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Varieties and Complexities of Doctrinal Change: Historical Commentary

Edward A. Purcell Jr.
New York Law School, edward.purcell@nyls.edu

9 Varieties and Complexities of Doctrinal Change: Historical Commentary, 1901–1945

*Edward A. Purcell, Jr.**

The preceding three fine chapters in Part III not only advance our understanding of international law developments in the United States but also suggest the challenges that confront scholars in the field. Although focused on the Supreme Court, they nonetheless suggest the sprawling scope of their subject and the complex interrelationships – institutional, intellectual, cultural, economic, and political – that often entangle and perplex both legal and historical analysis. By carefully identifying central issues and tracing major developments, the chapters illuminate the past and suggest important directions for future scholarship.

This review chapter proceeds in four parts. The first three examine the contributions of the chapters in this section, while the fourth explores three basic themes that run through much of the book. Those themes are hardly the only ones that merit discussion, but each seems central to the history of international law in the late nineteenth and early twentieth centuries.

I. The Law of Treaties

Professor Michael Van Alstine's essay introduces the period from 1901 to 1945 as one of paradox. Although vast social and political forces "propelled a substantial change in the domestic law," he explains, the law of treaties was marked "not by headstrong change, but rather by a sense of continuity, consolidation, and completion." While the numbers and types of treaties expanded rapidly in the early twentieth century, the Court "repeatedly reaffirmed the foundational principles of treaty law," including the duty of courts to apply treaties as controlling law, the "last-in-time" rule, the law of territorial acquisition, and the right of the President to determine the nation's treaty partners.[1]

The period's "most distinctive feature" was "the Court's distillation of a largely complete and broadly coherent system of treaty interpretation." The essential elements

*Joseph Solomon Distinguished Professor, New York Law School. The author wishes to thank New York Law School students Stephanie Gibbs, Jared Kagan, Sarah Mirsky, and Ann Young for their invaluable assistance and Michael McCarthy of the New York Law School Library for his help in tracking down hard-to-find source materials.

[1] Chapter 6, pp. 192–93.

of that system were "a purposive approach" to interpretation intended "to advance amicable relations" with the nation's treaty partners and a "presumption in favor of a liberal recognition of individual rights secured by treaties."[2] The Court established the law of contracts as interpreted in international law as its "fundamental model for treaty interpretation," laid firm foundations for "three of the established pillars of modern treaty interpretation," and developed other doctrines to implement its "substantive preference for enlarging individual treaty rights."[3]

Conversely, the Court gave little attention – and less effect – to the distinction between treaties that were "self-executing" and those that required congressional action to give them domestic effect,[4] and it saw relatively little need to defer to the other branches of government in interpreting treaties. To the Congress, it gave no deference, although it recognized the Senate's power to ratify treaties subject to binding reservations as well as Congress's power to alter or abrogate treaties.[5] To the executive branch, it gave only limited deference, and then not to its legal opinions but only to its actual and established practices in implementing treaty provisions.[6]

Most notably, Professor Van Alstine finds continuity in the Court's decision in *Missouri v. Holland*,[7] the period's "most famous treaty case." Although Justice Oliver Wendell Holmes, Jr.'s opinion seemed to give the treaty power an almost unlimited scope, Van Alstine argues that it "actually plowed very little new constitutional ground."[8] *Geofroy v. Riggs*[9] in 1890 "had already staked out a nearly unlimited substantive scope for the treaty power," and *Neely v. Henkel*[10] in 1901 had held that Congress could pass substantive legislation on the basis of any valid treaty.[11]

While Professor Van Alstine uses *Missouri v. Holland* to highlight his continuity thesis, his claim may be overstated. First, the precedents he cites are distinguishable on the ground that they dealt with relatively traditional and inherently "international" affairs. *Geofroy* addressed the claims of French citizens residing in France to inherit property located in the District of Columbia, while *Neely* dealt with Congress's power to extradite individuals to Cuba. *Missouri v. Holland*, in contrast, addressed the control of migratory birds found within the United States, a subject that had commonly been considered a "local" matter within the police power of the States.[12] Second, the precedents Van

[2] *Id.*, pp. 193–94. Professor Duncan Hollis suggests the Court neither enforced individual treaty rights as consistently in the earlier period nor employed such a consistent interpretive method. *See* Chapter 2, pp. 66–72, 80–85.

[3] Chapter 6, pp. 209–10.

[4] *Id.*, pp. 202–04. Professor Hollis supports Van Alstine's continuity thesis on this point. *See* Chapter 2, pp. 208–12.

[5] Chapter 6, 206–08. In contrast, Professor Hollis argues that the Court gave considerable deference to congressional interpretations of treaties during the 1860–1900 period. *See* Chapter 2, pp. 83–84.

[6] Chapter 6, 217–18. Chapter 2 suggests that the Court began to give some deference to the President in the late nineteenth century. *See* Chapter 2, pp. 84–85. In contrast, the Court gave "zero deference" to the Executive in the early nineteenth century. David Sloss, *Judicial Deference to Executive Branch Treaty Interpretations: A Historical Perspective*, 62 N.Y.U. ANN. SURV. AM. L. 497, 499 (2007).

[7] 252 U.S. 416 (1920).

[8] Chapter 6, p. 199.

[9] 133 U.S. 258 (1890).

[10] 180 U.S. 109 (1901).

[11] Chapter 6, pp. 198, 200.

[12] *See* G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 67 (1999).

Alstine cites were, with one hardly relevant exception,[13] all handed down after 1890. Thus, they tell us little about *Missouri v. Holland's* continuity with the treaty law of most of the nineteenth century.[14] Third, Van Alstine may give insufficient weight to the broader importance of Holmes's frequently cited language describing the Constitution as an "organism" whose meaning properly evolves with the nation's development.[15] By itself, that language gave the Court's opinion a deep resonance that carried far beyond the realm of treaty law.

Moreover, as Professor Van Alstine himself points out, there was something new about *Missouri v. Holland.* Challenging the statute based on the treaty, Missouri argued that Congress could not use the treaty power as a basis for legislation that invaded the rights of the States under the Tenth Amendment.[16] In response, the Court ruled that the amendment was irrelevant because the treaty power under Article II, Section 2, was a legislative power "delegated expressly" to the national government.[17] Together with its holding that the treaty power authorized the federal government to regulate migratory birds, a traditionally local matter, the Court's treatment of the Tenth Amendment laid to rest a longstanding States' rights claim and constituted a notable break with the past. As G. Edward White has argued, *Missouri v. Holland* was a critical part of the "transformation" in the constitutional law of foreign relations that occurred between the late nineteenth century and the 1930s.[18]

Finally, the period witnessed the expansion and escalating use of sole executive agreements, a development that Professor Van Alstine identifies as the period's "starkest example of change," one that was "perhaps even revolutionary."[19] *United States v. Curtiss-Wright Export Corp.*[20] claimed far-reaching foreign relations powers for the President in language suggesting that those powers were virtually unbounded, and *United States v. Belmont*[21] and *United States v. Pink*[22] seemed "to hold that an executive agreement may

[13] The exception, *American Insurance Co. v. 356 Bales of Cotton*, 26 U.S. 511 (1828), affirmed only that the United States could acquire territory by way of treaty, a far narrower and less controversial holding than the one in *Missouri v. Holland.*

[14] *Accord* Chapter 2, pp. 85–87.

[15] Chapter 6, p. 201 (citing *Holland*, 252 U.S. at 433).

[16] Professor Van Alstine underscores the importance of *Missouri v. Holland* by noting that the States' rights argument Missouri advanced had its "foundation" in *Geofroy v. Riggs*, 133 U.S. at 267 – the very case he identifies as having established a "nearly unlimited" treaty power. Chapter 6, p. 198. In fact, the scope of the treaty power was hotly contested in the early twentieth century. *See, e.g.*, HENRY ST. GEORGE TUCKER, LIMITATIONS ON THE TREATY-MAKING POWER UNDER THE CONSTITUTION OF THE UNITED STATES 140–41 (1915). *See generally* David M. Golove, *Treaty Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1238–57 (2000).

[17] 252 U.S. at 432.

[18] *See* White, *supra* note 12, at 72–73. For a different view supporting Van Alstine's claim of continuity, see Charles A. Lofgren, Missouri v. Holland *in Historical Perspective*, 1975 SUP. CT. REV. 77, 102–03.

[19] Chapter 6, p. 218; *accord* White, *supra* note 12, at 146; *see also* Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 VA. J. INT'L L. 431, 467–73 (2004) (arguing that strong deference to the President in treaty interpretation developed in the 1920s and 1930s). The shift in the balance between treaties and executive agreements (with or without congressional approval) began in the half-century before World War II when the nation entered 524 treaties and 917 executive agreements. Oona Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1287 (2008).

[20] 299 U.S. 304 (1936).

[21] 301 U.S. 324 (1937).

[22] 315 U.S. 203 (1942).

preempt any and all state laws by presidential fiat."[23] Together, he concludes, those cases created "a seemingly unlimited field for unilateral executive control over our country's foreign affairs."[24]

While Professor Van Alstine's continuity thesis requires qualification, it serves nicely to highlight another fundamental point he makes: that far more substantial changes in treaty law came in the century's second half. Then, the Court's commitment to both a "purposive approach" to treaty interpretation and a "liberal recognition" of individual treaty rights largely disappeared,[25] while the Justices showed increasing deference to the political branches and turned the concept of "non-self-executing" treaties into a major obstacle to judicial enforcement of treaty obligations. The nature and sweep of those later changes, Van Alstine implies, dwarfed earlier changes and consequently made the century's first half seem, relatively speaking, a period of continuity.

Perhaps Professor Van Alstine's most important contribution is to illustrate the way that the meaning and significance of constitutional principles change over time. During the nineteenth century the principle of separation of powers was understood to mean that the President and two-thirds of the Senate – the constitutionally defined "lawmaking" authority for treaties – had the power to "make" treaties, while the Court had the quintessential judicial function of construing and applying those treaties. Recognizing its "special responsibility" under the Supremacy Clause to ensure that treaties were honored, the Court served as "a faithful constitutional agent in the enforcement of international commitments in domestic law."[26] During the late nineteenth and twentieth centuries, however, massive changes in the United States and its role in an internationalizing world brought pressures that gradually altered the operation of those principles.[27] The power of the President and the Senate to "make" treaties remained, but it was employed less and less frequently as alternate methods of effecting international agreements proved quicker and easier to use. Gradually, the Court accepted the principle that the President together with simple majorities in both Houses of Congress could make international agreements that were the legal equivalents of treaties and, further, that the President alone could also make international agreements that were, at least in many ways, the legal equivalents of treaties. In addition, mostly after World War II, the Court changed its own role in two ways. First, it came to accept the idea that many treaties were, for one reason or another, "non-self-executing" and hence that it should not enforce them without further authorization from Congress. Second, it came to accept the idea that executive branch legal opinions, even if unprecedented or unmoored in prior practice, might properly influence or perhaps even determine how the Court should construe and apply treaties and other international agreements.[28] Together, those changes meant that

[23] Chapter 6, p. 223. More than sixty years after *Pink* the Court decided *Medellin v. Texas*, 552 U.S. 491 (2008), which casts doubt on the more aggressive interpretations of *Pink*.

[24] Chapter 6, p. 224.

[25] Professor Hollis supports Van Alstine's point about continuity on this issue, suggesting that in the earlier period there was "a presumption in favor of treaties as federal law vis-à-vis individuals *unless* something in the treaty or a federal statute suggested otherwise." Chapter 2, p. 67. *But see id.*, pp. 69–71 (discussing exceptions that limited the "presumption").

[26] Chapter 6, p. 202; *see also* Chapter 1, pp. 13–23; Chapter 4, pp. 133–41.

[27] The impact of those changed conditions is a major theme in Professor Paul Stephan's chapter. *See* Chapter 10.

