaty.

40. *See infra* note 65 for a brief discussion of the resurgent federalism doctrine.

41. Nevertheless, some scholars assert that the Court would apply the Constitution over any contrary treaty. *See*, *e.g.*, Jordan J. Paust, *Rediscovering the Relationship Between Congressional Power and International Law: Exceptions to the Last in Time Rule and the Primacy of Custom*, 28 VA. J. INT'L L. 393, 393 (1988) (stating that when there is a "clash between a treaty and the U.S. Constitution, our courts will apply the Constitution domestically even though such action places the United States in violation of international law at the international level").

42. At the founding, customary international law was called "the law of nations." Curtis A. Bradley, Breard*, Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529, 543 (1999); *see*, *e.g.*, The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815).

43. Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 669 (1986); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §102(2) (1987) (setting forth two requirements that must be met for an international custom to become international law: (1) the practice must be consistent and general; (2) the states must follow the practice out of a sense of duty).

44. For a good series of articles denoting and delineating the opposing positions in this debate, see Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997); Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319 (1997); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 (1997); Harold Hongju Koh, *Is International Law Really State Law?,* 111 HARV. L. REV. 1824 (1998).

discusses the dominant views of CIL, as there simply is no commonly adhered to black-letter law on the topic:[45]

> The debate over the proper status to assign international law—whether it is part of American law at all—has traditionally been between "monists" and "dualists." The dualist sees international and domestic law as two wholly independent systems. The fact that domestic law conflicts with international law does not have any implications for the former.[46]

Accordingly, rules of international law can come to have domestic legal status only through explicit adoption by the elected legislature of the home country.[47] "The monist, in contrast, sees domestic and international law as part of the same legal system [and argues that] [i]nternational law has superior status and invalidates contrary domestic legislation."[48] Some even go so far as to argue that international law could and should invalidate contrary domestic constitutional law.[49] They argue that

> [international law is] "self-executing" and [should be] applied by courts in the United States without any need for it to be enacted or implemented by Congress. Since it is law not enacted by Congress, and the principles of that law are determined by judges for application in cases before them, customary international law has often been characterized as "federal common law."[50]

However, "given the isolationist bent of the American legal system, it is unlikely" that CIL will be directly incorporated into United States law.[51] Therefore, many monists argue that CIL should at least be used to provide guiding principles for interpreting federal and state constitutions and statutes.[52]

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45. Bradley, *supra* note 42, at 544-45. Although the academy is nearly unanimous in its support of "monism," nevertheless, "there is no Supreme Court decision holding that customary international law is federal law. Indeed, at least one recent decision . . . could be read as suggesting the opposite." *Id.* For a discussion of monism, see *infra* notes 47-50 and accompanying text.

46. Lea Brilmayer, *Federalism, State Authority, And the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295, 299 (citation omitted).

47. *Id.*

48. *Id.* at 300.

49. Bradley, *supra* note 42, at 530-31 (quoting the opinion of "traditional" monists, most notably Professor Jordan J. Paust).

50. Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1561 (1984) (footnote omitted).

51. Nadine Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis*, 41 HASTINGS L.J. 805, 805 (1990).

52. *Id.*; Hartman, *supra* note 6, at 694. The closest the Court has come to adopting this sort of relationship with CIL is in its plurality opinion in *Thompson v. Oklahoma*. 487 U.S. 815, 830 (1988). The case involved the execution of a youth who committed his crime when he was under the age of sixteen. In reversing the death sentence, the Court noted:

Much of this controversy finds its legal support in the oft quoted dictum of Justice Gray in *The Paquete Habana*:[53]

> *International law is part of our law*, and must be . . . administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, *where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations* . . . .[54]

Monists claim that Justice Gray's words vindicate their position, as the Court "rejected the central dualist assumption, stating [that] '[i]nternational law is part of our law.'"[55] Therefore, they claim that CIL is incorporated into the federal common law or, at the very least, may be used to provide guiding principles of constitutional and statutory interpretation.[56]

However, this superficial understanding of the Court's decision in *The Paquete Habana* is easily undone. First, Justice Gray's words are dictum and have no precedential value,[57] which means that the Court has still not determined the exact parameters of the relationship between domestic law and CIL.[58]

Second, even if the dictum is taken for more than it is worth, it would not support the monist contention that CIL should automatically override conflicting federal and state law. The reason is that the Court said that CIL

> The conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western Europe community.

Id. at 830. However, two years later a different plurality changed course. Stanford v. Kentucky, 492 U.S. 361, 369 (1989), *abrogated by* Roper v. Simmons, 543 U.S. 551 (2005). In *Stanford v. Kentucky*, the Court stated emphatically that in determining evolving standards of decency, "we have looked . . . to those [values] of modern American society as a whole." *Id.* at 369. Moreover, the Court emphasized "that it is *American* conceptions of decency that are dispositive," and rejected the contention of petitioners that the sentencing practices of other countries are relevant. *Id.* at 369 n.1 (emphasis original).

53. 175 U.S. 677 (1900); Eric George Reeves, United States v. Javino*: Reconsidering the Relationship of Customary International Law to Domestic Law*, 50 WASH. & LEE. L. REV. 877, 883 (1993) (explaining that "[m]uch of the debate concerning the relationship of customary international law to domestic law centers on the meaning of the now-famous dictum from the Supreme Court's decision in *The Paquete Habana*").

