

MR. JUSTICE MILLER’S CLAUSE: THE PRIVILEGES OR IMMUNITIES OF CITIZENS OF THE UNITED STATES INTERNATIONALLY

*David S. Bogen**

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I. INTRODUCTION

Our understanding of the Privileges or Immunities Clause of the Fourteenth Amendment today is the creature of Justice Samuel Miller's opinion in the *Slaughter-House Cases*.¹ In his opinion, Justice Miller argued that the Clause did not create any new privilege or immunity for citizens of the United States; it merely referred to existing privileges or immunities. The success of his views led the Privileges or Immunities Clause of the Fourteenth Amendment to become a sterile tautology.² Without the Clause, states would still be barred from abridging the privileges or immunities of citizens of the United States³ and Congress could still legislate to protect those privileges or immunities.⁴ Thus, the Privileges or Immunities Clause of the Fourteenth Amendment operates like the Ninth and Tenth Amendments, which do not create the "rights . . .

* Professor Emeritus of Law, University of Maryland School of Law. I would like to thank Justin Brenner, Alice Johnson, Lena Kim, and Nicolas Blendy for their research assistance, the faculty workshop at the University of Maryland School of Law, my colleague Gordon Young, and especially Drake University School of Law, its Constitutional Law Center, and the Drake Law Review.

1. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872).

2. A number of authors have attempted to find room in Miller's opinion to support the use of the Clause to incorporate the Bill of Rights against the states. See generally Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases*, 109 YALE L.J. 643, 647-48 (2000); Robert C. Palmer, *The Parameters of Constitutional Reconstruction: Slaughter-House, Cruikshank, and the Fourteenth Amendment*, 1984 U. ILL. L. REV. 739, 769 (1984); Bryan H. Wildenthal, *The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment*, 61 OHIO ST. L.J. 1051, 1063-67 (2000). Others have suggested that the Clause, under Miller's reading, expands congressional power either to define privileges or to override sovereign immunity. See James W. Fox, Jr., *Re-readings and Misreadings: Slaughter-House, Privileges or Immunities, and Section Five Enforcement Powers*, 91 KY. L.J. 67, 164-65 (2002) (privileges); William J. Rich, *Taking "Privileges or Immunities" Seriously: A Call to Expand the Constitutional Canon*, 87 MINN. L. REV. 153, 230-32 (2002) (sovereign immunity). I have explained at length elsewhere why these scholars have misread Miller's opinion or why their theories for expansion are unlikely to be accepted. See David S. Bogen, *Slaughter-House Five: Views of the Case*, 55 HASTINGS L.J. 333, 390-96 (2003).

3. See *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 49 (1868) (holding, prior to the ratification of the Fourteenth Amendment, that a tax on travel out of state could not be collected because it violated rights of citizens of the United States).

4. See *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 625 (1842) (holding Congress could enforce the Fugitive Slave Act in order to make effective the Fugitive Slave Clause of the Constitution, although there was no express constitutional grant of power to Congress to enforce the Clause).

retained by the people”⁵ or the “powers . . . reserved to the States respectively, or to the people,”⁶ but simply acknowledge their existence.

The Supreme Court is unlikely to alter Justice Miller’s interpretation of the Clause because overturning it would serve little purpose. By interpreting the Equal Protection and Due Process Clauses broadly to attack racial discrimination,⁷ to enforce guarantees of the Bill of Rights against the States,⁸ and to apply fundamental rights limitations,⁹ the Court

5. U.S. CONST. amend. IX. Daniel Farber argues impressively that the Framers assumed that government had no legitimate authority to violate basic human rights regardless of constitutional provisions, and the Ninth Amendment recognized that. See DANIEL A. FARBER, *RETAINED BY THE PEOPLE: THE “SILENT” NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON’T KNOW THEY HAVE* 6–9, 40–44 (2007). That does not detract from the literal reading, which is that the Ninth Amendment recognizes rights—it does not create them. Thus, the strongest judicial support for the Ninth Amendment was Justice Douglas’s opinion in *Griswold v. Connecticut*, in which he asserted that the Ninth Amendment is not an independent source of rights but “simply lends strong support to the view that the ‘liberty’ protected by the Fifth and Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments.” *Griswold v. Connecticut*, 381 U.S. 479, 493 (1965).

6. U.S. CONST. amend. X.

7. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (applying equal protection to forbid segregation in schools); *Strauder v. West Virginia*, 100 U.S. (16 Otto) 303, 310 (1879) (holding racial discrimination in jury pool violates the Equal Protection Clause).

8. The Court has not yet applied the Second, Third, or Seventh Amendments against the states, nor has it required states to use grand jury indictments as required under the Fifth Amendment for many federal crimes. The guarantees of the rest of the first eight amendments have been applied to the states. See *Pointer v. Texas*, 380 U.S. 400, 403 (1965) (Sixth Amendment); *Malloy v. Hogan*, 378 U.S. 1, 3 (1964) (Fifth Amendment); *Robinson v. California*, 370 U.S. 660, 667 (1962) (Eighth Amendment); *Wolf v. Colorado*, 338 U.S. 25 (1949) (Fourth Amendment), *overruled on other grounds* by *Mapp v. Ohio*, 367 U.S. 643 (1961) (requiring state court exclusion of evidence obtained through unreasonable searches and seizures); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (First Amendment). Justice Black identified incorporation in the whole of the first section of the Fourteenth Amendment, rather than in the Due Process or Privileges or Immunities Clauses alone. *Adamson v. California*, 332 U.S. 46, 71–72 (1947) (Black, J., dissenting) (“[O]ne of the chief objects that the provisions of the Amendment’s first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the states.” In *Duncan v. Louisiana*, Justice Black used the Privileges or Immunities Clause to refute the argument that incorporation was not textually plain: “I suggest that any reading of ‘privileges or immunities of citizens of the United States’ which excludes the Bill of Rights’ safeguards renders the words of this section of the Fourteenth Amendment meaningless.” *Duncan v. Louisiana*, 391 U.S. 145, 166 (1968) (Black, J., concurring).

has achieved the results that an expansive reading of the Privileges or Immunities Clause would reach. Although Justice Thomas has urged a return to historical roots,¹⁰ and some scholars have called for a new interpretation of the Privileges or Immunities Clause,¹¹ there is little incentive for the Court to reverse a well-established precedent when doing so would not affect outcomes.¹²

However, he also relied on the Due Process Clause in his concurrence, arguing that “The due process of law standard for a trial is one in accordance with the Bill of Rights and laws passed pursuant to constitutional power, guaranteeing to all alike a trial under the general law of the land.” *Id.* at 170.

9. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (holding criminalization of homosexual conduct violates due process because adults have fundamental right to autonomy in intimate choices); *Roe v. Wade*, 410 U.S. 113, 164 (1973) (finding a fundamental right of privacy protected by the Due Process Clause of the Fourteenth Amendment).

10. *Saenz v. Roe*, 526 U.S. 489, 527–28 (1999) (Thomas, J., dissenting).

11. See 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1316–31 (3d ed. 2000) (discussing the obstacles facing courts and lawyers in dismantling the encumbrances of Miller’s opinion in the *Slaughter-House Cases*); Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 *CHI.-KENT L. REV.* 627, 628 (1994) (“Justice Miller’s majority opinion was indeed based on an incorrect reading of the Fourteenth Amendment [T]he Privileges or Immunities Clause of the Fourteenth Amendment was designed to protect substantive rights, primarily the Bill of Rights, from state abridgement.”); Erwin Chemerinsky, *The Supreme Court and the Fourteenth Amendment: The Unfulfilled Promise*, 25 *LOY. L.A. L. REV.* 1143, 1146–47 (1992) (arguing that the overly broad ruling of the *Slaughter-House* opinion has unfairly prevented later courts from protecting rights under the Privileges or Immunities Clause); Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 *N.C. L. REV.* 1071, 1146–49 (2000) (interpreting and broadening the meaning of the Privileges or Immunities Clause to include the protections in the federal Bill of Rights based upon the common understanding of the words of the Clause at the time it was proposed and ratified); Michael Kent Curtis, *Resurrecting the Privileges or Immunities Clause and Revising the Slaughter-House Cases Without Exhuming Lochner: Individual Rights and the Fourteenth Amendment*, 38 *B.C. L. REV.* 1, 86–90 (1996) (arguing that banning private actions undertaken with the specific intent of depriving a citizen of constitutional rights would be within the power of Congress).