[28] *Id.*, pp. 322–26 (increased reluctance to enforce treaties without congressional legislation); *id.*, pp. 335–38 (increased deference to views of Executive).

the Court's enforcement of treaties became more dependent on Congress and, to some uncertain but growing extent, on the President as well.

Those developments significantly realigned the relationships among the federal branches. The President was greatly enhanced; the House granted new authority; the Senate partially eclipsed; the Court more narrowly constrained; and Congress as a whole strengthened with respect to the Court but weakened with respect to the President. The principle of separation of powers remained as a fundamental constitutional concept, but its meaning and operation had been substantially altered.

II. Customary International Law

In contrast to Van Alstine, Professor Michael Ramsey stresses change, identifying not only a variety of shifts in the Court's jurisprudence but also a "revolution" in its understanding of the nature of law that came with *Erie Railroad Co. v. Tompkins* in 1938.[29] Indeed, he maintains, the "story of the Supreme Court and international law in the early twentieth century" is "to a large extent a story about *Erie*."[30] Accordingly, he breaks his chapter into pre- and post-*Erie* eras.

Professor Ramsey organizes the pre-*Erie* section around three themes: the sharpening conflict over the doctrine of "general" law, the waning role of customary international law as a direct source of legal rules, and a decline in "international law positivism." Examining the first trend, he notes that customary international law became increasingly understood as a component of "general" law and that its merger into the latter eventually brought the most striking doctrinal results in admiralty suits and suits between States.[31] Accordingly, he focuses on the Court's critical decisions in *Southern Pacific Co. v. Jensen*[32] and *Kansas v. Colorado*[33] to show how the Justices used the resulting blend to create a new and specifically "federal" law in those two areas. Outside admiralty and interstate disputes, however, customary international law remained an imprecisely defined element of "general" law and, consequently, not authentically "federal" within the meaning of either the Supremacy Clause or federal jurisdictional statutes.

The other two themes in the first section, the declining influence of customary international law and its positivist method, are less central to Professor Ramsey's broader argument about *Erie*. In part, their decline was due to the proliferation of statutes and treaties that displaced many customary international law rules and to the de facto disappearance of many traditional customary international law staples, such as cases involving privateers and prizes. The decline was also caused by the merging of customary international law into "general" law. The merger obscured the distinctive role of customary international law while making its positivist method unnecessary.[34] Because "general" law was based not on state consent and practice but on principles of reason and morality, the merger of customary international law into "general" law meant that American courts would look to those principles, not to state behavior, to determine customary international

[29] 304 U.S. 64 (1938).
[30] Chapter 7, p. 225.
[31] *Id.*, pp. 227–34.
[32] 244 U.S. 205 (1917).
[33] 185 U.S. 125 (1902) (announcing, *inter alia*, that the Court would consult international law in deciding merits); 206 U.S. 46 (1907) (deciding merits).
[34] Chapter 7, pp. 235–38.

law's content.[35] Finally, Ramsey suggests, the decline of customary international law was caused by the partial constitutionalization of two of its important subfields: conflict of laws and personal jurisdiction over nonresidents and noncitizens.[36] By extending constitutional mandates into those areas, the Court further narrowed the role that customary international law would play in its jurisprudence.

Rounding out the first section, Professor Ramsey addresses the relationship between international law and American foreign policy. While the period's cases were for the most part "not momentous,"[37] he identifies one major exception – *Curtiss-Wright* – a dubiously reasoned case[38] that would become "a standard citation" for those who sought to justify an "effectively unconstrained executive foreign affairs power."[39] Ramsey, however, points out that the Court's opinion in *Curtiss-Wright* not only contained language supporting such an "unconstrained" view of presidential power but also included language pushing in the opposite direction. The opinion explicitly states that the President is limited "by treaties, international understandings and compacts, and the principles of international law."[40] Thus, even with its broadest reading, Ramsey suggests, the case does not authorize unlimited executive power over foreign affairs. Rather, it proposes "a tradeoff": executive power is freed from constitutional fetters but cabined by international law.[41]

Unfortunately, if *Curtiss-Wright* were accepted on that theory, the tradeoff would likely impose few if any significant restraints on the President. It would squarely put a question that has become increasingly important during the twentieth century: does the President have the right to violate international law? It seems highly doubtful that a future Court would ever, in a significant showdown, give anything but an affirmative answer to that question.[42] If the President is to be constrained by law in the conduct of foreign affairs, it seems likely that only domestic authorities – constitutional barriers or explicit congressional statutes – would serve.[43]

In the second part of his chapter Professor Ramsey addresses *Erie* and the problem it generated for customary international law. Overruling a century of the Court's jurisprudence, Justice Louis D. Brandeis's majority opinion held that there was no such thing as "general" law and announced that the Court's prior decisions enforcing such law represented "an unconstitutional assumption of powers by the courts of the United States."[44]

[35] Professor David Bederman notes that in discussing customary international law issues the Court was often "vague," referred to "general" legal sources and principles, and used little direct evidence of actual state practice. Chapter 3, pp. 103–12. Its treatment of customary international law as "general" law, he concludes, was not consistent. *Id.*, pp. 114–17.

[36] Chapter 7, pp. 235–36.

[37] *Id.*, p. 240.

[38] *See, e.g.*, Charles A. Lofgren, United States v. Curtiss-Wright Export Corporation: *An Historical Reassessment*, 83 YALE L.J. 1, 32 (1973) (historical basis is "shockingly inaccurate"); David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467, 497 (1946) (makes "a shambles" of the idea of constitutional government).

[39] Chapter 7, p. 243.

[40] *Id.*, p. 242 (citing *Curtiss-Wright*, 299 U.S. at 318).

[41] *Id.*

[42] *Accord* Chapter 3, pp. 120–22.

[43] On the challenge of constraining executive foreign relations powers by law, see, *e.g.*, David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb: Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008).

[44] 304 U.S. 64, 79 (1938).

It declared that the word "laws" included only those rules – whether made by judges or legislatures – that a sovereign power would enforce, and it announced a basic constitutional principle: "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state."[45] Thus, *Erie* implicitly posed a major question: if "general" law does not properly exist and all legitimate domestic law is either "state" or "federal," what is customary international law?

In a valuable summary, Professor Ramsey evaluates the three basic approaches to the problem that scholars and judges have offered, noting strengths and weaknesses in each.[46] In the years after World War II most commentators regarded *Erie* as essentially irrelevant to issues of international law and accepted the proposition that customary international law was a form of federal law.[47] Recent critics, however, have advanced alternative positions based on broader readings of *Erie*. Some argue that, because customary international law is authorized by neither the Constitution nor congressional statutes, *Erie* means that customary international law cannot be federal law and must therefore be state law.[48] Others, relying on the federal nature of foreign relations law and the Court's acceptance of a "special" federal common law, argue that *Erie* means that customary international law may be federal law in some areas but state law in others.[49] Ramsey concludes quite accurately that none of the proposed solutions "was wholly embraced, nor wholly rejected, in *Erie*'s time" and that none is "wholly satisfactory."[50] The fundamental problem, as Professor William Dodge writes later in this volume in Chapter 11, is that *Erie* constituted such a profound jurisprudential change that many questions involving its significance for customary international law "would have made no sense before 1938."[51]

[45] *Id.* at 78.

[46] Professor Bederman points out that the Court's decisions in the late nineteenth century were "ambiguous in answering the question whether a norm of customary international law or general maritime law was one of federal law for purposes of the Constitution's Article III (conveying federal jurisdiction) or Article VI (preempting state law)." Chapter 3, p. 117. He concludes that the Court established that customary international law was not "federal" law for statutory jurisdictional purposes but that its "substantive status" as federal or state law nonetheless "remained indeterminate." *Id.*, p. 119.

[47] *See, e.g.*, RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 3 Reporters' Note 2 (1965); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 Reporters' Note 3 (1987).

[48] *See, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997); Curtis A. Bradley, *The Status of Customary International Law in U.S. Courts Before and After* Erie, 26 DENV. J. INT'L L. & POL'Y 807 (1998). For responses arguing that customary international law is federal law, see Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 (1997).

[49] E.g., Ernest A. Young, *Sorting out the Debate over Customary International Law*, 42 VA. J. INT'L L. 365 (2002); G. Edward White, *A Customary International Law of Torts*, 41 VAL. U. L. REV. 755 (2006); William S. Dodge, *Bridging* Erie: *Customary International Law in the U.S. Legal System After* Sosa v. Alvarez-Machain, 12 TULSA J. COMP. & INT'L L. 87 (2004). Bradley and Goldsmith note that their interpretation would leave some areas of foreign relations law unaffected. *See* Bradley & Goldsmith, *supra* note 48, at 870–75.

[50] Chapter 7, p. 254.

[51] Chapter 11, p. 375; *see also* Part V.B.

Considering *Erie*'s relevance for customary international law, four general conclusions seem warranted. First, then-Professor Philip C. Jessup was almost certainly right when he opined the year after *Erie* came down that "Mr. Justice Brandeis was surely not thinking of international law" when he wrote his opinion.[52] Neither the specific facts of the case, which involved a single individual injured by a passing train in a small Pennsylvania town, nor the broader social, political, and constitutional factors that concerned Brandeis and the Court at the time had any direct connection with customary international law. Indeed, as Ramsey points out, when the Court decided *Erie*, it "had not decided a pure direct-application international law case for over twenty years."[53] The *Erie*/customary international law problem, in other words, was apparently entirely absent from the Justices' minds.

Textual evidence supports that conclusion, for the Court's constitutional reasoning contained a glaring and otherwise inexplicable error. Announcing that state law controlled except "in matters governed by the Federal Constitution or by acts of Congress," the opinion left out treaties, a category of law that the Constitution explicitly makes "supreme."[54] Neither Brandeis nor any other Justice would have denied that status. Indeed, Brandeis had joined the Court's opinion in *Missouri v. Holland*, which recognized the sweeping scope of the federal treaty power. Thus, *Erie*'s omission of treaties could only have been due to inadvertence, to the fact that none of the Justices was thinking about the opinion's relevance for international law issues.[55]

Second, and equally obvious from the opinion's text, *Erie* was focused on four other quite different problems. One was the doctrinal confusion that the vague idea of "general" law caused and the "well of uncertainties"[56] it created about when and under what circumstances federal courts would follow decisions of state courts. A second was the fact that "general" law combined with federal jurisdictional and procedural rules to spur forum shopping and aggressive litigation tactics that burdened the courts and created inefficiencies in the legal system. A third was the unfairness that those aggressive litigation tactics imposed on relatively weak individual claimants, especially when they faced sophisticated corporate adversaries able to exploit their systemic advantages. The last, and most fundamental, was that "general" law had developed into a doctrine that allowed the federal courts to create rules of non-constitutional national law that were "confessedly" beyond the power of Congress to alter,[57] a doctrine that contradicted the fundamental

[52] Philip C. Jessup, *The Doctrine of* Erie Railroad v. Tompkins *Applied to International Law*, 33 AM. J. INT'L L. 740, 743 (1939). Indicative of the profession's inattention to the *Erie*/customary international law question at the time, Jessup's article was almost alone in discussing the problem, and it was exceptionally brief, covering less than three full printed pages.

[53] Chapter 7, p. 246. The Court itself subsequently distinguished *Erie* on the ground that Jessup suggested when it ruled that the act of state doctrine "must be treated exclusively as an aspect of federal law." Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964); *see* Chapter 11, pp. 262–63.

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

[55] Although Brandeis had strong international interests, especially in Jewish affairs in Palestine and in the events surrounding World War I and the coming of World War II, his professional focus remained on domestic issues. Indeed, his Zionism was largely shaped by his commitment to American ideals and Progressive values. MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 405–09 (2009). "Brandeis was too deeply immersed in American domestic problems to give foreign affairs much attention." ALPHEUS THOMAS MASON, BRANDEIS: A FREE MAN'S LIFE 438 (1946).

[56] 304 U.S. 64, 74 (1938).