54. *Paquete Habana*, 175 U.S. at 700 (emphasis added).

55. Brilmayer, *supra* note 46, at 300 (quoting *Paquete Habana*, 175 U.S. at 700).

56. See *supra* notes 47-50 and accompanying text for a description of the monist position.

57. U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship, 513 U.S. 18, 24 (1994) (holding that dicta has no precedential value even when it does not contradict the Court's holding).

58. *See supra* note 45 and accompanying text.

should *only* be used in situations "where there is no treaty, and no controlling executive or legislative act or judicial decision."[59] The Court not only rejected the idea of a "self-executing" CIL, but it limited the applicability of CIL to cases of first impression, because only in those situations is there no controlling law.[60] It follows *a fortiori* that CIL cannot override inconsistent constitutional provisions.[61]

Third, the Court—as currently composed—will never adopt the monist position because it is incompatible with its renewed emphasis on federalism.[62] Unlike years past when international law only made an impact internationally, today CIL imposes itself directly on states' affairs.[63] In fact, the current CIL debate primarily revolves around the adoption of international human rights norms.[64] If adopted, these norms would significantly affect and alter the actions of the States, which means that adoption would be at odds with the Court's federalism jurisprudence.[65] Therefore, it is extremely unlikely that the present Court will adopt the monist viewpoint.

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59. *Paquete*, 175 U.S. at 700.

60. This understanding of *Paquete* has been adopted by at least two federal circuits. *See* Tag v. Rogers, 267 F.2d 664, 666 (D.C. Cir. 1959), *cert. denied*, 362 U.S. 904 (1960) (declaring that federal statutes and treaties are superior to CIL); Garcia-Mir v. Meese, 788 F.2d 1446, 1453-55 (11th Cir. 1986), *cert. denied*, 479 U.S. 889 (1986) (holding that executive or legislative acts prevail over CIL); *but see* Henkin, *supra* note 50, at 1566 (arguing that "[a]n *old* act of Congress need not stand in the way of U.S. participation in the development of customary law") (emphasis added). However, Professor Henkin does not provide an explanation of when age morphs into irrelevance. The Constitution is the oldest statute of the United States—has it become irrelevant?

61. Henkin, *supra* note 50, at 1566 (if mere statutes override CIL, then the Constitution definitely overrides CIL). Moreover, the "Supremacy Clause makes no mention of customary international law . . . [suggesting that,] unlike treaties, customary international law can never be self-executing federal law." Bradley, *supra* note 42, at 543.

62. *See infra* note 65.

63. Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260, 2268-69 (1998) (explaining that the current CIL debate revolves primarily around "the new CIL of human rights," which would have a serious impact on the United States if adopted).

64. *See id.*; *see*, *e.g.*, Joan Fitzpatrick, *The Relevance of Customary International Norms to the Death Penalty in the United States*, 25 GA. J. INT'L & COMP. L. 165, 177-78 (1996) (giving reasons why international juvenile death penalty norms should prevent recalcitrant states from executing minors).

65. Over the last fifteen years, the Court has increasingly begun to restrict the federal government's right of action in the name of federalism concerns. *See*, *e.g.*, Alden v. Maine, 527 U.S. 706, 712 (1999) (prohibiting Congress from subjecting non-consenting states to lawsuits in the their own courts); City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (holding that Congress cannot expand rights at the expense of the States under the Fourteenth Amendment); Printz v. United States, 521 U.S. 898, 935 (1997) (holding that the Tenth Amendment prevents Congress from "conscripting" state officers to enforce a federal regulatory program); Seminole Tribe v. Florida, 517 U.S. 44, 47 (1996) (restricting congressional abrogation of state sovereign immunity); New York v. United States, 505 U.S. 144, 160-61 (1992) (providing that the States have an inviolable state sovereignty that prevents the federal government from "commandeering" the States' legislative processes). Hence, adoption of CIL would be deemed

Nevertheless, monists insist that CIL should at least act as a guide in determining abstract constitutional and statutory provisions, even if CIL is not accepted as self-executing federal common law. Accordingly, CIL should help define open-ended constitutional guarantees, for example, "cruel and unusual punishment," "due process of law," and "equal protection of laws."[66] However, as a purely legal matter this is problematic because the CIL creation process is hardly certain and remains enigmatic.[67] Moreover, *Paquete* said that only the law of "civilized nations" should be used.[68] The term "civilized," however, is somewhat vague and amorphous, making it difficult for judges to identify and apply.[69]

To summarize: Though the legal relationship between domestic law and CIL remains unclear, it is highly unlikely that the Court will adopt the monist position in its entirety.

PART III

The debate between the monists and dualists is one expression of the larger debate between the "originalists" and "living constitutionalists."[70] Monists think that current "international norms"[71] should affect domestic law.[72] For example, monists advocate reducing the use of the death penalty in deference to international ideas and ideals.[73] Accordingly, because the death penalty was

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unconstitutional because it would undoubtedly "commandeer" a state's legislature by forbidding it from engaging in certain modes of action. *Id.* at 188.

66. *See supra* notes 6, 50.

67. *See* Henkin, *supra* note 50, at 1561-66 (discussing the problems inherent in identifying CIL).

68. *See supra* note 54 and accompanying text.