12. Proposals like those of Professors Curtis and Zietlow would change current law by empowering Congress to legislate to protect rights against infringement by individuals. See Curtis, *Resurrecting*, *supra* note 11 and accompanying text; REBECCA E. ZIETLOW, *ENFORCING EQUALITY: CONGRESS, THE CONSTITUTION, AND THE PROTECTION OF INDIVIDUAL RIGHTS* 60–62 (2006) (arguing that the Reconstruction Amendments name “Congress, not the courts, as the principal enforcers of those rights”). These proposals will not be embraced by the current Court because all of the clauses of the second sentence of the Fourteenth Amendment are

Scholars and the Court should give up the fruitless pursuit of a change in the meaning of the Clause, and instead shift to developing the substance of the privileges or immunities that Miller identified or implied in his opinion. Building on Miller's opinion is a largely neglected task—in the past fifty years the Clause has been used only in cases establishing the right of interstate travel.¹³ Outside of the discussions of this right, little in the literature builds on Miller's premises.

This Article focuses on one aspect of the privileges and immunities of citizens of the United States envisioned by Justice Miller's opinion in *Slaughter-House*—their international dimension. These privileges and immunities include: the ability to engage in international trade and commerce; the protection of person and property abroad; the rights secured to individual citizens by treaties of the United States; and the privileges and immunities available under customary international law to the extent that the federal government behaves consistently with such rights.¹⁴

This Article describes these privileges or immunities of citizens and suggests that the international perspective of privileges or immunities may be helpful in considering future directions. For example, if government is instituted to establish and protect its citizens internationally, states cannot extend boycotts to citizens dealing with disfavored foreign governments unless Congress approves. Second, citizens' international travel is limited only by deference to executive and legislative discretion in foreign relations. Third, treaty provisions establishing individual rights should be presumed to be self-executing. Further, states may not establish a foreign policy in breach of customary international law in the absence of federal indications of support.

structured as limitations on state behavior, and a "new federalism" Court will not change its stripes. If the Court's ideology were to shift radically, and a newly composed Court were anxious to get past the state action hurdle, it could use enforcement of the Equal Protection or Due Process Clauses to do so without changing existing privileges or immunities interpretations. See, e.g., Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507, 557–66 (1991) (arguing that a constitutional right to affirmative state protection exists through enforcement of the Due Process and Equal Protection Clauses).

13. *Saenz*, 526 U.S. at 502–03 (holding that citizens are not to be discriminated against because they recently moved to a state to become residents).

14. See, e.g., *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1872).

II. *SLAUGHTER-HOUSE* AND JUSTICE MILLER

The *Slaughter-House Cases* presented the Court with its first opportunity to interpret the Privileges or Immunities Clause after its adoption. Although the Fourteenth Amendment had been adopted to deal with racial discrimination, these cases raised an issue of the constitutionality of a slaughterhouse monopoly—and it was scarcely surprising that the Court found that the new Amendment did not forbid the state from regulating slaughterhouses in this way.¹⁵ Former Supreme Court Justice John Campbell, on behalf of the Crescent City Butchers' Association, argued that monopolies abridged the privileges or immunities of citizens of the United States, but Justice Samuel Miller's majority opinion held that the Clause did not apply to the issue.¹⁶

A. *Privileges or Immunities as a Tautology*

Justice Miller distinguished the privileges and immunities of citizens of a state from those of citizens of the United States. The privileges and immunities of citizens of a state, Miller said, “embraces nearly every civil right for the establishment and protection of which organized government is instituted. They are . . . those rights which are fundamental.”¹⁷ States are the source of criminal, property, and contract law; thus, citizens look to state government for the protection of their person and property. Miller insisted that “the privileges and immunities of citizens of the States, as above defined, lay within the constitutional and legislative power of the States, and without that of the Federal government.”¹⁸ His conclusion that reference to the privileges or immunities of citizens of the United States Fourteenth Amendment did not involve the fundamental rights that were part of state citizenship disposed of the *Slaughter-House* plaintiffs' contention.

Justice Miller went on to explain what the privileges or immunities of citizens of the United States might be: “[W]e venture to suggest some

15. See RONALD M. LABBÉ & JONATHAN LURIE, *THE SLAUGHTERHOUSE CASES: REGULATION, RECONSTRUCTION, AND THE FOURTEENTH AMENDMENT* 207–11 (2003) (explaining the serious public health problems posed by the majority of the slaughterhouses' locations in well-populated areas upstream from the city's water supply, and the welcome reform crafted from legislative activity and capitalism that eventually relocated and centralized these facilities).

16. *Id.* at 183, 185–86, 215–16.

17. *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 76.

18. *Id.* at 77. Those privileges and immunities are constitutionally protected by Article IV, Section 2, but only against discrimination based on state citizenship.

which owe their existence to the Federal government, its National character, its Constitution, or its laws.”¹⁹ The national character of the federal government, the provisions of the Constitution, and the laws enacted by the federal government are not created by the Privileges or Immunities Clause; hence, the Clause did not create privileges or immunities of citizens of the United States. It simply maintains the status quo with respect to their substance.²⁰

B. *The Significance of United States Citizenship for Miller’s Clause*

The privileges or immunities of a citizen of a government flow from the function that government serves—they are the rights for which government was instituted. Citizens of a state and of the United States are both entitled to “protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole.”²¹ The difference is the sphere in which these protections operate. The citizen of a state must look to the political process in the state to achieve the positive rights of protection of life, liberty, and property. The privileges and immunities of citizens of the United States refer to a government that regulates interstate and international issues and enforces the negative commands of the Constitution that restrict the states.²² Miller’s reference to the national character of the government suggests that the rights the federal government was instituted to establish and protect are primarily interstate and international.

Citizenship of the United States confers implied rights as well as those stated expressly. For example, the Constitution does not expressly secure the right to travel from one state to another, but it is implied in the structure of the national government and the history of its creation. Thus,

19. *Id.* at 79.

20. Of course, Section 1 of the Fourteenth Amendment established that persons not previously recognized by the Court were citizens entitled to such privileges—namely African-Americans excluded from citizenship by Justice Taney’s opinion in *Dred Scott v. Sandford*. 60 U.S. (19 How.) 393 (1856); see U.S. CONST. amend. XIV, § 1.

21. *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 76 (quoting *Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3,230)).

22. Justice Miller’s listing of the privileges ends with, “To these may be added the rights secured by the thirteenth and fifteenth articles of amendment, and by the other clause of the fourteenth [due process and equal protection], next to be considered.” *Id.* at 80.

before the Fourteenth Amendment's adoption, the Supreme Court held in *Crandall v. Nevada*, in an opinion by Justice Miller, that a Nevada tax on traveling out of state violated the Constitution.²³ In the *Slaughter-House Cases*, Justice Miller pointed to his *Crandall* decision as an example of the privileges and immunities of citizens of the United States.

[T]he right of the citizen of this great country, protected by implied guarantees of its Constitution, "to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to its seaports, through which all operations of foreign commerce are conducted, to the subtreasuries, land offices, and courts of justice in the several States."²⁴

Only citizens of the United States have this right to travel from state to state because it is derived from their relationship to the federal government.²⁵ They also have a right secured by Article IV, Section 2 to be treated without discrimination in the state to which they travel.²⁶ Finally, citizens of the United States have a right to become a citizen of a state by moving there and a right to the same privileges or immunities as citizens of that state when they do.²⁷ With respect to this last right, the Court said in *Saenz v. Roe* that "it has always been common ground" that the Privileges or Immunities Clause of the Fourteenth Amendment

23. *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 49 (1868). The most prominent use of structural implication was *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); see CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 13-15 (1969).