[57] *Id.* at 72.

constitutional principle of legislative primacy.[58] No hint of international law figured in *Erie*'s discussion of any of those concerns.[59]

Third, had Brandeis actually considered the customary international law question, his constitutional jurisprudence suggests that he would likely have denied from the start that it required an "either/or" solution. As a general matter, Brandeis sought to give full scope to federal authority while ensuring that the States retained an important role when federal control was not necessary. However, when national action was called for, Brandeis had no qualms about upholding federal authority.[60] In Commerce Clause cases, for example, he sought "to treat the constitutional power of interstate commerce as very broad" but also "to treat acts of Congress as not invading State power unless it clearly appeared that the federal power was intended to be exercised exclusively."[61] Similarly, he joined Justice George Sutherland's opinion in *Curtiss-Wright* extending presidential power in the realm of foreign affairs, but the next year he refused to join Sutherland's follow-up opinion in *Belmont* that upheld a sole executive agreement and contained sweeping dicta about presidential power to override state law.[62] Instead, Brandeis joined Justice Harlan F. Stone's concurrence, which identified narrower grounds for the decision and emphasized that state law remained controlling in areas related to the executive agreement.[63]

Both the admiralty and interstate dispute cases support the same conclusion. In the former, Brandeis had no problem, as a general matter, with national authority over maritime law. His objections to *Jensen* were based on quite different grounds. He thought that the Court unnecessarily set aside state workers' compensation laws that, in his mind, were of the greatest social importance and that its decision was based on an alleged need for "uniformity" in the absence of reasons why such uniformity was necessary. His objections were further strengthened when the Court used *Jensen* to void two subsequent congressional statutes that authorized the application of state workers' compensation laws in admiralty.[64] Similarly, and for obvious practical reasons, Brandeis had no objection to the assertion of national authority over disputes between States. His objection to the law in that area was based, instead, on his opposition to

[58] EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA chs. 6 and 7 (2000).

[59] Professor Ramsey suggests that *Skiriotes v. Florida*, 313 U.S. 69 (1941), provides further evidence that "the Court was not thinking clearly about *Erie*'s relationship to international law." Chapter 7, p. 255. The Court's inattention was wholly understandable, for it had more than enough difficulty struggling to craft a coherent "*Erie* doctrine" in areas that the case directly implicated. PURCELL, *supra* note 58, at 201–28, 246–55, 276–78, 287–95.

[60] PURCELL, *supra* note 58, at 150–53, 182–85.

[61] Letter from Louis D. Brandeis to Felix Frankfurter (June 17, 1923), *in* 5 LETTERS OF LOUIS BRANDEIS 78 (Melvin I. Urofsky & David W. Levy eds., 1978); *see, e.g.*, Ark. R.R. Comm'n v. Chicago, Rock Island & Pac. R.R. Co., 274 U.S. 597 (1927) (Brandeis, J.); N.Y. Cent. R.R. v. Winfield, 244 U.S. 147, 154 (1917) (Brandeis, J., dissenting).

[62] Brandeis also sought to limit presidential power in *Myers v. United States*, 272 U.S. 52, 240 (1926) (Brandeis, J., dissenting), where, framing the issue far more narrowly than did the majority opinion, he would have upheld congressional power to limit the President's authority to remove federal officers. Nine years later he joined the Court in distinguishing *Myers* and restricting the President's removal power. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

[63] 301 U.S. 324, 333 (1937) (Stone, J., concurring, joined by Brandeis and Cardozo, JJ.).

[64] PURCELL, *supra* note 58, at 175–77. *Jensen* was also less offensive to Brandeis than was the broader "general" law, for in admiralty the Court recognized the authority of Congress to override at least some parts of the judge-made maritime law. *Id.* at 177.

the sweeping constitutional theory that Justice David J. Brewer set out in *Kansas v. Colorado*, the leading opinion in the field.[65] Brewer had used the Tenth Amendment to expand the federal judicial power beyond the reach of the legislative powers of both Congress and the States, and Brandeis responded to Brewer in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*,[66] handed down the same day the Court announced its opinion in *Erie*. There, Brandeis readily approved federal authority over interstate disputes but explicitly rejected Brewer's theory of sweeping and exclusive federal judicial power.[67]

Thus, had Brandeis thought about the customary international law question, it seems likely that he would have denied that *Erie* required a single comprehensive answer and would have urged the Court to consider instead the practical reasons for categorizing any particular element of customary international law as either "federal" or "state." He would likely have scrutinized the contexts in which each issue appeared, examined the various interests at stake, and estimated the likely consequences of applying one or the other label. He would, in other words, have searched for a socially convenient and institutionally balanced resolution for each different issue presented.

Finally, insofar as the Court's opinion in *Erie* offers any authentically rooted guidance on the customary international law problem, that guidance should come not from the opinion's terse language that can be read to suggest an "either/or" requirement but rather from the four substantive concerns that actually shaped its analysis.[68] *Erie* directs us to consider which categorization of customary international law would be more likely to create legal uncertainties, which more likely to produce systemic inefficiencies, which to disadvantage ordinary individuals litigating against resource-laden adversaries,[69] and which to honor relevant legislative policies and ensure ultimate legislative authority.[70]

Examining the *Erie*/customary international law problem by considering those four concerns would hardly resolve every relevant issue, but it would at least shape an approach that was substantially related to the actual concerns and reasoning that underlay the Court's opinion. That seems preferable to ignoring the fact that *Erie* gave no heed to customary international law issues and arbitrarily elevating it into an authority that compels a

[65] During the 1930s the Court cited Brewer's opinion a dozen times, sometimes in cases outside the area of interstate disputes, and relied on it to support the proposition that an "interstate common law" existed and that the Court could make law where neither Congress nor state legislatures could do so. *See* Cal. Or. Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 163–64 (1935); Connecticut v. Massachusetts, 282 U.S. 660, 670–71 (1931). The Court also cited Brewer's opinion in *Carter v. Carter Coal Co.*, 298 U.S. 238, 293–94 (1936), where Brandeis dissented (along with Hughes, Stone, and Cardozo).

[66] 304 U.S. 92 (1938).

[67] PURCELL, *supra* note 58, at 57–60, 186–190.

[68] For a different consideration of the "values" of *Erie* and the customary international law problem, see Young, *supra* note 49, at 394–404.

[69] The "social" aspect of *Erie* has been essentially lost, although it echoes faintly in the "inequitable administration of the law" language of *Hanna v. Plumer*, 380 U.S. 460, 468 (1965). It would seem to carry no weight with the contemporary Supreme Court. *See* PURCELL, *supra* note 58, at 290–92, 296–97.

[70] For example, in *Sandberg v. McDonald*, 248 U.S. 185 (1918), the Court construed LaFollette's Seaman's Act, 38 Stat. 1164, narrowly to preclude a seaman's recovery. The majority reasoned that Congress did not clearly intend a broader application of the statute that would contradict the territoriality principle. *Id.* at 195–96. Brandeis joined Justice Joseph McKenna's dissent (along with Justices Holmes and John Clarke), which argued that congressional policy required giving the statute a broader application and that congressional policy should trump the principle of territoriality and other such international law considerations. *Id.* at 201–05.

sweeping and categorical "either/or" answer to what is, after all, a historically incoherent question. Insofar as *Erie* created a meaningful problem for customary international law, it is not one of logically necessary categorization but of wise practical judgment.

III. International Law as an Interpretive Tool

Professor Roger Alford also highlights changes that occurred during the period, but he sounds a distinctly different note in warning about the potential dangers of using international law as an interpretive tool. He wisely reminds us that international law – like most other legal sources – can be used to support a wide range of social and political policies. During the first half of the twentieth century, he stresses, international law did not concern itself with "human rights" but instead focused "exclusively" on matters of "external" sovereignty, that is, on the rights and powers of nations in dealing with other nations. That focus underwrote "an expansive understanding of sovereignty that imposes few limits on the exercise of government power." Thus, he concludes, "the recurring theme during this period is that customary international law supports government action rather than curtails it."[71]

With respect to statutory construction, Professor Alford identifies international law's principal function as limiting the extraterritorial reach of federal law on the basis of its concept of sovereignty.[72] His story of that function is one of decline. In 1909 Justice Holmes adopted a "strict" territorial theory of national sovereignty in *American Banana Co. v. United Fruit Co.*[73] and ruled that federal statutes presumptively applied only inside American territory. Within only a few years, however, the Court began edging away from that doctrine, and in 1945 *United States v. Aluminum Co. of America*[74] sounded its "death knell."[75] Ushering in an "effects doctrine," *Alcoa* ruled that the presumption against extraterritoriality could readily be overcome by harm caused within the United States, the intent of Congress, or general concerns of international comity.[76]

Professor Alford's emphasis on *American Banana*'s "strict" territoriality theory and its subsequent decline seems somewhat misleading. As Professors Thomas Lee and David Sloss show in Chapter 4, the territorial principle was well established by the mid-nineteenth century, although it recognized certain exceptions that Holmes himself acknowledged in his opinion.[77] Similarly, as Professor Melissa Waters shows in Chapter 12, the Court continued to honor the territoriality principle after 1945, limiting the extraterritorial reach of U.S. laws in both maritime and non-maritime cases.[78] Professor Paul Stephan, moreover, finds in Chapter 10 that in the later period the Court often used treaties to accomplish the same limiting result.[79] Thus, territoriality was, and remained, a major principle in American jurisprudence both before and after *American Banana*, and

[71] Chapter 8, p. 257.
[72] *Id.*, pp. 258–59.
[73] 213 U.S. 347 (1909).
[74] 148 F.2d 416 (2d Cir. 1945).
[75] Chapter 8, p. 265.
[76] *Id.*, p. 269.
[77] *See Am. Banana*, 213 U.S. at 355–56. Professors Lee and Sloss note the importance of territoriality for certain constitutional issues, while Professor Bederman notes its importance in customary international law issues. *See* Chapter 4, pp. 148–52; Chapter 3, pp. 100–03.
[78] Chapter 12, pp. 381–93.
[79] Chapter 10, p. 330.

the Court's long-term practice was more nuanced than any theory of "strict" territoriality or any story of its straightforward decline would admit. Indeed, *American Banana*'s greatest long-term significance may lie elsewhere – not in its use of rigid ideas of sovereignty and territoriality but in its reliance on more flexible ideas of comity and conflict of laws principles in addressing questions of extraterritoriality.[80]

Intriguingly, Professor Alford suggests a plausible reason why the Court might have advanced such an ostensibly strict territorial theory in *American Banana*. Rather than being persuaded to adopt one of Holmes's pet positivist ideas, the Justices may have seized on territoriality as a serviceable method of dealing with an awkward diplomatic problem. A "finding against United Fruit would cast judgment on sovereign malfeasance," Alford comments, and adoption of strict territoriality may have reflected "the Court's desire to avoid sitting in judgment on the acts of another sovereign."[81] Thus, *American Banana*'s seeming embrace of strict territoriality may have been little more than a tactical expedient.[82]

With respect to the Constitution, Professor Alford's discussion is more complex and provocative. Examining four areas involving individual rights, he emphasizes the central role that the concept of sovereignty played and argues that international law served "to enhance government power."[83] In three of the four areas his argument is persuasive. First, the Court used the laws of war to restrict the constitutional rights of individuals, limiting the applicability of the Fifth Amendment in wartime and sanctioning harsh punitive measures that would otherwise violate the Constitution.[84] Second, the Court drew on ideas of sovereignty in *Curtiss-Wright* to provide a new vision of constitutional authority that justified sweeping presidential power over foreign affairs and seemed to exclude Congress entirely from the area.[85] However one might construe *Curtiss-Wright*, Alford suggests, international law provided a critical part of its reasoning and was used to justify a substantial expansion of presidential power.[86] Third, considering the constitutional status of the territories the United States acquired at the end of the nineteenth century, the *Insular Cases*[87] drew on international law to establish the nation's right of possession and to explain the new distinction it drew between "incorporated" and "unincorporated" territories. The former were territories that were fully a part of the United States, while the latter

[80] Professor Alford suggests this last point. *See* Chapter 8, p. 260; *see also* Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 SUP. CT. REV. 179, 186; William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT'L L.J. 101, 121–27 (1998).