69. Some might argue that the United Nations Commission on Human Rights should provide the guiding principles in domestic human rights cases. However, that does not seem eminently sensible, as sitting on that body are many nations that do not care for the human rights of their own citizens, such as Cuba, Egypt, Saudi Arabia, Sudan and Zimbabwe. These countries are some of the most egregious violators of their very own citizens' human rights. U.N. Comm'n on Human Rights, *Membership of the Commission on Human Rights*, *available at* http://www.unhchr.ch/html/menu2/2/chrmem.htm. For a laundry list of human rights violations committed by each of the aforementioned countries, see Human Rights Watch, Documents by Country, http://www.humanrightswatch.org/countries.html.

70. *See* Justice Antonin Scalia, International Law in American Courts: Remarks Before the American Enterprise Institute (Feb. 21, 2006), *available at* http://www.joink.com/homes/users/ninoville/aei2-21-06.asp (explanation by Justice Scalia as to why the monist position is a manifestation of living constitutionalism).

71. Fitzpatrick, *supra* note 64, at 165.

72. *See*, *e.g.*, Gordon A. Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses*, 52 U. CIN. L. REV. 3, 36 (1983) (arguing that "[h]uman rights norms . . . can be used to inform constitutional interpretation about the contemporary meaning of due process and equal protection"). For a full discussion of the monist position, see *supra* Part II.

73. *See* Hartman, *supra* note 6, at 656-57.

constitutional for two hundred years[74] and, moreover, because "its use is explicitly contemplated in the Constitution,"[75] monists must espouse the idea of a "living constitution"[76] or a constitution that "keeps with the times." In contrast, dualists place the Constitution on a pedestal beyond the reach of international law and evolving domestic reality.[77] Consequently, dualists support some form of originalist theory that necessitates "time-dated" constitutional interpretations.[78]

It is unquestionable that the Court has updated the Constitution since the days of the nation's founding. Some of the most glaring examples of this are the Court's jurisprudence in the areas of the First Amendment[79] and the "Right of Privacy."[80]

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74. The argument that the death penalty is unconstitutional is of recent vintage, and it has thus far only garnered three supporters on the Court. *See* Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari); Gregg v. Georgia, 428 U.S. 153, 227 (1976) (Brennan, J., dissenting); *id.* at 231 (Marshall, J., dissenting).

75. ANTONIN SCALIA, A MATTER OF INTERPRETATION 46 (Amy Gutmann ed., 1997). Justice Scalia's assertion is based upon the Fifth Amendment, which says that "No person shall be held to answer for a *capital*, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. CONST. amend. V (emphasis added).

76. "This phrase is commonly associated with Justice Brennan, although it has never been asserted that he actually said it." Books v. Elkhart, 79 F. Supp. 2d 979, 981 n.2 (N.D. Ind. 1999).

77. A case could be made for the proposition that dualists restrict their position to the clash between domestic and international law, and that they believe in an otherwise evolving constitution for purely domestic purposes. If that is true, then the assertion that dualism is a component of originalism is wrong, as dualists could be living constitutionalists in regard to domestic issues. However, that seems unlikely for the following reasons. Today's America is quite unlike the America of 1796, when George Washington could adjure—with total equanimity—his fellow citizens "[a]gainst the insidious wiles of foreign influence . . . ." George Washington, Farewell Address (Sept. 19, 1796), *available a*t http://www.pbs.org/georgewashington/milestones/farewelll_address_read.html. The America of the Monroe Doctrine, Roosevelt Corollary, and other isolationist principles lasted even after World War I, rejecting the principles espoused by the League of Nations. *See* WINTHROP D. JORDAN ET AL., THE AMERICANS: A HISTORY 606-07 (1994). Since WWII, however. the United States has become increasingly involved in the affairs of the World; it is a member of the United Nations and NATO, and it has signed thousands of treaties and conventions. Moreover, since the end of the "Cold War," the United States has become the world's "hyperpower," exerting its influence in every corner of the world. Lastly, the era of globalization has rendered illusory the boundaries between domestic and international law.

These aforementioned shifts in American policy must have been accepted by the electorate or they could not have taken place. Therefore, the argument that dualists may also be living constitutionalists fails because living constitutionalists advocate a current constitution and dualism goes against the internationalism of the last fifty years. Hence, all dualists must adhere to some form of originalism, which advocates steadfastness to tradition and text, even if it results in a law at odds with the times.

78. *See*, *e.g.*, SCALIA, *supra* note 75, at 148-49 (explaining that he interprets the Equal Protection Clause "on the basis of the 'time-dated' meaning of equal protection in 1868").

79. As of 1904, the Supreme Court had not yet issued a single decision establishing the First Amendment as an amendment of "any genuine importance at all." William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236, 1239 (1994).

Another telling example of a departure from the text—and certainly the departure that has enabled judges to do more freewheeling lawmaking than others—pertains to the Due Process Clause found in the Fifth and Fourteenth Amendment, which says that

> no person shall "be deprived of life, liberty or property without due process of law" . . . . By its inescapable terms, it guarantees only process. Property can be taken by the state; liberty can be taken; even life can be taken; but not without the *process* that our traditions require—notably, a validly enacted law and fair trial."[81]

To argue to the contrary, according to Justice Scalia, is to abandon the very text in favor of judicial lawmaking—which is what the Court has done most clearly in its Fourteenth Amendment jurisprudence.[82] This is the reason why lawyers consult cases before looking to the words of the Constitution.[83]

Today, however, it would be accurate to term the First Amendment a growth industry because the Supreme Court addresses First Amendment issues each term. *See* STEVEN H. SHIFFRIN & JESSE H. CHOPER, THE FIRST AMENDMENT (3d ed., 2001).