24. *Slaughter-House Cases*, 83 U.S. at 79 (quoting *Crandall*, 73 U.S. (6 Wall.) at 44).

25. See, e.g., *Passenger Cases*, 48 U.S. 283, 492 (1849) (Taney, C.J., dissenting) ("For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States, and as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States.").

26. U.S. CONST. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."); see *Slaughter-House Cases*, 83 U.S. at 77 (stating that the sole purpose of the Clause is to assure that privileges or immunities granted by a state to its own citizens are the measure for rights of citizens of other states within the granting state's jurisdiction); see also *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1868) (asserting "the right of free ingress into other States, and egress from them").

27. See *Saenz v. Roe*, 526 U.S. 489, 502-03 (1999).

protects this component of the right to travel.²⁸

Therefore, the right to travel is largely an implied right, but it cannot be abridged, even by Congress.²⁹ The Privileges or Immunities Clause creates no new protection for the citizen, but it identifies privileges or immunities as existing rights and underlines their protected nature. The critical question is what these rights might be. The Court has discussed the right to travel as a privilege or immunity of citizenship.³⁰ It has yet to express its analysis of foreign relations in these terms, although Justice Miller's description of privileges or immunities is heavily weighted with a discussion of foreign relations.³¹

III. PRIVILEGES OR IMMUNITIES OF UNITED STATES CITIZENSHIP WITH RESPECT TO INTERNATIONAL RELATIONS

The protection of the fundamental rights of citizens with respect to foreign nations was one of the reasons for the formation of the national government.³² Justice Miller's list of privileges of United States citizens either expressly or implicitly referred to three areas of international relations: access to international commerce, travel and protection of person and property in foreign countries, and treaty rights. The method of analysis he used suggests a fourth area—customary international law.

Privileges or immunities may be direct restrictions on government, but most privileges or immunities with respect to international law are derived from empowering the federal government to act. The power to act suggests a moral obligation to exercise the power on behalf of the people; however, there may also be implications involving default rules when the

28. *Id.* at 503.

29. *Id.* at 507–08.

30. *See generally id.*

31. *See generally* The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872).

32. For example, Alexander Hamilton stated:

The principal purposes to be answered by union, are these: The common defence of the members; the preservation of the public peace, as well against internal convulsions as external attacks; the regulation of commerce with other nations, and between the States; the superintendence of our intercourse, political and commercial, with foreign countries.

THE FEDERALIST NO. 23, at 112 (Alexander Hamilton) (Buccaneer Books 1992). Although the Constitution was not drafted as a document of individual rights, each of these purposes has its analogue as a fundamental right of a citizen—to protection from foreign nations, to participation in commerce, and to rights under international law.

government fails to exercise that power.

A. *Access to International Commerce*

“He has a right to free access to its sea-ports, through which all the operations of foreign trade and commerce are conducted.”³³

“A regulation which imposes onerous, perhaps impossible, conditions on those engaged in active commerce with foreign nations, must of necessity be national in its character.”³⁴

Justice Miller reasoned in *Crandall v. Nevada* that citizens of the United States have a right to travel from state to state in order to access operations of the federal government in another state; however, he also rooted the right to travel in a right to access foreign commerce: “He has a right to free access to its sea-ports, through which all the operations of foreign trade and commerce are conducted”³⁵

Permitting foreign companies to purchase goods and services benefits the United States citizen who sells them, while permitting a foreign company to sell goods benefits the United States citizen who purchases them. Even though the right to access foreign commerce may be raised by citizens and non-citizens alike, participation in foreign commerce is still a privilege or immunity derived from the federal Constitution. In that sense, such participation fits Justice Miller’s definition of privileges or immunities of citizens of the United States that a state could not interfere with.

The ability of the United States citizen to sell abroad is supported by Article I, Section 9, Clause 5, which states, “No Tax or Duty shall be laid on Articles exported from any State.”³⁶ Other constitutional provisions expressly limit state power to burden foreign commerce—for example, “No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for

33. *Crandall v. Nevada*, 73 U.S. (6 Wall) 35, 44 (1867).

34. *Henderson v. Mayor of N.Y.*, 92 U.S. (2 Otto) 259, 273 (1875).

35. *Crandall*, 73 U.S. (6 Wall.) at 44.

36. U.S. CONST. art. I, § 9, cl. 5; *see, e.g.*, *United States v. IBM Corp.*, 517 U.S. 843, 861–62 (1996) (invalidating a tax on insurance premiums paid by foreign insurers to insure exported goods, saying that the Export Clause forbids imposition of a federal tax on export transit even though the tax is generally applicable and nondiscriminatory).

executing its inspection Laws;”³⁷ and “No State shall, without the Consent of Congress, lay any Duty of Tonnage”³⁸ These express limits on import and export duties show the importance that the Framers attached to the ability of United States citizens to buy and sell internationally, but there is no express prohibition on state regulation of foreign commerce. The privilege or immunity of citizens of the United States to access foreign commerce without state interference results primarily from the centralization of power in the national government to deal with foreign commerce.

1. *The Dormant Foreign Commerce Clause*

The Constitution grants Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes.”³⁹ The Commerce Clause grants Congress plenary power to regulate commerce with foreign nations, including the power to prohibit it.⁴⁰ The Framers were concerned that regulation by individual states could produce a welter of conflicting rules that would impede trade and potentially enable coastal states to gain additional advantages over inland states in the arena of international commerce, even to the point of preventing inland states from having access to international trade.⁴¹ Thus, the grants to Congress were designed to protect inland states and their citizens specifically, as well as to foster trade generally.

The Court flirted with the idea that the grant of power to regulate interstate and foreign commerce was exclusive and that states lacked this power.⁴² But the Court ultimately determined that some state regulations

37. U.S. CONST. art. I, § 10, cl. 2; *see, e.g.,* *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 302 (1976) (upholding a Georgia property tax on inventory maintained in a distribution warehouse on the grounds that a nondiscriminatory tax also imposed on imported goods no longer in transport was not an import tax under the Clause).

38. U.S. CONST. art. I, § 10, cl. 3; *see, e.g.,* *Clyde Mallory Lines v. Alabama ex rel. State Docks Comm’n*, 296 U.S. 261, 266–77 (1935) (upholding “harbor fees” as service charge for policing harbor and not a duty of tonnage because the fees were a levy on the privilege of access by vessels or goods to the port and distinct from service charges).

39. U.S. CONST. art. I, § 8, cl. 3.

40. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197 (1824).

41. *See* Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, 448–49 (1941) (discussing the offensive and defensive use of tariffs by the states to influence commerce).

42. *Gibbons*, 22 U.S. at 209–10 (discussing whether a competing state law

were permissible and others were not.⁴³ When the Court perceives that a state regulation affecting interstate or foreign commerce interferes with the purposes of the grant of power to Congress, it will hold the regulation unconstitutional even though there is no relevant congressional action.⁴⁴ This doctrine is known as the “dormant Commerce Clause,” and it may be termed the “dormant foreign Commerce Clause” as applied to foreign commerce.⁴⁵ In *Henderson v. Mayor of New York*, Justice Miller used an early form of the dormant foreign Commerce Clause doctrine to strike down a state law that required posting a bond for arriving immigrants:

A regulation which imposes onerous, perhaps impossible, conditions on those engaged in active commerce with foreign nations, must of necessity be national in its character. . . . It is apparent, therefore, that, if there be a class of laws which may be valid when passed by the States until the same ground is occupied by a treaty or an act of Congress, this statute is not of that class.⁴⁶

States may regulate foreign commerce under current doctrine; only discriminatory or unduly burdensome regulation is forbidden. General state laws applicable to everyone will usually be upheld against challenges by persons who engage in foreign commerce.⁴⁷ The generality of the law

“must yield to the law of Congress”).

43. *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299, 319–20 (1851) (holding that regulation of pilots was reserved to the states, but refusing to analyze commerce powers beyond the question of that specific regulation).