[81] Chapter 8, p. 262.

[82] Professor Alford points out that Holmes subsequently joined a unanimous Court in "distinguishing" *American Banana* and giving the Sherman Antitrust Act extraterritorial application in *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927). *See* Chapter 8, pp. 264–65.

[83] Chapter 8, p. 169.

[84] *Id.*, pp. 275–78; *accord* Chapter 4, pp. 142–47.

[85] Chapter 8, pp. 279–83. *Curtiss-Wright* was written by Justice George Sutherland, who had been developing his theory of executive foreign affairs powers for two decades and who in 1918 termed it "an entirely new theory of the Constitution," *id.*, p. 280 (quoting Sutherland) – a revealing statement from the Justice who would subsequently write his views into law while defending them on historical grounds.

[86] As discussed *supra* p. 290, Professor Ramsey offers a somewhat different interpretation. *See* Chapter 7, p. 242.

[87] There were more than two dozen so-called *Insular Cases* decided between 1901 and the 1920s. Among the key early decisions were *Downes v. Bidwell*, 182 U.S. 244 (1901); *Dorr v. United States*, 195 U.S. 138 (1904); and *Rassmussen v. United States*, 197 U.S. 516 (1905). *See* BARTHOLOMEW H. SPARROW, THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE (2006).

were merely external possessions that the United States controlled. In incorporated territories the Constitution applied fully, while in unincorporated territories it did not. Thus, the *Insular Cases* gave Congress plenary authority over the latter – subject only to vague and unspecified "fundamental" limitations "inherent" in principles of free government.[88]

Although Alford refers to the Court's territorial "incorporation" doctrine as "natural law constitutionalism,"[89] it might more appropriately be termed "managerial constitutionalism." That is, while the *Insular Cases* employed a vague language of unspecified "fundamental" rights, the distinction between "incorporated" and "unincorporated" territories served an immediate and intensely practical administrative function. It drew a bright line dividing the nation's territorial possessions based on their de facto political "desirability" as potential new States, an instrumentalist divide that was strategically shrewd in both military and economic terms and highly popular in culturally and racially exclusionary terms.[90] The new doctrine of "unincorporated" territories authorized the political branches to administer the disfavored new possessions in whatever manner they wished, unencumbered by significant constitutional restrictions.[91] It maintained the Court's position as the ultimate constitutional authority while, in practice, allowing popular opinion to have its sway and the political branches to exercise nearly unhampered administrative control.

While developments in those three areas support Professor Alford's argument that international law served to strengthen government power and weaken the rights of individuals, the fourth area he discusses does not fit that pattern quite so snugly. In a particularly insightful section, he emphasizes the often ignored international aspects of two familiar developments: acceptance of the "Brandeis Brief" and debate over the "incorporation" of the Bill of Rights into the Due Process Clause. In both, Alford points out, the Court consulted foreign sources by adopting methods of constitutional comparativism.[92] The Brandeis Brief involved not just social facts but social facts drawn from sixty years of experience "in the leading countries of Europe."[93] Similarly, modern Fourteenth Amendment incorporation doctrine was rooted in the idea that due process embodied "certain immutable principles of justice" and that its content was to be found in "the jurisprudence of civilized and free countries."[94]

Those developments, however, do not give unalloyed support to Professor Alford's broader thesis. True, in both areas "constitutional comparativism" was used to strengthen government and limit individual rights. The Brandeis Brief justified expanded state power and restricted employers' rights, while the jurisprudence of "civilized and free countries" served as a norm that initially blocked incorporation and cabined the meaning of due process. At the same time, however, the former was also used to create important new legal rights and remedies for women and then for workers generally, while the latter

[88] Chapter 8, p. 272 (quoting *Downes*, 182 U.S. at 290–91 (White, J., concurring)).

[89] *Id.*

[90] On the pervasive racism that urged sharp limits on American territorial annexations, see ERIC T. L. LOVE, RACE OVER EMPIRE: RACISM AND U.S. IMPERIALISM, 1865–1900 (2004).

[91] The distinction also avoided the potentially troublesome language of *In re Ross*, 140 U.S. 453, 464 (1891), which stated that the "Constitution can have no operation in another country." The *Insular Cases* made it clear that an unincorporated territory, although not a "part" of the United States, was nonetheless officially a U.S. possession and not "another country."

[92] Chapter 8, pp. 272–75.

[93] *Id.*, p. 272 (quoting the Brief for the State of Oregon submitted by Louis D. Brandeis in Muller v. Oregon, 208 U.S. 412 (1908)).

[94] *Id.*, pp. 273–74 (quoting Twining v. New Jersey, 211 U.S. 78, 100–01, 113 (1908)).

eventually led to broadening views of individual rights and, beginning tentatively with the First Amendment in the 1920s, to the eventual, if selective, incorporation of most of the Bill of Rights.

Professor Alford's broader thesis should also be qualified in another respect. When the Court construed treaties during this period, it often did so to protect individual rights. As Professor Van Alstine tells us, the Court transformed its interpretative canon requiring liberal construction into a "formal presumption in favor of recognizing individual rights secured by treaties."[95] That presumption, the Court announced proudly in 1933, had been "consistently recognized and applied by this Court."[96]

Professor Alford closes his discussion by noting its bearing on contemporary debates over the use of foreign sources in constitutional interpretation. The approaches adopted in the Brandeis Brief and the incorporation debate, which he terms "pragmatic empiricism and natural law constitutionalism,"[97] evidence a judicial practice of consulting foreign sources in constitutional cases. Because they "are not rooted in constitutional text and permit free-range harvesting of international best practices," they are "highly controversial methods for resolving constitutional questions."[98] Still, Alford suggests, together they provide the "most coherent arguments for reliance on foreign or international law in constitutional interpretation."[99] The two developments do provide clear historical precedents for such reliance, and they surely illustrate the complexity of American legal development. Even granted their precedential relevance, however, they are only analogies with highly contestable elements and implications. Thus, they would seem to offer little prescriptive authority even to those who believe that international law norms should be relevant to constitutional questions.[100]

IV. Three Central Themes

The chapters in this book raise a wide range of issues that merit extended examination. Three seem particularly important for this period.

A. *The Pervasiveness of Change*

One of the most striking features of the chapters is their emphasis on change in the Court's international law jurisprudence. While the editors' introductory chapter stresses continuity in the Court's decisions from the late eighteenth century to the Civil War, the chapters covering later periods find considerably more change, not only in the

[95] Chapter 6, p. 213.

[96] Factor v. Laubenheimer, 290 U.S. 276, 293 (1933). Professor Van Alstine notes that the Court did not invariably enforce individual treaty rights. *See* Chapter 6, pp. 214–15. Professor Hollis also argues that in the late nineteenth century the Court frequently enforced certain kinds of individual treaty rights although it refused to enforce others. *See* Chapter 2, pp. 66–72. After 1945, Van Alstine further suggests, the Court became increasingly reluctant to enforce individual treaty rights, a proposition with which Professor Stephan seems to agree. *See* Chapter 6, p. 215; Chapter 10, pp. 339–46.

[97] Chapter 8, p. 275.

[98] *Id.*

[99] *Id.*

[100] For an elaborate treatment of the role of foreign and international law in constitutional interpretation, see VICKI C. JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA (2010).

Court's doctrines and interpretive techniques but also in its attitude toward international law and its own institutional role.[101] Professor Hollis terms the decades after the Civil War "a period in flux,"[102] while Professor Bederman sees them bringing "a real revolution in understanding the nature of customary international law and its role in U.S. law."[103] The disappearance of staple international law cases involving pirates, prizes, and privateers reoriented the Court's docket, drastically shrank its opportunities to address customary international law issues, and accelerated its intensifying focus on domestic law sources, especially the Constitution. Further, the expansion of interstate and international commerce and the rise of the regulatory state forced to the fore complex new problems involving personal jurisdiction, conflict of laws, and the extraterritorial reach of both state and federal laws. The conditions and challenges that shaped the eighteenth and nineteenth centuries differed so substantially from those that marked the twentieth century, Professor Stephan concludes, the Court's treaty decisions in the later period in effect changed "what it meant to be the law of the land."[104]

Perhaps the most fundamental change the chapters chart is the long-recognized shift in power in foreign relations law from Congress and the courts to the executive branch.[105] Thus, the chapters make it clear that current foreign relations law does not represent "original" or "traditional" constitutional doctrine. Before 1860, "the Court gave no deference to the executive branch's position on treaty interpretation questions," the editors note, and the U.S. government prevailed in only three of the Court's nineteen treaty cases in which it was a party during that early period.[106] After 1860, as both Professors Hollis and Van Alstine show, the Court began to give increasing deference to the President,[107] and the latter author also identifies a pivotal change in the grounds on which the Court based its deference. Into the early decades of the twentieth century, Van Alstine explains, "the relevant interpretive evidence [for construing treaties] was the actual, practical 'construction' of the treaty through the past actions of the executive branch," and "[d]ecisions from the first half of the twentieth century did not accord deference to the mere legal *opinion* of the executive branch on the proper interpretation of a treaty."[108] By the late twentieth century, however, the Court had "strayed far" from its original doctrines and was giving "great weight" to executive branch opinions.[109] Obviously, deferring to executive "opinions," as opposed to deferring to established executive branch practices worked out over longer periods of time, served to expand presidential power substantially by allowing new administrations more easily to overturn settled interpretations and practices.

[101] Even though the Court frequently referred to the *Charming Betsy* canon, for example, it applied the principle differently at different times and sometimes simply ignored it. *See* Chapter 2, pp. 73–76; Chapter 4, pp. 130–41; Chapter 12, pp. 393–401.

[102] Chapter 2, p. 65.

[103] Chapter 3, p. 90.

[104] Chapter 10, p. 352.

[105] The Constitution gives Congress and the Senate substantial power over foreign relations, and as late as the 1930s courts were commonly involved in deciding issues related to the nation's foreign affairs. *See, e.g.*, LOUIS L. JAFFE, JUDICIAL ASPECTS OF FOREIGN RELATIONS: IN PARTICULAR OF THE RECOGNITION OF FOREIGN POWERS (1933).

[106] Chapter 1, p. 17. Moreover, they continue, the "executive branch agreed that the judiciary had an independent responsibility to decide treaty interpretation questions." *Id.*

[107] Chapter 2, pp. 84–84; Chapter 6, pp. 217–18.

[108] Chapter 6, p. 217.

[109] *Id.*

All the chapters agree, moreover, that the Court's decisions in *Curtiss-Wright* and *Belmont* represented major turning points. The former seemed to free the President from constitutional restraints in foreign relations law, and the latter seemed to elevate sole executive agreements to the constitutional status of Senate-ratified treaties. Combined with other changes the authors describe, the chapters make clear that in the twentieth century the power of the President expanded enormously in foreign relations and moved the law far from the Founders' understandings.[110]

Accepting the fact of pervasive change is a necessary step in forcing us to think anew about the nature of international law and its proper role in American law and government. Appeals to simplified ideas of "original intent" or "original understanding" seldom, if ever, capture either the complexities of the founding era or the realities of subsequent historical developments. Similarly, appeals to supposedly normative "traditions" are too often invocations of made-up standards confected from scattered shards of history and willful acts of imagination. Such concepts usually obscure our understanding of the past while consciously or unconsciously twisting it to support dubious or novel claims in the present. They thereby corrupt our efforts to discern whatever particular – and usually elusive – lessons the past might actually have to teach.[111] In contrast, an honest recognition of both the complexity of the historical record and the reality of persistent change can provide a more reliable foundation for efforts to understand the present and to sustain the enterprise of adapting the principles of American law and government wisely to the demands of an evolving society and an increasingly globalized world.