80. *See*, *e.g.*, Griswold v. Connecticut, 381 U.S. 479, 484-86 (1965) (creating a new constitutional right to birth control out of the "penumbras" that are formed by the "emanations" of the Bill of Rights). The Court's decision effectively brought the law up to the times, adapting it to fit with feminism and the new sexual mores. Anne C. Hydorn, Note, *Does the Constitutional Right to Privacy Protect Forced Disclosure of Sexual Orientation*?, 30 HASTINGS CONST. L.Q. 237, 261 (2003). *See also id.* (discussing the cases extending the *Griswold* precedent).

81. SCALIA, *supra* note 75, at 24-25.

82. *See id.* at 24-25. Originally, the Fourteenth Amendment was interpreted in a very narrow and limited way. *See* The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71 (1872) (holding that the amendment only guaranteed "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him"). The Court refused to interpret the Fourteenth Amendment as "transfer[ing] the security and protection of . . . civil rights . . . from the States to the Federal government." *Id.* at 77. However, that soon changed. *See* Twining v. New Jersey, 211 U.S. 78, 98-99 (1908) (acknowledging that "it is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law"). Twenty years later, this possibility became a reality. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925) (assuming for the purposes of decision that "freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States"). *Gitlow's* supposition became the law ten years later. *See* Palko v. Connecticut, 302 U.S. 319, 325 (1937) (holding in stark contrast to *Slaughter-House*, that the Fourteenth Amendment prohibited the States from infringing on rights that are so "implicit in the concept of ordered liberty [and . . .] so rooted in the 'traditions and conscience of our people as to be ranked as fundamental'") (citation omitted).

Notwithstanding the new appreciation of the Due Process Clause, most rights were still not deemed fundamental enough to be incorporated into the Fourteenth Amendment for protection against the States. A few years later, however, the Court overruled *Palko* and fashioned a far more lenient test for incorporation. Benton v. Maryland, 395 U.S. 784, 794

At the same time, it is self-evident that all United States lawyers and judges are to some extent originalists. This is so because all legal briefs and decisions cite to precedent, which is understood to be at least somewhat binding. Accordingly, as there is no pure originalist or living constitutionalist theory in practice, the constitutional debate and its monist and dualist expression must be framed in terms of degrees rather than in any absolute sense.

PART IV

This section sets forth the prototypical foundation supporting the theory of living constitutionalism, which starts from the premise that

> [t]he first question any advocate of constitutionalism must answer is why Americans of today should be bound by the decisions of people some 212 years ago. . . . To whatever extent our present-day decisions are shaped or constrained by the Constitution—however interpreted—we are governed by the dead hand of the past. How can this be justified?[84]

In fact, not all the Framers were convinced that their decisions should guide us. For example, Thomas Jefferson declared "the earth belongs in usufruct to the living . . . [and] the dead have neither powers nor rights over it."[85] This dilemma is not unique to the American experience; it has caused profound quandaries for many legal systems and religions.[86]

According to living constitutionalists, the Constitution is a guiding light, because

> it expresses principles of political morality and organization that continue to command our assent and agreement. If the provisions of the Constitution were

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(1969) (overruling *Palko* and adopting the theory of selective incorporation); Duncan v. Louisiana, 391 U.S. 145, 149-50 n.14 (1968) (holding that if a right is merely "*necessary* to an Anglo-American regime of ordered liberty," it will be incorporated into the Due Process Clause for protection against state infringement) (emphasis added).

For an extensive discussion of the evolving Due Process Clause, see Simcha Herzog, Note, *Applying the Incorporation Conundrum to the Second Amendment: Can States Infringe on the Individual Right to Keep and Bear*?, 23 QUINNIPIAC L. REV. 115 (2004).

83. SCALIA, *supra* note 75, at 39.

84. Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1127 (1998).

85. *Id.* (stating that Jefferson "thought that the Constitution . . . should expire at the end of a generation, which he calculated to be nineteen years").

86. For example, scripturally-based religions face the same dilemma as constitutional theorists—what should be done with an unchanging text in light of new realities? However, there is one critical difference between constitutional and religious textualist interpretation: "Scripture, for the most part, is believed to be the work of God, and therefore perfect." Rebecca L. Brown, *Tradition and Insight*, 103 YALE L.J. 177, 207 (1993). This changes the whole equation; if the belief element exists, then the text remains applicable, relevant and—most importantly—right.