44. *See City of Philadelphia v. New Jersey*, 437 U.S. 617, 628–29 (1978) (holding a New Jersey statute that prohibited the importation of waste from outside the territorial limit of the state discriminated in violation of the Commerce Clause); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145–46 (1970) (holding an Arizona law prohibiting a company from transporting uncrated cantaloupes from an Arizona ranch where it lacked packing facilities to a nearby California city for packing and shipping was an excessive burden on commerce in violation of the Commerce Clause); *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 544–45 (1949) (holding a state may not burden interstate commerce in order to promote its own economic interests); *Cooley*, 53 U.S. (12 How.) at 318–320 (finding state power to regulate interstate or foreign commerce depends on the nature of the regulation).

45. *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 310 n.9 (1994) (“Our jurisprudence refers to the self-executing aspect of the Commerce Clause as the ‘dormant’ or ‘negative’ Commerce Clause.”); *see also id.* at 320 (discussing the “[dormant] Foreign Commerce Clause”).

46. *Henderson v. Mayor of New York*, 92 U.S. (2 Otto) 259, 273 (1876).

47. *See, e.g., Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28, 40 (1948) (upholding state civil rights statute as applied to travel between Detroit and a Canadian island only after examining the factual circumstances carefully to determine

suggests that the state has a local concern rather than an antipathy to other states or nations; thus, such laws are unlikely to give offense. Further, citizens suffer no disadvantage from the law because they trade internationally. Discrimination, however, whether by regulation or by taxation, will be struck down.⁴⁸

Many of the Court's decisions apply the dormant Commerce Clause without distinguishing between interstate and foreign commerce,⁴⁹ including the seminal case of *Cooley v. Board of Wardens*.⁵⁰ As Justice Stone stated in his *Di Santo v. Pennsylvania* dissent, "[T]he purpose of the commerce clause was not to preclude all state regulation of commerce crossing state lines, but to prevent discrimination and the erection of barriers or obstacles to the free flow of commerce, interstate or foreign."⁵¹ State laws that discriminate against both interstate and foreign commerce are struck down as to both. Despite suggestions that the Court should abolish the dormant foreign Commerce Clause, the doctrine is well entrenched.⁵² The judiciary has a great deal of experience in applying the

that the law did not impose an undue burden on doing business in foreign commerce).

48. See *Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue and Fin.*, 505 U.S. 71, 82 (1992) (holding differential treatment of foreign and domestic subsidiaries by an Iowa law tracking the federal tax law violated the dormant Commerce Clause even though the discrimination was wholly against foreign commerce and did not favor Iowa subsidiaries).

49. See *Di Santo v. Pennsylvania*, 273 U.S. 34, 36–37 (1927) (holding that state law requiring a person who sells steamship tickets for foreign travel to be licensed violates the dormant Foreign Commerce Clause), *overruled in part by* *California v. Thompson*, 313 U.S. 109, 114–16 (1941) (state law requiring a transportation agent to obtain a license for interstate transportation also applied to motor vehicle transportation over state highways, as it is a local concern that does not violate Commerce Clause). Justices Brandeis, Holmes, and Stone dissented in *Di Santo* on the grounds that the law was a local concern and the Court's use of a direct and indirect effects test was inappropriate, but the dissenters also viewed the cases on interstate commerce and foreign commerce alike. *Id.* at 37–45.

50. *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299 (1851). "Indeed the *Cooley* criterion has been applied so frequently in cases concerning only commerce among the several states that it is often forgotten that that historic decision dealt indiscriminately with such commerce and foreign commerce." *Bob-Lo Excursion*, 333 U.S. at 38.

51. *Di Santo*, 273 U.S. at 43–44 (Stone, J., dissenting).

52. See Leanne M. Wilson, Note, *The Fate of the Dormant Foreign Commerce Clause After Garamendi and Crosby*, 107 COLUM. L. REV. 746, 786–89 (2007) (arguing that the national unity principle underlying dormant Commerce Clause concerns interstate and not international matters, and that only Congress should determine whether state law affects international affairs so severely that it should be barred).

dormant Commerce Clause to foreign trade, and Congress has given no indication that it should stop. By not forcing the executive or Congress to become involved every time a state law affects interstate or foreign commerce, the doctrine benefits citizens of the United States who want to engage in international trade.

The Court has indicated, however, that the dormant foreign Commerce Clause may be even more restrictive than the dormant interstate Commerce Clause: "When construing Congress' power to 'regulate Commerce with foreign Nations,' a more extensive constitutional inquiry is required."⁵³ In addition to the factors used to determine whether state or local taxation interferes with interstate commerce, the Supreme Court said:

[A] court must also inquire, first, whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation, and, second, whether the tax prevents the Federal Government from "speaking with one voice when regulating commercial relations with foreign governments." If a state tax contravenes either of these precepts, it is unconstitutional under the Commerce Clause.⁵⁴

Subsequent cases continue to refer to the difference in standards, but they have consistently upheld state taxes against dormant foreign Commerce Clause challenges if the tax would pass muster under dormant interstate Commerce Clause analysis.⁵⁵ The Court retreated on the risk of international multiple taxation and seems satisfied in most cases by a state's attempt at fair apportionment, lest concern for multiple taxation override legitimate state taxing power.⁵⁶ Thus, the Court upheld a state

53. *Japan Lines, Ltd. v. County of Los Angeles*, 441 U.S. 434, 446 (1979).

54. *Id.* at 451.

55. *See Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 330–31 (1994) (upholding a California franchise tax on a multinational corporation domiciled in foreign country); *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 193–97 (1983) (upholding a California franchise tax on a multinational corporation domiciled in the United States).

56. The Court in *Container Corp.* distinguished *Japan Lines* on the grounds that it involved an ad valorem property tax on containers used for foreign commerce rather than a franchise tax based on income. *Container Corp.*, 463 U.S. at 185–86. It noted that Japan treated the containers as based in their home ports and imposed its tax on all of them, making the California tax an additional tax, and contrasted the property tax with income-based taxes that could be more readily apportioned. *Id.* "The Court's decision in *Container Corp.* effectively modified, for purposes of income taxation, the Commerce Clause multiple taxation inquiry described in *Japan Lines*,

franchise tax law assessing income of multinational corporations operating in the state even though the state's apportionment reached a higher portion of that income than did the methodology used by many other states and nations.⁵⁷

The Court's "one voice" inquiry was satisfied in the later cases by the lack of any preemptive congressional legislation or treaties.⁵⁸ Even when the executive indicated its opposition to the imposition of a nondiscriminatory tax on foreign commerce, the Court still sustained the tax.⁵⁹ The Court viewed commerce as a congressional domain and held that Congress may indicate that state practices affecting foreign commerce are permissible more passively and with less clarity than would be necessary to uphold discriminatory or very burdensome state laws.⁶⁰ The taxes did not violate any international agreements, and Congress was aware of the state taxes—either exempting them from agreements or refusing to enact legislation that would have superseded the state power.⁶¹ The "one voice" of the nation is no barrier to state action where there is only silence from the relevant federal government branch. In short, the Court is unlikely to invalidate nondiscriminatory taxes and regulations passed by states that incidentally affect foreign nations without some support by congressional or executive action. The privilege or immunity of United States citizens is access to international commerce without discriminatory state regulation, not access without any state regulation at all.

2. *The Intersection of the Dormant Foreign Commerce Clause and Foreign Affairs: State Boycotts of Foreign Goods and the Market Participant Exception*

As a participant in the market, the state or its subdivisions may make

Ltd." *Barclays Bank*, 512 U.S. at 319 n.18.

57. See *Barclays Bank*, 512 U.S. at 302–07, 311–12.

58. See, e.g., *id.* at 328–31; see also *Wardair Can., Inc. v. Fla. Dep't of Revenue*, 477 U.S. 1, 6, 8–9 (1986).

59. See *Barclays Bank*, 512 U.S. at 328–31.

60. *Id.* at 323.