B. *Sovereignty, Inherent Powers, and American Constitutionalism*

Another persistent theme is the influence of the concept of sovereignty. International law made sovereignty the defining mark of the nation-state: complete independence from all other nations, freedom from obligation to any political superior, and absolute authority over its territory and citizens. That idea of sovereignty, however, fit uncomfortably with two basic principles of American constitutionalism: that the federal government is a government of limited and delegated powers and that American citizens have rights and liberties that are beyond the power of government to infringe.[112]

In spite of the ill fit, the transformation of the United States in the post–Civil War decades gave the idea of sovereignty a special appeal. Northern victory created a newly

[110] Chapter 7, p. 242; Chapter 8, pp. 279–83; Chapter 6, pp. 217–23; White, *supra* note 12, at 109–10, 148–49. Professor Stephan presents a more qualified view. *See* Chapter 10, pp. 331–38.

[111] *See, e.g.*, Hathaway, *supra* note 19, at 1306 (evolution of Treaty Clause jurisprudence and the development of executive agreements brought profound shifts from the original purpose of the clause; "the law simply developed over time in response to particular events and circumstances").

[112] *See, e.g.*, *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819). Tension between traditional principles and ideas of inherent sovereign powers was apparent, for example, in *Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1889), where the majority upheld congressional power as "an incident of national sovereignty," *id.* at 42, while three dissenters rejected that theory and insisted that the "power of Congress is delegated and not inherent, and is therefore limited." *Id.* at 67. Similarly, in *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), the majority relied on "an inherent and inalienable right of every sovereign and independent nation," *id.* at 711, to uphold the power of Congress to deport certain aliens, while three dissenters rejected the doctrine as inconsistent with the Constitution's principles of limited government. *See id.* at 737 (Brewer, J., dissenting); *id.* at 757–58 (Field, J., dissenting); *id.* at 762–63 (Fuller, C.J., dissenting).

unified and vibrant nation, while explosive economic growth made the United States the world's most productive nation and generated unprecedented levels of wealth and power. Westward expansion filled the continent with "white" settlers and new States, while economic expansion pushed the nation's political and economic interests across the Pacific and on to the shores of Asia. Those developments spurred the nation to assert itself with increasing boldness in international affairs. At the same time, millions of ethnically and religiously diverse immigrants from across the world poured into the country, unnerving the nation's dominant Anglo-Saxon Protestant population and exacerbating racial, ethnic, and religious tensions throughout the society. Those rapid and stunning changes combined to press a variety of new demands on the federal government – for overseas territorial acquisitions, ethnically based immigration restrictions, limitation or elimination of Native American treaty rights, and support for market penetration and control throughout the world, especially in the Western Hemisphere and the vast untapped regions of Asia. Satisfying those new demands often required the exercise of novel or expanded national powers, and to many Americans it came to seem that the United States, as a truly sovereign nation, must necessarily possess whatever powers were needed to achieve those ends.

The Court seemed to accept that logic.[113] As Professors Lee and Sloss point out in Chapter 4, the Court "began to extrapolate common characteristics of inward sovereignty as a corollary to the vision of international law," and "proceeded from the idea that all sovereigns possess the same set of powers and rights in foreign relations to the concept that there is a similar set of domestic powers inherent in what it means to be a sovereign state."[114] Beginning in the 1870s the idea of inherent sovereign powers helped underwrite the expansion of federal authority in a variety of areas, including immigration, territorial governance, the law of governmental immunity, the limits of judicial jurisdiction, the plenary power of Congress over Indian tribes, and the power of the federal government – the President in particular – over foreign affairs.[115] Upholding the authority of Congress to exclude aliens in 1892, for example, Justice Horace Gray invoked "an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions."[116]

[113] Positivism dominated international law thinking when the Court began to address those new problems and confronted constitutional sources that offered uncertain support for responsive policies that enjoyed great popular support. For the most part, the Court upheld those policies. *See generally* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009).

[114] Chapter 4, p. 152.

[115] *See* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1 (2002) [hereinafter Cleveland, *Powers Inherent in Sovereignty*]; Sarah H. Cleveland, *The Plenary Power Background of* Curtiss-Wright, 70 COLO. L. REV. 1127 (1999).

[116] Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892); *accord* Fong Yue Ting v. United States, 149 U.S. 698, 711 (1893) (right to deport noncitizens is "an inherent and inalienable right of every sovereign and independent nation"); Juilliard v. Greenman, 110 U.S. 421, 447 (1884) (power to coin money "universally understood to belong to sovereignty"); United States v. Lee, 106 U.S. 196, 206–07 (1882) ("the supreme power in every state" creates immunity of sovereign from suit); Boom Co. v. Patterson, 98 U.S. 403, 406 (1879) (eminent domain "requires no constitutional recognition; it is an attribute of sovereignty").

While the Court continued to invoke such inherent powers reasoning in foreign affairs cases well into the twentieth century,[117] it began turning away from that reasoning in domestic law cases at the end of the nineteenth. That doctrinal bifurcation stemmed largely from the different political and institutional considerations that moved the Court in domestic and international cases,[118] and it inspired in domestic law cases the increasing use of an interpretive method that can be called "infusionary textualism" – the practice of justifying desired rights or powers by infusing them into specific constitutional provisions. That method would render inherent power reasoning unnecessary and banish it from orthodox constitutional thinking, first at the turn of the century in domestic law cases and then during the later twentieth century even in most areas of foreign affairs law.

The initial decline of inherent power reasoning in domestic law cases was due largely to the sharp political conflicts that marked the decades after 1890. Then, Populists, Progressives, labor unions, social dissidents, academic legal scholars, and an emerging plaintiffs' personal injury bar all began charging the Court with pro-corporate biases and subjective decision making. Under those concerted attacks, vague ideas of "inherent" powers and other non-textual grounds for constitutional rulings became intensely suspect. The Court's inherent power decisions after the Civil War had commonly involved the assertion of national power over disfavored ethnic groups and distant foreign possessions,[119] and for that reason they had seemed relatively acceptable and uncontroversial, if not highly desirable. The Court's decisions beginning in the 1890s that addressed intensely contested domestic issues, however, inspired vigorous and widespread criticism. Quickly, the Justices came to realize that prudence dictated minimizing or abandoning inherent power reasoning in domestic law cases and resting their decisions instead on specific and well-established legal sources, above all on the Constitution itself.[120] Indeed, insofar as

[117] The outstanding example is, of course, *Curtiss-Wright*. *See also* Mackenzie v. Hare, 239 U.S. 299, 311–12 (1915); Burnet v. Brooks, 288 U.S. 378, 396, 400, 405 (1932); United States v. California, 332 U.S. 19, 34 (1947). Professor Waters places the Court's final rejection of inherent powers in *Afroyim v. Rusk*, 387 U.S. 253 (1967). *See* Chapter 12, p. 412; *Afroyim*, 387 U.S. at 257 (holding that Congress possessed no powers "as an implied attribute of sovereignty").

[118] The Court likely felt far more comfortable invoking ideas of sovereign and "inherent" national powers in foreign affairs cases. Such cases were much less likely to provoke sustained domestic disputes and more likely to rally Americans behind rhetoric that portrayed the United States in world affairs as a strong and respected nation fully equal in rights and powers to all others. While still a senator, Justice Sutherland embraced inherent powers reasoning in foreign affairs law and made the point clearly: "Why should any citizen of the great Republic, proud of its strength and glory, desire that *his* government should be inferior in power to any government?" George Sutherland, *The Powers of the National Government, reprinted as* S. Doc. No. 417, 61st Cong., 2d Sess. at 7 (1910).

[119] The "inherent plenary power" doctrine "derived directly from late-nineteenth century judicial decisions addressing Indians, aliens, and territorial expansion," and the Court developed it "in a series of decision in these areas between 1886 and 1910." Cleveland, *Powers Inherent in Sovereignty*, *supra* note 115, at 7.

[120] Senator Sutherland was one of the first anti-Progressives to recognize the dangers of inherent powers reasoning and to develop an elaborate and politically responsive theory to cabin its uses. In 1910 he maintained that such reasoning was proper only in addressing "external" issues where national power was complete and exclusive and that it did not apply to "internal" issues where the Tenth Amendment limited federal power. If not so cabined, he argued, inherent powers reasoning could trump the rights of the States and give Congress authority to pass the federal child labor bill as well as the power to regulate other domestic areas including manufacturing, master–servant law, and conditions of factory labor. Sutherland, *supra* note 118, at 10–12. On the Court, he continued to invoke the idea of inherent sovereign powers in foreign relations law, *see* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 316 (1936), but rejected the idea with respect to domestic matters. *See* Carter v. Carter Coal Co., 298 U.S. 238, 294–95 (1936).

the Justices in their domestic law jurisprudence sought more commonly to limit than extend government authority, they were primed in that area to abandon the potentially dangerous theory of inherent sovereign powers and embrace in its place the far safer theory of limited and delegated powers.

In that context, the Court abandoned "inherent powers" reasoning in domestic law cases and began the practice of justifying desired rights and powers by infusing them into specific constitutional provisions. Such infusionary textualism was obviously advantageous. It justified the desired rights and powers by providing them with a textual grounding in the Constitution, and it demonstrated that those rights and powers neither arose from the personal views of the Justices nor contradicted the Constitution's fundamental principles of limited and delegated power.

The technique was not entirely novel,[121] but in the late nineteenth century it drew strength from two more recently established practices. One was the Court's use of "general" law – the idea that there were basic principles of reason and morality that properly controlled human affairs in the absence of specific "local" rules – and its gradual expansion of that category to include most common law subjects as well as some areas of constitutional law. As the Justices grew increasingly comfortable giving ever wider scope to "general" law, they found it easy to incorporate the analogous principles of international law into its realm, including ideas of sovereignty and "inherent powers."[122] Such basic principles of "general" law, they believed, were surely consistent with the principles of the Constitution itself. By the 1890s, when the Justices confronted rising domestic challenges and sought firmer foundations for their domestic law decisions, they readily came to see those "general" principles as actually embedded in the textual provisions of the Constitution itself.

The other practice that helped advance the development of infusionary textualism was the Court's blending of inherent powers reasoning with more traditional text-based arguments by conceiving of them as alternate or interrelated grounds of decision.[123] In the *Legal Tender Cases*,[124] for example, which Professors Lee and Sloss identify

[121] In *Federalist No. 31* Hamilton suggested the desirability of expansive interpretations of national powers in terms that seemed similar to later ideas of inherent sovereign power. "A government ought to contain in itself every power requisite to the full accomplishment of the objects committed to its care, and to the complete execution of the trusts for which it is responsible, free from every other control but a regard to the public good and to the sense of the people." THE FEDERALIST NO. 31, at 190 (Alexander Hamilton) (Edward Meade Earle ed., 1937). His subsequent interpretation of the Necessary and Proper Clause highlighted the potential elasticity of textualism, *see* Alexander Hamilton, *Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank*, *in* 8 THE PAPERS OF ALEXANDER HAMILTON 98 (Harold C. Syrett et al. eds., 1965) [hereinafter Hamilton, *Bank Opinion*], and the Court followed his lead in *McCulloch v. Maryland*, 17 U.S. 316 (1819). Early doctrines such as the "dormant" Commerce Clause, *see* Willson v. Black Bird Creek Marsh Co., 27 U.S. 245 (1829), and the doctrine of "non-self-executing" treaties, *see* Foster v. Neilson, 27 U.S. 253 (1829), found substantive powers and limitations in the Constitution – and, consequently, new authority in the federal judiciary – that had no warrant in the document's text.

[122] *See, e.g.*, Huntington v. Attrill, 146 U.S. 657, 683 (1892) ("In this country, the question of international law must be determined in the first instance by the court, state or national, in which the suit is brought. If the suit is brought in a Circuit Court of the United States, it is one of those questions of general jurisprudence which that court must decide for itself, uncontrolled by local decisions.").