> inefficient, evil, or unjust, we would be fully justified in scrapping it; it is only the happy contingency that the Framers, Ratifiers and Amenders of our Constitution did such an excellent job on the merits that justifies constitutionalism today. In other words, the authority of the Constitution is attributable not to any authority the dead have over the living, but to the enduring validity of its principles. . . .
>
> . . . .
>
> [T]he job of courts is to keep the Constitution contemporary, and the constitutional text and history will play little role in determining the outcome of hard cases.[87]

Living constitutionalists argue that reasonable constitutional construction

> does not require static doctrines but instead permits evolution and adjustment to changing conditions as well as to a varied set of facts. Because it is a framework for governmental structure, a constitution is necessarily general to allow for needed flexibility. . . . This is the essence of a "living" constitution; to do otherwise would force us to subject 20th Century needs to 19th Century foibles.[88]

The Constitution's genius "rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs."[89] Hence, "[h]istorical analysis is only a starting point. The constitution of our state is an organic document. *In no way must our understanding of its guarantees be frozen in the past.*"[90] If the constitution is not kept up then it would stand as "a petrified reminder of the limits of human foresight."[91]

In fact, Justice Holmes justified his *Missouri* decision on a living constitution basis. He said:

> [W]e may add that when we are dealing with words that are also 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. The case before us must be considered in the light of our whole experience and not

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87. McConnell, *supra* note 84, at 1128-29.

88. Randolph County Bd. of Educ. v. Adams, 467 S.E.2d 150, 163 (W. Va. 1995); *see also* County Court Judges Ass'n v. Sidi, 752 P.2d 960, 967 (1988) (holding that the state constitution is "not lifeless, but is a flexible, living document intended to accommodate new conditions and circumstances in a changing society").

89. LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 135 (1996) (quoting Justice William Brennan).

90. *Ex parte* Tucci, 859 S.W.2d 1, 32 (Tex. 1993) (citing Davenport v. Garcia, 834 S.W.2d 4, 16 (Tex. Comm'n App. 1992)) (emphasis added).

91. Miller v. Civil City of South Bend, 904 F.2d 1081, 1096 (7th Cir. 1990).

> merely in that of what was said a hundred years ago. The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that Amendment has reserved.[92]

Although this pragmatic approach to the Constitution seems eminently sensible and practical, it nevertheless contains several flaws, which have thus far prevented it from becoming openly accepted within society. First, how can it be that "what the Constitution meant yesterday it does not necessarily mean today. . . . This is preeminently a common-law way of making law, and not the way of construing a democratically adopted text. . . . One would suppose that the rule that a text does not change would apply a fortiori to a constitution."[93]

Second, judges are supposed to be above the fray. A judge's power and influence is derived from society's belief that his or her decisions are independent and objective.[94] Hence, as a matter of practical policy,

> if the people come to believe that the Constitution is *not* a text like other texts; that it means, not what it says or what it was understood to mean, but what it *should* mean, in light of the 'evolving standards of decency that mark the progress of a maturing society'—well, then, [the people] will look for qualifications other than impartiality, judgment, and lawyerly acumen in those whom they select to interpret it. More specifically, they will look for judges who agree with *them* as to what the evolving standards have evolved to; who agree with *them* as to what the Constitution *ought* to be.[95]

Such a situation has already arisen and has arguably disgraced the justice system.[96]

Lastly—and perhaps most importantly—when the Court invalidates an act passed by the political branches on constitutional grounds, ordinary lawmaking processes cannot "correct" it: "Thus the central function, and it is at the same time the central problem, of judicial review: a body that is not elected or otherwise politically responsible in any significant way is telling the people's

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92. Missouri v. Holland, 252 U.S. 416, 433-34 (1920) (emphasis added). For a fascinating discussion regarding Holmes's theory of judicial review, see John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17, 19-22 (1924).

93. SCALIA, *supra* note 75, at 39-40.

94. That is why Article III provides for lifetime appointments and a compensation that cannot be diminished. U.S. CONST. art. III, § 1.

95. SCALIA, *supra* note 75, at 46-47.

96. *Estrada Withdraws as Judicial Nominee*, CNN.com, Sept. 4, 2003, http://www.cnn.com/ 2003/ALLPOLITICS/09/04/estrada.withdraws/index.html (explaining that Miguel Estrada's nomination to the D.C. Circuit never came up for a Senate vote because Democrats repeatedly exercised their filibuster power). Estrada's saga is just one more storyline in what is becoming an evermore partisan search for judges.

elected representatives that they cannot govern as they'd like."[97] And that goes against the constitutional development of the past century, which has been a continuing march towards strengthening the original commitment to majoritarian principles.[98]

Because of the aforementioned reasons, the pragmatic appeal of living constitutionalism wanes, and consequently, so does the charm of monism. First, both positions advocate anti-majoritarian rule. Living constitutionalism argues that the law should be promulgated by judges, whereas monism goes even further and argues that foreign law should be able to bind Americans. Moreover, "[a]ll power stems from the sovereign people, and the authority of the Constitution comes from their act of sovereign will in creating it. It follows that the Constitution should be interpreted in accordance with their understanding,"[99] and not on the basis of an arbitrary common-law internationalist approach to domestic adjudication.[100]

PART V

Justices Scalia and Thomas are America's preeminent champions of originalism.[101] Justice Scalia's viewpoint, as expressed in *A Matter of Interpretation*, will be challenged in this section.

It must be noted at the outset that the legal system has definitely accepted some version of originalism. No judge making a statutory or constitutional law decision has the temerity to say, "Forget the written provision; I make the law as I see fit."[102] The very essence of any constitutional theory presupposes the central principle of originalism—that the past binds the present in some

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97. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 4-5 (1980) (citation omitted).

98. *Id.* at 7 (explaining that "six of our last ten constitutional amendments have been concerned precisely with increasing popular control of our government. And five of those six . . . have extended the franchise to persons who had previously been denied it").