61. See *Wardair*, 477 U.S. at 6 ("In the present case, not only is there no indication that Congress wished to preclude state sales taxation of airline fuel, but, to the contrary, the Act expressly permits states to impose such taxes."); see also *Barclays Bank*, 512 U.S. at 329 ("Congress has focused its attention on the issue, but has refrained from exercising its authority to prohibit state-mandated world-wide combined reporting.").

investments, purchases, or sales that exclude all outsiders, whether from another state or another nation.⁶² These entities cannot require others to boycott, because that discrimination would be a regulation that interferes with foreign commerce. Thus, the dormant Commerce Clause applies to downstream regulation; for example, contractual conditions imposed by the state to control the subsequent behavior of those contracting with it.⁶³ If the state does not use a contractual condition but simply refuses to deal with someone who comes from a disfavored nation or who has done business in that nation, it becomes more difficult to determine whether a state is regulating impermissibly or is merely participating in the market.⁶⁴

The constitutionality of using local and state boycotts to affect the foreign policy of other nations has been the subject of scholarly debate⁶⁵ and conflicting state and lower court decisions.⁶⁶ Such a law does not

62. See *Reeves, Inc. v. Stake*, 447 U.S. 429, 440–41 (1980) (restrictions by the state on sales of its state-produced cement to state residents involve participation in the market and are not subject to dormant Commerce Clause analysis); see generally David S. Bogen, *The Market Participant Doctrine and the Clear Statement Rule*, 29 SEATTLE U. L. REV. 543 (2006) (explaining that the market participant doctrine is analogous to the clear statement rule, and preventing “the federal government from ordering states to make specific purchases or sales without a congressional determination that such regulation is necessary . . . poses no threat to interstate commerce in the light of other safeguards”). But cf. J.T. Hutchens, *The Market-Participant Exception and the Dormant Foreign Commerce Clause*, 5 CARDOZO PUB. L. POL’Y & ETHICS J. 445, 476–77 (2007) (arguing that the market participant exception should not apply to foreign commerce because “[t]he particular concerns raised by foreign commerce trump the notions of fairness and federalism that might be advanced by granting states the power to restrict international trade”).

63. See *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 99–101 (1984) (restrictions on purchaser’s subsequent use of timber are regulations and should be judged by dormant Commerce Clause standards).

64. See Bogen, *supra* note 61, at 576–77 (explaining that refusals to deal can sometimes allow states to, in effect, accomplish the same goals of downstream regulation without suffering invalidation by the Court).

65. See, e.g., Brandon P. Denning & Jack H. McCall, Jr., *The Constitutionality of State and Local “Sanctions” Against Foreign Countries: Affairs of State, States’ Affairs, or a Sorry State of Affairs?*, 26 HASTINGS CONST. L.Q. 307, 310 (1999) (arguing that “state and local . . . involvement in foreign affairs . . . violates the structural allocation of power . . . [and] . . . impermissibly burden[s] foreign commerce”); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1624–25 (1997) (arguing that federal common law of foreign relations lacks justification and state law should not be invalidated by judicial regulation); Wilson, *supra* note 52, at 786–89 (arguing that preemption should be preferred and state policies sustained in the absence of federal action).

66. See, e.g., *Trojan Techs., Inc. v. Pennsylvania*, 916 F.2d 903, 908–09 (3d Cir.

violate any express provision of the Constitution—it is neither part of any agreement with a foreign country nor a tax on importing or exporting goods. The law may escape the dormant Commerce Clause because the state is acting as a market participant; however, the Court has not dealt with boycotts that directly target other states by name. Such a boycott would abridge the Article IV privileges and immunities of citizens of the targeted state.⁶⁷ It would create friction that conflicts with the constitutional policy of union, and would not be justified by concern for the state's own citizens.⁶⁸ For those reasons, the Court might also find that one state's boycott of the products of a named state would be outside the market participant doctrine. There is no similar policy of union with respect to foreign relations; however, there is federal preeminence in the area.⁶⁹

The federal government sets foreign policy for the nation; states are forbidden from entering into treaties with foreign governments,⁷⁰ and even compacts require congressional consent.⁷¹ In the few cases that have reached the Supreme Court involving state laws targeted at activities in a particular foreign country, the Court has used preemption rather than dormant Commerce Clause or equal protection analysis. Where the federal government has set foreign policy with respect to a particular issue, the Court has found state laws preempted by the federal policy, even

1990) (upholding a law requiring companies supplying public works projects to use American steel); *Bd. of Trs. of the Employees' Ret. Sys. of Balt. v. Mayor of Baltimore City*, 562 A.2d 720, 732–33 (Md. 1989) (upholding an ordinance that required city pension funds to divest from South African companies); *K.S.B. Technical Sales Corp. v. N.J. Dist. Water Supply Comm'n*, 381 A.2d 774, 788–89 (N.J. 1977) (upholding a New Jersey “Buy American” statute). *But cf.* *Springfield Rare Coin Galleries, Inc. v. Johnson*, 503 N.E.2d 300, 305–08 (Ill. 1986) (striking down a state tax exemption for rare coins that discriminatorily excluded the South African Krugerrand).

67. *See* *United Bldg. & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208, 221–22 (1984) (applying Article IV to exclusionary market participant behavior of the city of Camden and requiring justification for that behavior).

68. A reciprocity provision in a state purchasing law might, however, survive scrutiny as an attempt to open the market for the state's citizens, which is directly related to the reasons for the market preference for in-state residents. This is quite different from a provision designed to affect the state's policies in unrelated areas. *See infra* Part III.A.3.

69. U.S. CONST. art. I, § 8, cl. 3; *id.* at art. II, § 2, cl. 2.

70. *See id.* at art. I, § 10, cl. 1 (“No State shall enter into any Treaty, Alliance, or Confederation . . .”).

71. *See id.* at art. I, § 10, cl. 3 (“No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power . . .”).

though compliance with both laws would be possible.⁷² Of course, the federal government may authorize state and local boycotts instead of, or in addition to, acting itself.⁷³

When the federal government has taken no action, it is not clear that state boycotts of foreign nations conflict with federal policy. Congressional silence indicates nothing, and there is no constitutional presumption against state boycotts of foreign goods because there is no constitutional interest in promoting the interests of foreign governments. Like other market participants, the state's refusal to trade does not necessarily involve a government function that would create problems for the nation. The pressure brought by such boycotts depends on others joining them, and diverse boycott actions by various states and localities are likely to add to the bargaining power of the federal executive. The boycotted nation is probably behaving badly, and localized minor pressure may be desirable.⁷⁴

Nevertheless, state boycott laws directly impinge on citizens of the United States when the state's refusal to trade also applies to persons who do business with the disfavored nation or nations. Although boycotting the product of the boycotted nation, regardless of who sells it, limits the market for resale of the goods, it does not otherwise impair the decision of the United States citizen to deal with the boycotted country. However, boycotting a company because it has, in an unrelated deal, purchased goods from the boycotted nation pushes foreign policy into an attempt to control the behavior of United States citizens. The foreign Commerce Clause was not enacted to benefit foreign nations, but it was enacted to benefit citizens of the United States who wanted to trade with foreign nations. From the perspective of this section—that access to international trade is a privilege or immunity of citizens of the United States that cannot be abridged by

72. See *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373–74 (2000) (holding a state law barring state entities from buying goods or services from companies doing business with Burma [Myanmar] was preempted by federal statute imposing restrictions on trade with Burma and delegating authority to the President in this area); *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 419–20 (2003) (holding a state requirement that insurance companies disclose past operations in Europe before end of World War II was preempted by executive agreements establishing a forum for resolving claims concerning such operations).

73. For example, recent federal legislation imposing a ban on federal investment and trade in Sudan—in connection with events in Darfur—makes specific provision for states and localities to decide whether to boycott Sudan in their market decisions. See *Sudan Accountability and Divestment Act of 2007*, Pub. L. No. 110-174, § 3, 121 Stat. 2516.

74. *Id.*

states—a state’s economic boycott of companies that do business with a boycotted nation violates the foreign Commerce Clause.