[123] Chief Justice John Marshall had used the same technique when he held that the United States could create territorial courts either under its "general" powers of sovereignty or under the Territories Clause, U.S. CONST. art. IV, § 3, cl. 2. *See* American Ins. Co. v. Canter, 26 U.S. 511, 546 (1828).

[124] 79 U.S. 457 (1871).

as "one of the Court's earliest manifestations of inherent power reasoning,"[125] Justice Joseph Bradley's concurrence invoked the principle of "inherent and implied powers" while noting that, in the event the principle "be not true," the "express authority" of the Necessary and Proper Clause – on which the majority had primarily relied – also justified the Court's decision.[126] Similarly, when the Court began expanding the powers of the President, it did so by mixing vague principles of "international relations" and "the nature of the government under the Constitution" with ordinary statutory and constitutional grounds of decision.[127] In a brash example of the calculated fusion of these distinct theories, Justice Edward White approved American territorial expansion on the ground that the federal government, like every other "sovereign nation," possessed "the full right to acquire territory" and that it did so "in virtue of its sovereignty, supreme within the sphere of its delegated power."[128] His reasoning, in effect, made inherent and delegated powers synonymous.[129]

In the turn-of-the-century decades, the Court resorted to infusionary textualism in a variety of controversial domestic areas. Most fundamental, in a series of cases in the 1890s it infused the content of its "general" constitutional law into the Due Process Clause of the Fourteenth Amendment. The infusion allowed the Court to transform "general" constitutional law into truly "federal" constitutional law binding under the Supremacy Clause and authorizing federal control over such issues as takings, contractual freedom, the requirement of just compensation, the reasonableness of rate regulation, and "public purpose" limitations on the taxing power of States and municipalities.[130]

The Court also used infusionary techniques to deal with many narrower issues. *Hans v. Louisiana*[131] infused into the Eleventh Amendment an expansive concept of state sovereign immunity that was inconsistent with the amendment's express terms, unsupported by the Court's pre–Civil War jurisprudence, and unjustified in terms of the sovereign immunity doctrines of international law.[132] *In re Debs*[133] injected into several otherwise irrelevant constitutional provisions the principle that the federal courts

[125] Chapter 4, p. 153.

[126] Legal Tender Cases, 79 U.S. 457, 556 (1871) (Bradley, J., concurring). For similar reasoning, see *Juilliard v. Greenman*, 110 U.S. 421, 447 (1884) (holding the issuance of "greenbacks" constitutional).

[127] *In re* Neagle, 135 U.S. 1, 64 (1890).

[128] Downes v. Bidwell, 182 U.S. 244, 303 (1901) (White, J., concurring).

[129] White explicitly declared that federal power had to be "derived expressly or by implication" from the Constitution, *id.* at 288, while nonetheless invoking an "inherent attribute" of sovereignty, *id.* at 300, and insisting that "our forefathers" created a government that "was endowed with those general powers to acquire territory which all independent governments in virtue of their sovereignty enjoyed." *Id.* at 302. The powers of sovereignty, therefore, were necessarily embedded in the text of the Constitution, "either in express terms or by lawful implication." *Id.* at 288.

[130] Michael G. Collins, *Before* Lochner – *Diversity Jurisdiction and the Development of General Constitutional Law*, 74 TUL. L. REV. 1263 (2000); Michael G. Collins, *October Term, 1896 – Embracing Due Process*, 45 AM. J. LEGAL HIST. 71 (2001).

[131] 134 U.S. 1 (1890).

[132] *See* Edward A. Purcell, Jr., *The Particularly Dubious Case of* Hans v. Louisiana: *An Essay on Law, Race, History, and "Federal Courts,"* 81 N.C. L. REV. 1927, 1934–44 (2003); Chapter 4, p. 160 (identifying the original Eleventh Amendment with the international law principle of sovereignty and arguing that *Hans* went well beyond what that concept would justify). Subsequently, the Court infused the term "admiralty" into the Eleventh Amendment in spite of the fact that its text extended its reach only to suits "in law or equity." *See Ex parte* New York, 256 U.S. 490 (1921).

[133] 158 U.S. 564 (1895).

possessed an equitable power to maintain interstate order by injunction, while *Plessy v. Ferguson*[134] empowered the States to establish legalized racial segregation by inserting the decisive qualification of "separate" into the Constitution's unqualified guarantee of "the equal protection of the laws." The *Insular Cases* infused the distinction between "incorporated" and "unincorporated" territories into the Constitution, a distinction that paralleled *Plessy*'s "separate but equal" doctrine and served analogous racial goals.[135] Another series of cases infused a substantive national lawmaking power over maritime matters into the admiralty jurisdiction conferred by Article III.[136] A third series infused into the Commerce Clause a new "unconstitutional conditions" limitation on the power of States to regulate out-of-state corporations.[137] A fourth infused a new and substantially broadened doctrine of "field preemption" into the Supremacy Clause.[138] A fifth infused substantive limits on state statutes and conflict of law rules into the Full Faith and Credit and Due Process Clauses.[139] Most audacious of all, in 1907 *Kansas v. Colorado*[140] infused an exclusive national judicial lawmaking power over interstate disputes into – of all things – the Tenth Amendment.[141]

By the time of World War I, then, the Court no longer felt any need to invoke ideas of sovereignty or "inherent" powers in domestic law cases. When rights or powers seemed necessary and desirable, it could simply infuse them into some constitutional provision and thereby confer on them a textual foundation.[142] Subsequent developments – including incorporation of the Bill of Rights, announcement of constitutional "privacy" rights, development of a "special" federal common law, and continuing expansions of executive power – proceeded by similar infusionary techniques.[143] Once the method

[134] 163 U.S. 537 (1896).

[135] *See supra* p. 297.

[136] Butler v. Boston & Savannah S.S. Co., 130 U.S. 527 (1889); S. Pac. Co. v. Jensen, 244 U.S. 205 (1917); *see* Note, *From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century*, 67 HARV. L. REV. 1214, 1230–37 (1954).

[137] GERARD C. HENDERSON, THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW: A CONTRIBUTION TO THE HISTORY AND THEORY OF JURISTIC PERSONS IN ANGLO-AMERICAN LAW ch. 8 (1918); *see, e.g.*, Ludwig v. W. Union Tel. Co., 216 U.S. 146 (1910); Pullman Co. v. Kansas, 216 U.S. 56 (1910); Harrison v. St. Louis & San Francisco R.R. Co., 232 U.S. 318 (1914).

[138] *See, e.g.*, S. Ry. Co. v. Reid, 222 U.S. 424 (1912); *see* ALEXANDER M. BICKEL & BENNO C. SCHMIDT, JR., THE JUDICIARY AND RESPONSIBLE GOVERNMENT, 1910–1921, at 270–75, 415–18 (1984); Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 795–805 (1994).

[139] *See, e.g.*, Allgeyer v. Louisiana, 165 U.S. 578 (1897); N.Y. Life Ins. Co. v. Head, 234 U.S. 149 (1914); Supreme Council of the Royal Arcanum v. Green, 237 U.S. 531 (1915). Professor Ramsey notes the way these cases replaced customary international law with domestic law sources. *See* Chapter 7, pp. 235–36.

[140] 206 U.S. 46 (1907).

[141] *See* PURCELL, *supra* note 58, at 57–63. Brewer's theory in *Kansas v. Colorado* presumably responded to the positivist stricture that Holmes, struggling with the question of the Court's authority in interstate disputes, had announced the previous year: absent a controlling congressional statute, the "only ground" on which the Court could control a State was "one which must be implied from the words of the Constitution." Missouri v. Illinois, 200 U.S. 496, 519 (1906); *see* Chapter 7, p. 230.

[142] Using reasoning similar to White's in *Downes*, Professor Alford shows how the "inherent" power and "external" sovereignty language of *Curtiss-Wright* can be given textual foundation by invoking Hamilton's theory of "resulting" powers. *See* Chapter 8, pp. 282–83. Similarly, Professor Stephan shows how the Court gradually came to locate stronger legal protections for aliens and for the status of citizenship in the constitutional text. *See* Chapter 10, pp. 339–44.

[143] In this regard, the significance of *Erie* is that, in contrast to the Court's decisions in admiralty and interstate disputes, it cabined a major head of federal jurisdiction (diversity) with an anti-infusion principle.

was understood and its advantages recognized, it could be applied in any constitutional field.[144]

Two critical doctrines illustrated the process. The power of the President to make international agreements that would be binding as domestic law without congressional authorization was initially identified as flowing from inherent "powers of external sovereignty."[145] Subsequently, the Court explained that power as based on the provisions in Article II, Sections 2 and 3, authorizing the President to recognize and deal with foreign nations.[146] Similarly, the doctrine of plenary congressional power over Native American tribes developed in the late nineteenth century, and the Court explained it as a power "inherent" in the nation's sovereignty. In the early twentieth century, however, it began suggesting textual bases for the power, referencing both the Territory Clause and the Indian Commerce Clause as its source.[147] Eventually, it expressly rejected the inherent power rationale[148] while making it crystal clear that Congress nonetheless continued to hold the exact same plenary power that the nineteenth-century cases had upheld on grounds of "inherent" sovereign power. In 1989 the Court announced the completed infusion. Providing "Congress with plenary power to legislate in the field of Indian affairs," it declared, was the "central function of the Indian Commerce Clause."[149]

The Court's recourse to inherent powers reasoning, as well as its subsequent use of infusionary textualism, further undermines the claim that in the late nineteenth and early twentieth centuries it was in thrall to a highly "formalist" and deductive jurisprudence. Its flexible, expansive, and innovative reasoning in both inherent power and textualist modes suggests, instead, that the Court was profoundly instrumentalist.[150] It used sharp categories and deductive reasoning to be sure, but it shaped the categories and deployed the reasoning artfully to achieve the practical social, political, and institutional ends that its majorities sought.[151] Rather than following some rigid logic of "essentialist" categories,

[144] Traces of the old inherent power idea remain in foreign affairs law, especially in immigration law. *See* Cleveland, *Powers Inherent in Sovereignty*, *supra* note 115, at 158–63. Infusionary techniques, of course, could be used as easily to impose new limits on rights and powers as to expand them. For a series of opinions infusing into the words "enforce" and "appropriate" increasingly heavy and exacting substantive limitations on the power of Congress under Section 5 of the Fourteenth Amendment, *see, e.g.*, City of Boerne v. Flores, 521 U.S. 507 (1997); Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999); Bd. of Tr. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001). For an effort to infuse into the words an even more restrictive limitation on congressional power, see Nev. Dept. of Human Res. v. Hibbs, 538 U.S. 721, 741 (2003) (Scalia, J., dissenting, joined by Kennedy, J.). *Compare, e.g.*, Hamilton, *Bank Opinion*, *supra* note 121, at 102 (word "necessary" in the Necessary and Proper Clause means "no more than *needful, requisite, incidental, useful, or conducive to*").

[145] United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936); *see* Chapter 6, p. 220.

[146] United States v. Pink, 315 U.S. 203, 228–30 (1942).

[147] Cleveland, *Powers Inherent in Sovereignty*, *supra* note 115, at 58–74, 78–81.

[148] Morton v. Mancari, 417 U.S. 535, 551–52 (1974).

[149] Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989).

[150] Professor Hollis identifies the "results oriented" nature of the Court's two different interpretive methods for construing treaties. *See* Chapter 2, pp. 81–83.

[151] Professor Cleveland suggests that the Court relied on inherent powers reasoning rather than the Commerce Clause, which seemed the most obvious textual basis for congressional power in immigration cases, because it was unwilling, for domestic anti-legislative and pro-federalism reasons, to expand the scope of the commerce power. Cleveland, *Powers Inherent in Sovereignty*, *supra* note 115, at 269–71. Professor Alexander Aleinikoff suggests similarly that use of the Commerce Clause in immigration cases would have nudged the Court toward a higher degree of judicial supervision than Congress wanted or the Court wished to exercise. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83

the Court was acutely sensitive to contemporary problems and needs, and it molded its jurisprudence to manage those problems and meet those needs.[152]

While positivism in its international law form declined in the decades after *The Paquete Habana*[153] and positivism as a general philosophy of law came under severe challenge after World War II, domestic law positivism survived and prospered in the form of a textualist convention. Most judges and commentators insisted that all legitimate power in the American legal and governmental system was derived from the specific text and structural provisions of the Constitution itself, and infusionary textualism saved that particular form of positivism by giving it the adaptability and creative potential necessary for its efficacy.