99. McConnell, *supra* note 84 at 1132 (citation omitted)

100. For a superb article critiquing the living constitutionalist position, see Walter Berns, *Government by Lawyers & Judges*, COMMENTARY, June 1987, at 17.

101. Justice Scalia's views will be extensively discussed *infra*. There are many cases detailing Justice Thomas's originalist position. *See*, *e.g.*, Knight v. Florida, 528 U.S. 990, 990 (1999) (Thomas, J., concurring in denial of certiorari) (using "American constitutional tradition" to decide a death penalty case); Saenz v. Roe, 526 U.S. 489, 527-28 (1999) (Thomas, J., dissenting) (anticipating the day when the Fourteenth Amendment will be decided in accordance with its original meaning).

102. Even an ardent supporter of living constitutionalism like Justice Brennan (see *supra* notes 74, 76 and 89 and accompanying text), when asked "why the Nazis should be permitted to march through a neighborhood inhabited by Holocaust survivors . . . responded: 'the First Amendment, the First Amendment, the First Amendment.' In other words, judges are not responsible for this outcome; the Framers of the First Amendment are responsible." McConnell, *supra* note 84, at 1129-30 (citation omitted). This is despite the fact that the First Amendment's protections were created by the Court, as the First Amendment had no significance until the 1900s. *See supra* note 79.

way.[103] Hence, everyone but an anarchist agrees with the conceptual basis of originalism. It is the manner of its application and what it instructs that remain debatable. Consequently, living constitutionalists raise the prospect that originalism allows, and in fact mandates, future generations to reinterpret age old maxims to fit new realities.[104]

Scalia's view of originalism, in contrast, argues that the present should live according to the views of the past until the majority changes the law democratically.[105] Accordingly, the two most vital factors in Scalian originalism are: (a) textualism—which attempts to construe a text "to contain all that it fairly means"[106] and (b) traditionalism—which claims to apply the Constitution "in accordance with the long-standing and evolving practices, experiences, and tradition[s] of the nation."[107] The reason Scalia claims to adhere most especially to these factors is that text and tradition do not respond to current events, enabling the Court to remain a neutral spectator in the culture wars and allowing democracy to continue on its meandering course.[108]

Consequently, it would seem that Scalian originalism is a superior method of constitutional interpretation to living constitutionalism. It enables the judge to be objective; to decide a case without allowing his personal prejudices to interfere. And even if the originalist judge is somewhat activist, he or she will nevertheless be bound to the confines of the text and the boundaries of tradition. Originalism ostensibly provides a good rejoinder to the school of legal realism;[109] the judge is not making the law, he or she is merely applying the law as it stands.

The most common critique of Scalia's originalism is that it is formalistic, simpleminded, wooden, unimaginative, and pedestrian.[110] "'What am I?' Judge

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103. Ultimately, the Court uses the living constitutionalist method of interpretation while covering it with the façade of originalism. *See supra* notes 80-83 and accompanying text.

104. *See supra* notes 84-86 and accompanying text (supporting the contention that originalism dictates adherence to living constitutionalism). Similarly, Thomas Paine, Noah Webster, and other Founders thought that every generation should be free to act for itself as it wished, without being bound by a constitution. McConnell, *supra* note 84, at 1127.

105. *See infra* note 113 and accompanying text.

106. SCALIA, *supra* note 75, at 23. "Textualism should not be confused with the so-called strict constructionism, a degraded form of textualism that brings the whole philosophy into disrepute." *Id.*

107. McConnell, *supra* note 84, at 1133; Ronald Turner, *Were Separate-But-Equal and Antimiscegenation Laws Constitutional?: Applying Scalian Traditionalism to* Brown *and* Loving, 40 SAN DIEGO L. REV. 285, 287 (2003) (explaining Scalia's view of tradition).

108. *See* Lawrence v. Texas, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) (lamenting "that the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed").

109. For a good discussion of legal realism, see KALMAN, *supra* note 89, at 15-75.

110. SCALIA, *supra* note 75, at 23, 25.

Richard Posner asked rhetorically—'A potted plant?'"[111] However, as Justice Scalia answered,

> [to be a good originalist,] one need not be too dull to perceive the broader social purposes that a statute is designed, or could be designed, to serve; or too hidebound to realize that new times require new laws. *One need only hold the belief that judges have no authority to pursue these broader purposes or write those new laws.*[112]

Arguably, Scalian originalism occupies a fundamentally sound and logically coherent position within constitutional theory. However, although in theory Scalian originalism is superior, in practice it does not reach that rarified realm of objectivity it espouses.

Scalia considers himself to be an originalist, and his belief is based on the fact that he brands himself first and foremost a textualist. "I argue for the role of tradition in giving content only to *ambiguous* constitutional text; no tradition can supersede the [text of] the Constitution."[113] Although logical,[114] Scalia's stance is problematic because it forces the judge to decide whether a given constitutional text is "ambiguous." Tradition cannot be used to determine the ambiguity of a text; it may only be appealed to once a text has been deemed ambiguous.[115] This means that either the text must explicitly attest to its own ambiguity or—more likely—the judge decides whether or not the text is ambiguous. This raw judicial power enables the judge to choose between the often competing text and tradition to suit his or her preference. It is in this area that Scalian originalism fails.