3. *The Foreign Affairs Power*

Although citizens are free from discriminatory state taxes or regulations that might interfere with their trade in foreign commerce, states and localities have attempted to restrict citizens’ interaction with foreign nations and foreign nationals in other ways.⁷⁵ States argue that activities wholly within the state, such as employment, land ownership, or other local business arrangements, are local matters rather than foreign commerce, and that the state may exclude aliens from participation.⁷⁶ The privilege or immunity of citizens to deal with aliens free of state impediments in these areas comes primarily from the centralization of foreign affairs powers in the federal government.⁷⁷

Unlike the right to travel interstate, which limits congressional power, the privilege of access to foreign commerce is derived from the grant of power to Congress; thus, Congress is free to regulate and restrict individuals—the nature of the privilege is to be free from state interference, not from federal action. Nevertheless, the Constitution secures the right of a citizen to engage in foreign commerce without interference from the state by placing the authority to regulate that commerce, and authority over aliens and foreign relations, in the federal government. In this respect, citizens of the United States can claim a privilege or immunity from state regulations that would hinder them from transacting business in foreign commerce or in dealing with aliens or foreign companies within the state.

Exclusion laws impinge on United States citizens who might want to employ aliens; thus, the Supreme Court has struck down many such laws as breaches of the Equal Protection Clause of the Fourteenth Amendment.⁷⁸

75. *See infra* notes 79–84.

76. *Id.*

77. *Id.*

78. *See Bernal v. Fainter*, 467 U.S. 216, 227–28 (1984) (invalidating a citizenship requirement for becoming a notary public); *In re Griffiths*, 413 U.S. 717, 727–29 (1973) (striking down a state law excluding aliens from being licensed attorneys); *Graham v. Richardson*, 403 U.S. 365, 376 (1971) (holding a state law denying welfare benefits to aliens violates equal protection). The Court’s strict scrutiny of alienage classifications does not apply to classifications related to self-government and the democratic process. *See Foley v. Connelie*, 435 U.S. 291, 300 (1978) (upholding a state statute requiring members of police force to be United States

In this context, the Court pointed out that exclusionary laws conflict with federal immigration policy, which permits aliens to be present.⁷⁹ The basic decision whether such persons should be in the country and have access to opportunities is a decision for the federal government.⁸⁰

State laws restricting alien ownership of real property within the state pose further issues. In 1923, the Court held that states have a special public interest in regulating land in the state and could exclude aliens from land ownership.⁸¹ The Court has not overturned this decision,⁸² and there have been no recent challenges.⁸³ Whether a state will permit aliens to hold property is a matter for each state to decide unless there is relevant federal action. A total exclusion of nonresident aliens from holding land may not be offensive to any particular foreign country, but state policies that distinguish between foreign countries are more likely to conflict with federal policies in foreign affairs. Simple reciprocity rules may not offend foreign nations, but an examination of the fairness of the foreign legal system could easily do so.⁸⁴ Thus, the Court has indicated that it will weigh

citizens).

79. See *Graham*, 403 U.S. at 377–78. Discrimination by the federal government against aliens is not subject to strict scrutiny because it may be an exercise of its immigration or foreign relations powers, which permits discretion. See *Mathews v. Diaz*, 426 U.S. 67, 83 (1976).

80. Federal power over immigration comes from the grant to Congress of power to regulate commerce with foreign nations. U.S. CONST. art. I, § 8, cl. 3. For the power to establish a uniform rule of naturalization, see *id.* at art. I, § 8, cl. 4, and for the inference from the prohibition of migration desired by the states prior to 1808, see *id.* at art. I, § 9, cl. 1.

81. *Terrace v. Thompson*, 263 U.S. 197, 217–21 (1923).

82. The Court did, however, strike down a state statute that presumed land transfers to citizens paid for by ineligible aliens were illegal attempts to transfer property to the alien. See *Oyama v. California*, 332 U.S. 633, 645–47 (1948).

83. Many bilateral treaties secure inheritance rights for aliens. Consequently, the issue can arise only when no such agreement has been reached.

84. In *Clark v. Allen*, the Court said that inheritance law was a matter of state concern, and it upheld a California law that prohibited aliens from taking property unless their native country allowed foreign citizens to inherit or hold property. *Clark v. Allen*, 331 U.S. 503, 517–18 (1947). Congress had not forbidden such a reciprocity rule, and no express provision of the Constitution precluded it. *Id.* Nevertheless, the Court struck down a similar Oregon law, saying that it unduly interfered with the federal government's conduct of foreign affairs. *Zschernig v. Miller*, 389 U.S. 429, 432 (1968). Justice Douglas, who wrote both opinions, distinguished the cases on the basis of the degree of intrusion into foreign affairs. See *id.* at 432–33. He characterized *Clark* as a facial challenge to the statute, and the Court assumed that the representation of the foreign government as to reciprocity would govern. *Id.* at 433. The reciprocity law of

the impact on foreign relations against the state's local interest.⁸⁵

B. *Protection of Life, Liberty, and Property Abroad*

Another privilege of a citizen of the United States is to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government. Of this there can be no doubt, nor that the right depends upon his character as a citizen of the United States.⁸⁶

The protection of life, liberty, and property is one of the fundamental rights of citizens. Within the jurisdiction of a state, it is a privilege or immunity of state citizenship and not of citizenship of the United States because the state is the source for such protections.⁸⁷ Outside the state's jurisdiction, however, that protection is the responsibility of the federal government. Thus, Miller wrote that:

Another privilege of a citizen of the United States is to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government. Of this there can be no doubt, nor that the right depends upon his character as a citizen of the United States.⁸⁸

The privilege or immunity of protection abroad has a variety of

Oregon in *Zschernig* insisted that the foreign government permit foreign citizens to inherit or hold property "without confiscation." *Id.* at 431. Douglas found this provision required courts to examine the policies and legal systems of the foreign nation under Oregon law, which could lead to international friction by the Court's characterization of those systems. *Id.* at 433–35.

85. *Zschernig*, 389 U.S. at 441 ("The Oregon law does, indeed, illustrate the dangers which are involved if each State, speaking through its probate courts, is permitted to establish its own foreign policy.").

86. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1872).

87. *See id.* at 77 ("But with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the States . . . lay within the constitutional and legislative power of the States, and without that of the Federal government."). The provision for the security of person and property is a fundamental purpose of state existence, and failure to achieve this goal is a reason for a state's citizens to vote the legislators out of office; however, courts will not intervene to correct the failure because there is so much discretion in the means for affording these protections. Courts are more institutionally suited to enforce negative rights. At the state level, state courts will enforce the restrictions of state constitutions.

88. *Id.* at 79.

elements—the ability of the individual to travel to a foreign nation, the application of United States law to events that occur in that country, and the efforts of the federal government to secure protection for United States citizens from the foreign nation.

1. *The Privilege or Immunity of International Travel*

The right to travel abroad is a correlative of the federal government's role as the source of protection abroad. A citizen has to travel abroad in order to receive protection in a foreign jurisdiction, and international travel is fundamental to access to foreign commerce as well. The Court has recognized a right to international travel, saying "The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment."⁸⁹ However, the court subsequently distinguished the right to travel domestically and internationally, noting that the constitutional right of interstate travel is "virtually unqualified," but the "right" of international travel can be regulated within the bounds of due process.⁹⁰

Statutes have required persons to have passports for international travel at some times and to some places.⁹¹ That regulation is primarily justified as part of the foreign policy of the United States.⁹² "Revocation of a passport undeniably curtails travel, but the freedom to travel abroad with a 'letter of introduction' in the form of a passport issued by the sovereign is subordinate to national security and foreign policy considerations; as such, it is subject to reasonable governmental regulation."⁹³ In view of the deference that the Court pays to the federal government's foreign policy

89. Kent v. Dulles, 357 U.S. 116, 125 (1958).

90. Haig v. Agee, 453 U.S. 280, 307 (1981) (quoting Califano v. Aznovarian, 439 U.S. 170, 176 (1978)).

91. For example, it was a crime to travel outside the Western Hemisphere or to Cuba without a passport. See *Aptheker v. Sec'y of State*, 378 U.S. 500, 507 (1964). Pursuant to statute, the Secretary of State became the sole issuer of passports in 1856. See *Haig*, 453 U.S. at 294. Initially a document for the benefit of the bearer, the passport became a necessary document for travel during wartime and later for international travel at any time, at least to certain parts of the world. *Id.* at 293 ("[T]he only means by which an American can lawfully leave the country or return to it—absent a Presidentially granted exception—is with a passport."); see also 8 U.S.C. § 1185(b) (2000).