C. *Context and Congruence*

Although focused on the evolution of doctrine, the chapters in this book suggest a keen awareness of the broad historical conditions that helped shape the Court's international law jurisprudence. There seems to be agreement, for example, that in the Republic's early years the Court was particularly sensitive to the rights and obligations of international law because the new nation was relatively weak and dependent.[154] Similarly, all scholars recognize the profound impact of World War II and its consequences on international law, especially the establishment of the United Nations and the subsequent development of human rights law. Most recently, the emergence of movements for gay rights, abolition of the death penalty, and vigorous use of the Alien Tort Statute[155] have forced international law issues to the forefront of contemporary politics and generated sharp ideological disagreements on the Court.

For the period from the late nineteenth century to World War II, the connection between broad historical forces and the Court's international law jurisprudence may not seem quite so obvious. The chapters in this period, however, point to a number of historical factors that influenced the Court's work, including the influence of positivism, the Spanish-American War and World War I, and the rapidly expanding power of the United States in world affairs. To those factors, at least two more should be added: first, the changing nature of international law itself and second, prevailing European and American attitudes about race and expansionism.

Am. J. Int'l L. 862, 864 (1989). Assuming that such domestic concerns about the commerce power did push the Court toward adopting inherent powers reasoning, that fact further supports the proposition that the Court shaped its concepts not according to some essentialist logic but to serve the practical political and social purposes the Justices shared.

152 *See, e.g.*, Harry N. Scheiber, *Instrumentalism and Property Rights: A Reconsideration of American 'Styles of Judicial Reasoning' in the Nineteenth Century*, 1975 Wis. L. Rev. 1; Edward A. Purcell, Jr., Litigation and Inequality: Federal Diversity Jurisdiction in Industrial America, 1870–1958, at 253–54, 394–96 nn.13–15 (1992).

153 175, 677 (1900).

154 Chapter 1, pp. 7, 44–46; *see also* Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 Vand. L. Rev. 819 (1989); Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. Pa. L. Rev. 26, 792 (1952). For a qualifying view, see Douglas J. Sylvester, *International Law as Sword or Shield? Early American Foreign Policy and the Law of Nations*, 32 N.Y.U. J. Int'l L. & Pol. 1 (1999) (the early Republic used international law to compete commercially with stronger European powers).

155 28 U.S.C. § 1350.

As for international law, the late nineteenth century brought three interrelated developments that gave the field new visibility and influence. One was political: the unifications of Italy and Germany in 1870, the consolidation of the European state system, and the subsequent rush among those states for territorial acquisitions and influence in Asia, Africa, and the Pacific. A second development was institutional: the appearance of codes, practices, scholarship, and organizations that gave the field of international law a new prestige and professional status. The proposed codes of Bluntschli and Field appeared in 1868 and 1872, respectively; the Treaty of Washington in 1871 paved the way for the widely noted *Alabama Claims* arbitration that was successfully concluded the following year; the *Institute de Droit International* held its first meeting in 1873; the Berlin West Africa Conference convened in 1884; and the First Hague Conference met in 1899.[156] In the United States international lawyers and foreign policy experts began gathering annually in 1895, and a decade later they established the American Society of International Law, with Elihu Root, the nation's Secretary of State, as its first president.[157] Scholars in the field, the society's "Prospectus" declared in 1906, were establishing "the true principles of international relations" and advancing "the science of International Law."[158] A third development was cultural and ideological: giving new prescriptive connotations to the traditional idea that international law was the law of "civilized" nations. Europe and the United States came to share a unifying belief that they quite authoritatively defined what it meant to be "civilized" and, consequently, that they could determine which countries around the globe met that standard and how "civilized" nations could seek to dominate and control the "uncivilized."[159] The first development undergirded the burgeoning political, military, and cultural power of the modern industrialized nation-state;[160] the second provided the intellectual foundation for a new and assertedly more authoritative international law; and the third crowned Europe and the United States as the voices of that law and, implicitly, the arbiters of the legal rights of the rest of the world.[161]

In the United States equally broad changes combined to make the new, professionalized international law especially attractive. Rapid industrialization, urbanization, and

[156] *See* MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW, 1870–1960 ch. 1 (2001).

[157] *See* FREDERIC L. KIRGIS, THE AMERICAN SOCIETY OF INTERNATIONAL LAW'S FIRST CENTURY, 1906–2006 ch. 1 (2006).

[158] The American Society of International Law, *Prospectus*, 1 AM. J. INT'L L. 130, 131 (1907).

[159] "Outside the family of civilized nations... the central purpose of international order was to promote the civilization of decadent, backward, savage or barbaric peoples." EDWARD KEENE, BEYOND THE ANARCHICAL SOCIETY: GROTIUS, COLONIALISM AND THE ORDER OF WORLD POLITICS 7 (2002); *accord* KOSKENNIEMI, *supra* note 156, ch. 2; ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW ch. 2 (2004). This function of international law, while newly sharpened and more broadly utilized, was not new. *See* RICHARD TUCK, THE RIGHTS OF WAR AND PEACE: POLITICAL THOUGHT AND THE INTERNATIONAL ORDER FROM GROTIUS TO KANT (1999).

[160] It was at the end of World War I when Max Weber defined the nation-state as the entity that possessed "the *monopoly of the legitimate use of physical force* within a given territory." Max Weber, *Politics as a Vocation*, *in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77–78 (H.H. Gerth & C. Wright Mills eds., 1958) (emphasis in original).

[161] GERRIT W. GONG, THE STANDARD OF "CIVILIZATION" IN INTERNATIONAL SOCIETY 56 (1984). Under international law, for example, territory not in possession of a "civilized" state was available for occupation or conquest. *See* Cleveland, *Powers Inherent in Sovereignty*, *supra* note 115, at 28–30 and sources cited in *id.* at 28 nn.135–36.

population growth expanded the nation's international interests and brought vigorous new efforts to penetrate foreign markets and influence world affairs.[162] At the same time, the failure of Reconstruction, the political resurrection of the South, and the near-total eclipse of ideas of racial equality brought a resurgence of intense, pervasive, and often violent racism, while the de facto national reunion between North and South that marked the century's end sanctioned the racist upsurge and further stoked the fires of nationalism. The nation's growing international assertiveness moved beyond familiar policies designed to expand foreign markets and prevent European intrusions into the Western Hemisphere and began to inspire more ambitious campaigns to ensure total hemispheric dominance, build and control a canal through the Isthmus of Panama, acquire strategically located naval bases across the Pacific, and protect the nation's far-flung markets and expanding national interests by building – and if necessary using – a large and expensive modern navy.

Those international and domestic developments proved highly interactive. On a social and political level, the United States – particularly its legal and professional elites – grew closer to Western Europe, most especially to England. Increasing numbers of Americans traveled abroad and established continuing international contacts,[163] while the United States and Great Britain buried the long-running resentments that had marked their relations since the American Revolution and the War of 1812.[164] Their statesmen gradually established a pivotal diplomatic rapprochement, and the elite bar in the United States – particularly influential in the conduct of foreign affairs[165] – cultivated close personal and professional ties with its English counterpart.[166] Those developments intensified America's sense of its European, and especially its English, roots, while England and Europe responded by accepting the United States as a "civilized" member of the "family of nations" and a major player in world affairs.[167]

On an ideological and cultural level, nationalist and expansionist fervor unified the United States and Europe in their understanding of the proper bases of world order and highlighted the significance of their concept of sovereignty. Further, a shared and pervasive racism combined with international law's fundamental concept of "civilization" to unite them behind legal and "scientific" race theories that justified their common, if often jealous and sharply conflicting, efforts to colonize or control vast regions of Asia, Africa, and the Pacific.[168] Their shared cultural attitudes and common international

[162] *See, e.g.*, PAUL KENNEDY, THE RISE AND FALL OF THE GREAT POWERS 198–249 (1989).

[163] "The decades after 1860 witnessed a tenfold expansion in the volume of Americans sailing abroad." MICHAEL B. OREN, POWER, FAITH, AND FANTASY: AMERICA IN THE MIDDLE EAST, 1776 TO THE PRESENT 228 (2007); *see also* JAMES T. KLOPPENBERG, UNCERTAIN VICTORY: SOCIAL DEMOCRACY AND PROGRESSIVISM IN EUROPEAN AND AMERICAN THOUGHT, 1870–1920 (1986).

[164] "Imperialism played a major role in the great rapprochement." BRADFORD PERKINS, THE GREAT RAPPROCHEMENT: ENGLAND AND THE UNITED STATES, 1895–1914, at 64 (1968).

[165] Between 1889 and 1945 every U.S. Secretary of State was a lawyer. Richard H. Steinberg & Jonathan M. Zasloff, *Power and International Law*, 100 AM. J. INT'L L. 64, 65 (2006).

[166] *See, e.g.*, DANIEL T. ROGERS, ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE (1998); RICHARD A. COSGROVE, OUR LADY THE COMMON LAW: AN ANGLO-AMERICAN LEGAL COMMUNITY, 1870–1930 (1987).

[167] There were also tensions, of course, especially a growing wariness about the power of Imperial Germany.

[168] Duncan Bell, *Victorian Visions of Global Order: An Introduction*, *in* VICTORIAN VISIONS OF GLOBAL ORDER: EMPIRE AND INTERNATIONAL RELATIONS IN NINETEENTH-CENTURY POLITICAL THOUGHT 10 (Duncan Bell ed., 2007).

interests drove an even deeper wedge – religious, cultural, ethnic, and racial – between them and most of the other countries and peoples of the world.[169]

Those complex developments nudged the Court's jurisprudence along two distinct but ideologically related lines. First, they helped inspire it to begin nationalizing and centralizing ever larger areas of American law and government. Second, they helped induce it to accept racist assumptions and approve racist policies in both its domestic and international law decisions. Indeed, it was the race issue that produced the most important exception to the Court's nationalizing thrust, for on that issue decentralization won the day in domestic law. That exception, however, only highlighted the political and ideological compatibility of the Court's domestic and international law decisions, for in both areas the Court's doctrines brought the same result: the nation's "white" majority was authorized to subordinate disfavored racial and ethnic groups.

On the first trend, the Court began reshaping federal law to enhance the power of the national government and broaden the reach of its law.[170] Over the years from approximately 1890 to 1917 – always excepting racial matters – the Court expanded the powers of both Congress and the President, imposed constraining new legal limits on the States, and strengthened the federal judicial power to enable the national courts to exercise a tighter supervisory authority over the federal government and especially over state courts, legislatures, and administrative agencies.[171] The Court's international law decisions reflected that same drive. Professor Ramsey tells us that the Court expanded the reach of federal judge-made law and began constitutionalizing such areas as personal jurisdiction and conflict of laws.[172] Professor Van Alstine argues that the Court adopted a "purposive approach to treaty interpretation designed, fundamentally, to advance amicable relations" with other nations.[173] Such an approach reflected the Court's recognition of both the nation's growing involvement in world affairs and the desirability of a centrally controlled foreign policy. More particularly, Van Alstine maintains that the foundational precedents that underwrote the Court's sweeping interpretation of the treaty power in *Missouri v. Holland* were handed down in the same period: *Geofroy v. Riggs* in 1890 and both *De Lima v. Bidwell*[174] and *Neely v. Henkel* in 1901.[175] Most broadly, Professor Alford argues that the Court's international law decisions worked to support "assertions of government power."[176] Thus, the Court's international and domestic law decisions

[169] *See, e.g.*, PAUL R. SPICKARD, ALMOST ALL ALIENS: IMMIGRATION, RACE, AND CAPITALISM IN AMERICAN HISTORY AND IDENTITY (2007); PAUL A. KRAMER, THE BLOOD OF GOVERNMENT: RACE, EMPIRE, THE UNITED STATES, AND THE PHILIPPINES (2006); Kornel Chang, *Circulating Race and Empire: Transnational Labor Activism and the Politics of Anti-Asian Agitation in the Anglo-American Pacific World, 1880–1910*, 96 J. Am. Hist. 678 (2009).