For example, Scalia attempted to explain the constitutionality of *Brown v. Board of Education*[116] in his dissent in *Rutan v. Republican Party of Illinois*.[117] The problem facing Scalia was that tradition mandated a finding that *Brown* was decided unconstitutionally. Segregation was an undeniable American tradition,

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111. KALMAN, *supra* note 89, at 135 (quoting Posner's antipathy for the originalist movement).

112. SCALIA, *supra* note 75, at 23 (emphasis added). Moreover, Scalia argues that of all the criticisms, "the most mindless is that it is 'formalistic.' The answer to that is, *of course it's formalistic!* The rule of law is *about* form." *Id.* at 25. Even if a murder is caught on videotape, the murderer still gets a full-dress criminal trial. "Is that not formalism? Long live formalism. It is what makes a government a government of laws and not of men." *Id.*; *see also* ELY, *supra* note 97, at 4 (explaining how modern America has reinforced its commitment to democratic principles).

113. Rutan v. Republican Party, 497 U.S. 62, 95 n.1 (1990) (Scalia, J., dissenting).

114. Appealing to text before tradition makes sense. The text was enacted democratically; it is the extant voice of the people, whereas it is much more difficult to determine the existence and nature of an amorphous tradition.

115. *See supra* note 114 and accompanying text.

116. 347 U.S. 483 (1954) (holding that "separate but equal" is inherently unequal under the Equal Protection Clause).

117. 497 U.S. at 92 (Scalia, J., dissenting).

which was caused by the adoption of the Fourteenth Amendment.[118] And because the tradition of segregation was never deemed unconstitutional, ergo the tradition must render "separate but equal"[119] segregation constitutional under the Equal Protection Clause.[120] Hence, because tradition is controlling, Scalia should hold the *Brown* decision unconstitutional. However, in Scalian originalism, tradition only controls the outcome of a case in which the text is ambiguous.[121] Therefore, Scalia claimed that the text here was decidedly unambiguous; in his view, "the Fourteenth Amendment's requirement of 'equal protection of the laws,' combined with the Thirteenth Amendment's abolition of the institution of black slavery, leaves no room for doubt that laws treating people differently because of their race are invalid."[122]

Scalia's argument is fraught with problems. First, he decided that the text is unambiguous to avoid a controlling tradition that was contrary to current American mores and morals. But while it is plausible and arguable that the text is unambiguous, nevertheless, the clarity of the text "is not automatic or obvious and [this] reflects Justice Scalia's choice as to *the* proper reading and meaning of the constitutional language."[123] Moreover, should not tradition at least be allowed to show that the text is ambiguous? And finally, Scalia puts two constitutional amendments together to arrive at a conclusion that *Brown* is constitutional. But that argument is "extratextual, for nothing in the text of the Constitution says that those amendments should be read together."[124] Hence, Scalia is mixing and matching to wind up at a result he can stomach, even if it does not comport with his professed adherence to originalism.[125]

A second example of Scalia's activism is found in the exact reverse scenario, that is, when he likes the tradition but not the text. Here, Scalia downgrades the text by claiming that it is ambiguous, enabling it to be supplanted with a controlling tradition. This is what has occurred in the Court's recent federalism cases.

The Tenth Amendment reserves non-delegated powers to the states.[126] As Holmes pointed out in *Missouri*, as long as a power is delegated to the federal

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118. Turner, *supra* note 107, at 333-34 (explaining that the South segregated to keep blacks from realizing the boons achieved by the Fourteenth Amendment).

119. Plessy v. Ferguson, 163 U.S. 537 (1896) (holding that if blacks are provided equal facilities, then the inherent separation from whites is constitutional).

120. Turner, *supra* note 107, at 333-36 (discussing how Scalia's originalism would apply to *Brown* and *Loving*).

121. *See supra* note 113-15 and accompanying text.

122. *Rutan*, 497 U.S. at 95 n.1.

123. Turner, *supra* note 107, at 335-36.

124. *Id.* at 336.

125. "[I]t is perfectly understandable, if unfortunate, that conservatives have felt compelled to adjust/distort their constitutional theories to accommodate *Brown*." Michael J. Klarman, Brown*, Originalism and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1930 (1995).

126. U.S. CONST. amend. X. For the full quotation of the amendment, see *infra* note 134 and accompanying text.

government—for example, the treaty power—a state cannot prevent the federal exercise of that power because of "invisible radiations" from the Tenth Amendment.[127] "*If a power is delegated . . .the Tenth Amendment expressly disclaims any reservation of that power to the States*."[128] "*[T]he Tenth Amendment imposes no restriction on the exercise of delegated powers*."[129]

The text of the Tenth Amendment imposes no limitations on the delegated powers; the federal government can act as it wishes within the confines of those delegated powers. Seemingly, then, the Tenth Amendment and States' rights should play no role in constraining the delegated treaty power.[130] Moreover, state concerns based upon the Tenth Amendment ought not carry any weight in the international law debate.[131]

Nevertheless, it is quite likely that the current Court would severely limit the binding scope of both treaties and CIL. This is because the Court has reinvigorated the once stagnant federalism doctrine[132] by diminishing the federal government's right to exercise its delegated powers in favor of states rights.[133] This renewed emphasis on federalism is problematic, however, because the text of the Tenth Amendment states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[134] Accordingly, *the power that is delegated to the United States must consequently be denied to the States*. Therefore, because the text seems unambiguous, it should control according to Scalian originalism. This would enable the United States' to fully exercise its delegated treaty power, notwithstanding state protestations.