92. See *Haig*, 453 U.S. at 307 ("Protection of the foreign policy of the United States is a governmental interest of great importance, since foreign policy and national security considerations cannot neatly be compartmentalized.").

93. *Id.* at 306.

decisions, the federal government has broad power to limit international travel. Thus, the Court has upheld geographical restrictions on passports to avoid the risk of involving the United States in “dangerous international incidents.”⁹⁴ Most of the successful arguments challenging the denial of passports question whether the government acted in a procedurally correct manner, rather than whether the federal government had the power to deny a citizen a passport.⁹⁵

The deference paid to federal foreign policy decisions should not impair the understanding that international travel is a fundamental right and, thus, a privilege or immunity of citizens of the United States. Protection of that right requires the United States to interact with foreign nations. Although courts are not appropriate institutions to review foreign policy, they may be the appropriate forum to determine whether the federal government is acting for reasons of foreign policy or is curtailing travel for inappropriate domestic reasons. The procedural protections available for individual citizens are important to ensure that restrictions are legitimate.

States cannot justify restricting international travel on foreign policy grounds because foreign policy is primarily a federal matter, much like the admission of aliens. Without such a justification, states are precluded from interfering with the right of citizens of the United States to travel internationally. Thus, international travel, like interstate travel, is a privilege or immunity of citizens of the United States.

2. *Application of United States Law Abroad*

The citizen abroad is likely to be subject to the laws of the nation where he or she is present rather than the laws of the United States. Nevertheless, there are several bases for asserting federal jurisdiction over acts committed outside the United States, including the citizenship of the actor or the object of the act. Congress has acted on this premise in several instances. Thus, Congress has extended antidiscrimination laws to apply to

94. *Zemel v. Rusk*, 381 U.S. 1, 15 (1965) (“[T]he Secretary has justifiably concluded that travel to Cuba by American citizens might involve the Nation in dangerous international incidents, and that the Constitution does not require him to validate passports for such travel.”).

95. *See Aptheker*, 378 U.S. at 505–08 (stating that denial of passports on the basis of membership in registered Communist association is invalid for overbreadth); *Kent v. Dulles*, 357 U.S. 116, 129–30 (1958) (stating that Congress did not confer authority on the Secretary of State to deny passports because of Communist beliefs and associations).

United States corporations that discriminate against citizens of the United States, even when that discrimination occurs in other countries.⁹⁶ Congress has also made certain acts criminal under federal law when committed against a United States citizen outside the United States.⁹⁷ Such federal statutes must be consistent with the Constitution. Further, the citizen is entitled to the individual rights and protections of the Constitution if tried in a United States tribunal abroad.⁹⁸ However, as Justice Miller held in 1886, the illegality of the kidnapping of a person in a foreign country to bring him before a court in the United States does not prevent trial or make it a violation of due process.⁹⁹

The ability of the United States to criminalize and punish acts committed outside of its boundaries is limited by the sovereignty of the nation where the acts occurred. There are jurisdictional problems in the reach of the law and potential conflicts with the law of the nation where the events occur. Equally important, the perpetrator may remain outside the United States and largely beyond its reach. According to the Foreign

96. See Paul Frantz, *International Employment: Antidiscrimination Law Should Follow Employees Abroad*, 14 MINN. J. GLOBAL TRADE 227, 228–29 (2005) (identifying laws that apply abroad to citizens working for U.S. companies and urging application to lawful permanent residents as well).

97. For example, taking United States nationals hostage violates the Comprehensive Crime Control Act of 1984, which asserts extraterritorial jurisdiction over hostage crimes committed by or against United States nationals. Pub. L. No. 98-473, § 2002(a), 98 Stat. 2186 (1984) (codified as amended at 18 U.S.C. § 1203 (2000)). The Omnibus Diplomatic Security and Antiterrorism Act of 1986 makes it a crime to conspire to commit homicide against a U.S. national with the intent to coerce, intimidate, or retaliate against a government or civilian population. Pub. L. No. 99-399, § 1202(a), 100 Stat. 896 (1986) (codified as amended at 18 U.S.C. § 2332 (2000)).

98. See *Reid v. Covert*, 354 U.S. 1, 5–6 (1957). Whether such protections apply to aliens has been a subject of controversy. See J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463, 464–65 (2007) (arguing against application of the Constitution to aliens abroad); Zachary Margulis-Ohnuma, Note, *The Unavoidable Correlative: Extraterritorial Power and the United States Constitution*, 32 N.Y.U. J. INT'L L. & POL. 147, 148–50 (1999) (arguing for application of the Constitution to exercises of United States sovereignty abroad and actions done in official capacity with host country consent).

99. See *Ker v. Illinois*, 119 U.S. 436, 441–44 (1886) (holding, in the case of a criminal who had fled to Peru and was abducted back to the United States, that a treaty's extradition terms did not allow a party to find asylum in the country to which he has fled); see also *United States v. Alvarez-Machain*, 504 U.S. 655, 657 (1992) (holding that a Mexican citizen abducted and brought to the United States could be tried in United States courts); *Frisbie v. Collins*, 342 U.S. 519, 522–23 (1952) (upholding the Michigan conviction of a person kidnapped from Chicago by Michigan officers to bring him before court).

Sovereign Immunities Act and the foreign policy principles it represents, foreign sovereigns that injure U.S. citizens may be beyond the jurisdiction of American courts.¹⁰⁰ The legality of behavior usually depends on the law of the jurisdiction; normally the law of the country where the act takes place governs protection of life, liberty, and property, and that nation is primarily responsible for its enforcement. In short, the bulk of the protection of United States citizens abroad occurs abroad.

3. *Securing Fundamental Rights from Foreign Nations*

Congress recognized its obligation to protect the fundamental rights of United States citizens from infringement by foreign nations and, in the Hostage Act, authorized the President to take action short of acts of war to secure the release of American citizens unjustly detained by foreign governments.¹⁰¹ The Hostage Act empowers the President to act, but it

100. Chapter 97 of the Foreign Sovereign Immunities Act of 1976 reads in part:

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1604 (2000). Section 1605 of the Act provides a commercial exception that withdraws immunity from a foreign state if it is carrying on a commercial activity in the United States; performing an act in the United States in connection with its commercial activity elsewhere; or conducting an act outside the United States that has a direct effect in the United States. *See* 28 U.S.C. § 1605(a)(2); *see also* Amelia L. McCarthy, Comment, *The Commercial Activity Exception—Justice Demands Congress Define a Line in the Shifting Sands of Sovereign Immunity*, 77 MARQ. L. REV. 893, 913 (1994) (urging that the FSIA exception for commercial activity be extended to international human rights violations in employment contexts).

101. The Hostage Act provides:

Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war and not otherwise prohibited by law, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress.

22 U.S.C. § 1732 (2000).

does not require executive action.¹⁰² The duty to protect American citizens is confided to the discretion of the President.¹⁰³

Justice Miller suggested in *In re Neagle* that the duty of the executive to “take care that the laws [are] faithfully executed” was not limited to express provisions in the law, but included “the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution.”¹⁰⁴ As one example, Miller related with approval how an American naval officer used threats of force to secure the release of a confined man who had declared his intention to become a United States citizen.¹⁰⁵

Military force, treaties, negotiations, letters, and intermediaries are all methods that might be used to secure protection for citizens, and the political branches have discretion to determine what method is best under the circumstances. Representatives of the United States government may simply talk to the foreign government, employ sanctions, or offer assistance to those governments to gain their agreement to protect United States citizens. Agreements of the United States may protect its citizens abroad, and those agreements may be enforced in the courts of other nations. Such agreements will be reciprocal in nature; provisions, such as the notification of counsel when a national is arrested, need to be enforced domestically as a mechanism for securing protections for one’s own citizens abroad.¹⁰⁶ At the extreme, a government may send troops to rescue its citizens from

102. See Kevin D. Hughes, *Hostages’ Rights: The Unhappy Legal Predicament of an American Held in Foreign Captivity*, 26 COLUM. J.L. & SOC. PROBS. 555, 564 (1993) (discussing contemporary Supreme Court dicta which “places no requirements on the President in hostage-taking situations”); cf. Abner J. Mikva & Gerald L. Neuman, *The Hostage Crisis and the “Hostage Act”*, 49 U. CHI. L. REV. 292, 344 (1982) (“The President is given broad discretion in choosing among diplomatic, military, and economic means of bringing pressure or influence to bear on a foreign state that has imprisoned American citizens unlawfully. His response must be within constitutional bounds . . . and must be a direct means [against] the foreign state. . .”).