[170] The Court was also suspicious of legislative power, and it sought in certain areas to check national and, most especially, state legislation.

[171] Edward A. Purcell, Jr., Ex parte Young *and the Transformation of the Federal Courts, 1890–1917*, 40 TOLEDO L. REV. 931, 942–60 (2009). During the years from 1886 to 1910 the Court established the foundations of inherent powers doctrine in dealing with Native Americans, aliens, and federal territories. *See* Cleveland, *Powers Inherent in Sovereignty*, *supra* note 115, at 7, 10–11.

[172] Chapter 7, pp. 231–33 (admiralty); *id.*, pp. 235–36 (personal jurisdiction and conflict of laws).

[173] Chapter 6, p. 194. "Indeed, on the subject of treaty law, the period from 1901 to 1945 is among the most active ones in the Court's history." *Id.*, p. 193. Professors Lee and Sloss find the Court using customary international law to shape treaties and statutes to serve the same purposes. *See* Chapter 4, pp. 130–33.

[174] 182 U.S. 1, 218 (1901) ("The treaty-making power is as much a constitutional power as the legislative or judicial powers. It is a supreme attribute of sovereignty.").

[175] Chapter 6, pp. 198–202.

[176] Chapter 8, p. 283.

were mutually supporting parts of its accelerating nationalization of American law and government.[177]

On the second trend, the Court found the ideological underpinnings of international law welcome support for its decisions on domestic matters. Like most Americans, the Justices accepted and sometimes proclaimed racist ideas, and their racial attitudes helped shape their rulings on a number of domestic issues.[178] In the 1870s they began to turn away from the freedmen and freedwomen, and in a series of cases over the next three decades they essentially scuttled both the constitutional and the statutory achievements of the Civil War and Reconstruction.

The fundamental premise of international law – that it grew from "the acts and usages of civilized nations"[179] – was entirely satisfactory to the turn-of-the-century Court, and it assumed apodictically that the United States, like England and Western Europe but unlike most of the rest of the world, was truly "civilized."[180] Indeed, the Court frequently identified the United States as "civilized" as well as "European," "English-speaking," and "Christian."[181] All those terms carried well-recognized racial connotations.[182] Through the concept of "civilization," Professor Gail Bederman has explained, "many Americans found a powerfully effective way to link male dominance to white supremacy."[183] Indeed, in *Dred Scott* Chief Justice Roger Taney had invoked that same premise – that "civilization" had a racial foundation – when he declared that blacks were excluded from full citizenship by all "civilized nations."[184]

In international law matters, the Court's decisions reflected those same attitudes.[185] Immigration cases, especially those involving Chinese and Japanese, revealed clear

[177] *Compare* Cleveland, *Powers Inherent in Sovereignty*, *supra* note 115, at 251.

[178] Purcell, *supra* note 58, at 2001–28; Cleveland, *Powers Inherent in Sovereignty*, *supra* note 115, at 256–67. Racial hostility and congressional efforts to negate the treaty rights of Chinese immigrants may have strengthened the Court's commitment to the "later-in-time" rule. *See* Chapter 2, p. 60; Chapter 6, pp. 206–07.

[179] Hilton v. Guyot, 159 U.S. 113, 163 (1895). "Repeatedly, the Court made reference to 'the law of civilized nations.'" Chapter 3, p. 101.

[180] The Court asserted that Congress had the power to limit the rights of Indians who were U.S. citizens because the United States was "a superior and civilized nation" and Indians were "essentially a simple, uninformed and inferior people" who remained "Indians in race, customs, and domestic government." United States v. Sandoval, 231 U.S. 28, 39 (1913).

[181] Harriman v. ICC, 211 U.S. 407, 419 (1908) (United States as "English-speaking"); Otis v. Parker, 187 U.S. 606, 609 (same); Reynolds v. United States, 98 U.S. 145, 164 (1879) (polygamy "odious among the northern and western nations of Europe" and in the United States, and "almost exclusively a feature of the life of Asiatic and of African people"); Church of the Holy Trinity v. United States, 143 U.S. 457, 471 (1892) ("this is a Christian nation"); United States v. Macintosh, 283 U.S. 605, 625 (1931) ("We are a Christian people").

[182] The religious term "Christian" often took on racial connotations in references to Africa and Asia. *See, e.g.*, Chew Heong v. United States, 112 U.S. 536, 560, 569 (1884) (Field, J., dissenting). In England claims about the inferior nature of most non-European societies "found extraordinarily widespread acceptance" and "tracked various theories about the distinctiveness of the European law of nations as uniquely civilised or distinctively Christian." Jennifer Pitts, *Boundaries of Victorian International Law*, *in* Victorian Visions, *supra* note 168, at 68.

[183] Gail Bederman, Manliness & Civilization: A Cultural History of Gender and Race in the United States, 1880–1917, at 23 (1995); *see also* Jacqueline Fear-Segal, White Man's Club: Schools, Race, and the Struggle of Indian Acculturation (2007).

[184] Dred Scott v. Sanford, 60 U.S. 393, 410 (1857); *see* Chapter 1, p. 43.

[185] As Professors Lee and Sloss point out, there were exceptions. *See* Chapter 4, p. 155. The Court occasionally offered protection to disfavored racial and ethnic groups. The classic example is *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), and the number of examples increased somewhat during the 1920s and 1930s. *See, e.g.*, Asakura v. City of Seattle, 265 U.S. 332 (1924). The Court was arguably less racist than

and sometimes quite overt racist views.[186] So, too, did the cases dealing with Native Americans.[187] Further, in the *Insular Cases*, Justice White enjoyed the seeming support of the majority for his statement that a treaty could not "incorporate an alien people into the United States without the express or implied approval of Congress."[188] The danger of adding "alien people" to the Union, the Justices believed, should require the purposeful assent of the whole Congress, a requirement that made such incorporation exceptionally unlikely.[189] Similarly, Professor Hollis notes the proliferation of treaties with non-European nations in the late nineteenth century and suggests insightfully that "pervasive racial prejudices" embedded in the distinction between "civilized" and "uncivilized" states "may explain why so many more non-European treaties proved inapplicable or unenforceable than their European counterparts."[190]

Thus, in the turn-of-the-century decades international law merged with racism, expansionism, and American nationalism to generate a distinctive ideological formation that informed the policies of the turn-of-the-century Court. Its characteristic elements were well represented, for example, in the thinking of Robert E. Lansing, a prominent international lawyer from New York who was a founding member of the American Society of International Law and later Woodrow Wilson's Secretary of State.[191] Writing on the theory of sovereignty in 1907, Lansing insisted that the Civil War had "nationalized" sovereignty in the United States and that the Union's "national character" could never thereafter be destroyed.[192] He believed that the federal government possessed total "external sovereignty" and that it was free to govern the nation's "colonial possessions" and colonial populations without constitutional limitation.[193] Indeed, subsequently serving in the administration that introduced formal racial segregation in federal employment practices, Lansing was comfortable embracing the perspective of "the civilized world" and dismissing "the savage races of today."[194] Finally, he approved the infusionary textualism the Court used to justify its nationalizing and centralizing decisions in both domestic

general popular opinion, the political branches, state and local governments, and most white-controlled organizations and associations.

186 *Compare, e.g.*, Church of the Holy Trinity v. United States, 143 U.S. 457 (1892), *with* Nishimura Ekiu v. United States, 142 U.S. 651 (1892).

187 *See, e.g.*, Montoya v. United States, 180 U.S. 261, 265, 267 (1901) ("Owing to the natural infirmities of the Indian character, their fiery tempers, impatience of restraint, their mutual jealousies and animosities, their nomadic habits, and lack of mental training, they have as a rule shown a total want of that cohesive force necessary to the making up of a nation in the ordinary sense of the word." Consequently, "[w]hile as between the United States and other civilized nations an act of Congress is necessary to a formal declaration of war, no such act is necessary to constitute a state of war with an Indian tribe.").

188 Downes v. Bidwell, 182 U.S. 244, 312–13 (1901) (White, J., concurring).

189 Racial fears and anxieties were a major force in shaping American expansionism and especially in limiting territorial annexation and the "incorporation" of "non-white" territories. ROBERT L. BEISNER, TWELVE AGAINST EMPIRE: THE ANTI-IMPERIALISTS, 1898–1900, at 219 (1992) (1968); LOVE, *supra* note 90; PERKINS, *supra* note 164, at 74.

190 Chapter 2, pp. 61, 65; *accord* Cleveland, *Powers Inherent in Sovereignty*, *supra* note 115, at 14.

191 *See generally* Daniel M. Smith, *Robert Lansing*, *in* AN UNCERTAIN TRADITION: AMERICAN SECRETARIES OF STATE IN THE TWENTIETH CENTURY 101 (Norman A. Graebner ed., 1961).

192 Robert E. Lansing, *Notes on Sovereignty in a State*, 1 AM. J. INT'L L. 105, 128 (1907) (part 1).

193 Robert E. Lansing, *Notes on Sovereignty in a State*, 1 AM. J. INT'L L. 297, 301–04 (1907) (part 2).

194 Lansing, *supra* note 193, at 300; Lansing, *supra* note 192, at 113; *see also* Lansing, *supra* note 193, at 320 (contrasting "the civilized and barbarous races of today"); ROBERT E. LANSING, THE PEACE NEGOTIATIONS: A PERSONAL MEMOIR 97, 102 (1921). On the Wilson administration's institution of racial segregation, see ARTHUR S. LINK, WOODROW WILSON AND THE PROGRESSIVE ERA, 1910–1917, at 64–66 (1954).

and foreign relations law. The "fixity" of written constitutions, Lansing explained, "frequently" caused difficulties "when new and unforeseen conditions" arose. In the United States, however, the problem of "fixity" had been "overcome by a liberal construction of certain provisions of the federal constitution." The Court had embraced "the theory that it was the original intention of its framers to provide for every contingency that could possibly arise and that the powers granted by the constitution are sufficient for every condition."[195] The Court, in other words, had accepted the doctrine of sovereignty and the supervening claims of national necessity.

The social, cultural, economic, and political conditions of the late nineteenth and early twentieth centuries underwrote those ideas in Lansing's mind as well as in the minds of a great many of his contemporaries. That context made international law a highly useful source of both inspiration and justification for the Court.

V. Conclusion

The chapters in this section highlight the variety, complexity, and adaptability of the Supreme Court's international law jurisprudence. They show on the one hand that the spare language of the Constitution and the uncertain nature of international law gave the Court substantial and sometimes virtually uncabined discretion in resolving the issues it faced and, on the other hand, that continually changing domestic conditions and the nation's shifting role in world affairs repeatedly induced it to reformulate and remold its doctrines. Neither the text of the Constitution nor the sources of international law wholly determined its course. Nor, of course, did any determinate original intent or understanding. Rather, by its best if imperfect lights the Court struggled to fulfill the twin – and sometimes tension-plagued – charges that its role imposed: an institutional duty to enforce the law and an institutional need to accommodate the dominant demands and perceived interests of the American people. Recognizing the nature of that tension and the complex considerations that shaped the Court's course leads to a deeper understanding of both its evolving international law jurisprudence and the nation's overall system of constitutional government.

[195] Lansing, *supra* note 193, at 311; *see also id.* ("The medium, by which this desirable and necessary elasticity has been obtained, is judicial interpretation.").