However, Justice Scalia found the text of the Tenth Amendment ambiguous. In *Printz v. United States*, the Court dealt with a federal regulatory scheme that was enacted under Congress's delegated commerce power. Printz protested, saying that the federal act unconstitutionally infringed on the State's executive power. At issue before the Court was whether the federal

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127. Missouri v. Holland, 252 U.S. 416, 432-34 (1920).

128. New York v. United States, 505 U.S. 144, 156 (1992) (emphasis added).

129. Printz v. United States, 521 U.S. 898, 941 (1997) (Stevens, J., dissenting) (emphasis added).

130. See *supra* notes 9-10 and accompanying text for the constitutional provisions delegating the treaty power to the federal government.

131. *See supra* note 65 and accompanying text (arguing that monism is incompatible with the resurgent federalism doctrine adopted by the Court).

132. In the late 1930s, the Court began to uphold New Deal legislation under the Commerce Clause. In so doing, the Court increased the power of the federal government enormously at the expense of the States and regulated the Tenth Amendment to nothing "but a truism." United States v. Darby, 312 U.S. 100, 124 (1941).

133. *See*, *e.g.*, United States v. Lopez, 514 U.S. 549, 552 (1995). The Court held unconstitutional a federal act passed by Congress under the Commerce Clause. The Court explained that the Commerce Clause is not so elastic as to include all federal legislation because "[t]he Constitution creates a Federal Government of [limited] enumerated powers . . . [that] are few and defined." *Id.*

134. U.S. CONST. amend. X.

government was acting constitutionally if in the pursuit of its delegated powers it infringed on the state's rights. According to Scalia, "[b]ecause there is no constitutional text speaking to this precise question, the answer . . . must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court."[135] In other words, because the text of the Tenth Amendment would render the regulatory scheme constitutional, Scalia was forced to declare that the text was ambiguous. This enabled Scalia to reference a controlling tradition that unsurprisingly proves that the States have an inviolable state sovereignty preventing Congress from "commandeering" state executives.[136]

There are two glaring problems with Scalia's ruling in *Printz*. First, he ignores an unambiguous text in favor of tradition in blatant contradiction of his favored method of constitutional interpretation. Moreover, Scalia creates a right out of tradition for which no supporting text exists. For a Justice who exalts textualism and claims to only use tradition to elucidate an unclear text,[137] Scalia seems to have thoroughly embraced tradition as a separate means of adjudication in contradistinction to his professed theory of adjudication. Hence, although Scalian originalism makes sense on paper, in practice Justice Scalia does not always adhere to his own canons of interpretation.[138] These objections remove the predominant form of originalism—Scalian originalism—from the pedestal from which it claims to objectively dictate the correct constitutional results.

That there is no objectivity or principled method of adjudication in either camp is obvious. Scalian originalism—when followed—is superior to living constitutionalism, because it reinforces democratic principles and enables the judge to be more objective.[139] On the other hand, living constitutionalism is better, because it both strengthens the democratic rights of oppressed minorities and accounts for the changed world of today.[140]

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135. Printz v. United States, 521 U.S. 898, 905 (1997).

136. *Id.* at 935.

137. *See* Rutan v. Republican Party, 497 U.S. 62, 95 n.1 (1990); *supra* note 113 and accompanying text.

138. These critiques—in consonance with the theme of this note—assume that objectivity may be reached on rare occasions. This supposition, however, is generally not accepted in today's *avant garde* circles of legal realism. For example, the Critical Legal Studies movement believes that "law (with its attendant institutions and representatives) is not neutral or objective, but legitimizes the prejudicial power relations and hierarchical structures of class, economics, gender, and race in the society by which it is itself determined, legitimized and maintained." E. Mediterranean Univ., Critical Legal Studies: Ideology and Objectivity in Law, http://www.emu.edu.tr/ elh/cfp_linked/critical.htm.

139. *See supra* notes 105-109, 113 and accompanying text.

140. Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 6, 13 (1995) (presenting the living constitutionalist argument that the Court should act to reinforce democracy and improve the democratic character of the political process itself by protecting minority groups that are at special risk because "the democratic process is not democratic enough").

The debate over the advantages and disadvantages of these conflicting means of constitutional adjudication applies with equal force to the question of the influence of international law. The originalists and dualists have the better argument in terms of being in accord with the rules formulated in the past, while the living constitutionalists and monists recognize that society must live in accordance with the realities of the present.

CONCLUSION

In surveying judicial decisions and legal scholarship, there may very well come a moment of "terrifying realization" that despite the sound and fury generated by both sides of the debate, "there cannot be any normative system [of justice] ultimately based on anything except human will . . . As things now stand, . . . everything is up for grabs:

> Nevertheless:
> Napalming babies is bad.
> Starving the poor is wicked.
> Buying and selling each other is depraved.
> Those who stood up to and died resisting
> Hitler, Stalin, Amin, and Pol Pot—and General
> Custer too—have earned salvation.
> Those who acquiesced deserve to be damned.
> There is in the world such a thing as evil.
> [All together now:] Sez who?
> God help us.[141]

141. KALMAN, *supra* note 89, at 92-93 (quoting Arthur Allen Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1249).