103. “[A]s it respects the interposition of the executive abroad, for the protection of the lives or property of the citizen, the duty must, of necessity, rest in the discretion of the president.” *Durand v. Hollins*, 8 F. Cas. 111, 112 (C.C.S.D.N.Y. 1860) (No. 4186) (approval of United States troops bombarding and setting fire to a town in Nicaragua to redress threats to an American diplomat and to property in which Americans had an interest).

104. *In re Neagle*, 135 U.S. 1, 64 (1890) (quoting U.S. CONST. art. II, § 4).

105. *Id.*

106. Domestic law may make that enforcement difficult, as seen in *Medellín v. Texas*, 128 S. Ct. 1346 (2008), discussed *infra* Part III.C.

harm.¹⁰⁷

The Iranian hostage issue provides examples of the various means that the executive may use to protect its citizens abroad. When American diplomats were seized and held hostage in Iran in November of 1979, President Carter issued an order freezing all the assets of Iran in the United States.¹⁰⁸ He demanded the hostages' release and obtained a resolution of the United Nations Security Council calling for their release.¹⁰⁹ The United States also brought an application against Iran in the International Court of Justice (ICJ).¹¹⁰ While the international case was pending, the U.S. military made an abortive attempt to rescue the hostages.¹¹¹ The ICJ held that Iran had breached its obligations under international law and the hostages should be released.¹¹² Finally, the President negotiated an agreement with Iran to free the hostages. The agreement established a claims tribunal and called for suspension of all claims by United States citizens that could be presented to that tribunal.¹¹³ Thus, the President used negotiation, economic sanctions, military force, international law, and international bodies to protect United States citizens. The Supreme Court upheld the President's suspension of claims in federal and state courts because the executive agreement with Iran was sustained by congressional acquiescence and support.¹¹⁴

107. See *supra* notes 102–04 and accompanying text for a discussion of this point in *Durand and Neagle*. See also U.S. Dep't of State, Right to Protect Citizens in Foreign Countries by Landing Forces 44–48 (3d rev. ed. 1934) (Memorandum of the Solicitor); PHILLIP R. TRIMBLE, INTERNATIONAL LAW: UNITED STATES FOREIGN RELATIONS LAW 213 (2002) (“The President’s authority to use the armed forces to protect American diplomats, nationals and property is therefore well-established and does not seem to be at least generally controversial.”).

108. See *Dames & Moore v. Regan*, 453 U.S. 654, 662–63 (1981).

109. See S.C. Res. 457, U.N. Doc. S/RES/457 (Dec. 4, 1979); S.C. Res. 461, U.N. Doc. S/RES/461 (Dec. 31, 1979).

110. See *United States Diplomatic and Consular Staff in Tehran* (United States v. Iran), 1980 I.C.J. 3 (May 24).

111. For a discussion of the failed rescue attempt, see Charles T. Kamps, *Operation Eagle Claw: The Iran Hostage Rescue Mission*, AIR & SPACE POWER J.-ESPAÑOL, Fall 2006 (English version in the Spanish edition), available at <http://www.airpower.maxwell.af.mil/apjinternational/apj-s/2006/3tri06/kampseng.html>. See also Mark Bowden, *The Desert One Debacle*, ATLANTIC MONTHLY, May 2006, at 62.

112. See *United States Diplomatic and Consular Staff in Tehran*, 1980 I.C.J. at 42–43, 45–46.

113. See *Dames & Moore*, 453 U.S. at 665–66.

114. See *id.* at 677–82.

The Court has observed that matters relating “to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.”¹¹⁵ Invasion of another country may jeopardize the security of many other individuals and wreak havoc with American interests abroad. No court would order a President to take such an action. Further, there are no objective standards for federal intervention that are amenable to judicial action. “Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.”¹¹⁶ As a result, the privilege of international protection is not judicially enforceable against the United States.¹¹⁷

The inability of courts to compel the federal government to protect citizens abroad does not make the privilege meaningless. The privilege or immunity is the federal government’s power to act, its moral obligation to do so, and the prohibition on state interference with such actions. Thus, on its face, a United States passport provides international travelers with both identification and needed documents for travel that request foreign governments to respect the holder.¹¹⁸ “Even under a travel control statute . . . a passport remains in a sense a document by which the Government vouches for the bearer and for his conduct.”¹¹⁹ In practice, when citizens’ persons or property are endangered abroad, the government recognizes its obligation and acts on their behalf.

Further, the courts would support the federal government by stopping any attempt by a state to interfere with the federal government’s acts abroad. For example, Miller held in *Neagle* that states could not try a man for murder under state law because the killing occurred while he was acting

115. *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952) (citations omitted).

116. *Haig v. Agee*, 453 U.S. 280, 292 (1981).

117. Compare the attempt in Australia to compel the Australian government to intervene on behalf of Australian citizen David Hicks, who was held in Guantanamo by the United States. Mr. Hicks was released before the Australian courts reached the case, so it was dismissed as moot. See, e.g., Raymond Bonner, *Australia Terrorism Detainee Leaves Prison*, N.Y. TIMES, Dec. 29, 2007, at A7.

118. See *Urtetiqui v. D’Arcy*, 34 U.S. (9 Pet.) 692, 698 (1835) (“[A passport] is a document, which, from its nature and object, is addressed to foreign powers; purporting only to be a request, that the bearer of it may pass safely and freely; and is to be considered rather in the character of a political document, by which the bearer is recognised, in foreign countries, as an American citizen; and which, by usage and the law of nations, is received as evidence of the fact.”); see also *Haig*, 453 U.S. at 292–93.

119. *Haig*, 453 U.S. at 293.

as a bodyguard for a federal judge.¹²⁰ His opinion analogized the bodyguard's action to the behavior of the executive protecting citizens abroad.¹²¹ Thus, it seems clear that states cannot interfere with the provision of federal protection. This is so apparent that there is little litigation on the subject, but it does not make the privilege any less important.

C. *Treaty Rights*

[A]ll rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States, and not citizenship of a State.¹²²

[A] treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. . . . But even in this aspect of the case there is nothing in this law which makes it irrepealable or unchangeable. The Constitution gives it no superiority over an act of Congress in this respect, which may be repealed or modified by an act of a later date.¹²³

A third privilege of citizens of the United States is the right that citizens obtain under treaties with foreign countries. The Constitution provides that the President “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur”¹²⁴ As Justice Miller noted, “all rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States, and not citizenship of a State.”¹²⁵

Treaty rights under international law are generally enforceable only by nations, even in international courts.¹²⁶ But, the Supremacy Clause of

120. See *In re Neagle*, 135 U.S. 1, 75–76 (1890).

121. See *id.* at 64.

122. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79–80 (1872).

123. The Head Money Cases, 112 U.S. 580, 598–99 (1884).

124. U.S. CONST. art. II, § 2, cl. 2.

125. *Slaughter-House Cases*, 83 U.S. at 79–80.

126. See Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1086–97 (1992) (explaining this particularity of international law exists because in that legal order, only sovereign states—not

the Constitution provides that treaties “shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby”¹²⁷ That means, for purposes of United States domestic law, individuals may raise treaty provisions when relevant in their case and state officials and state courts must honor them. Thus, Miller noted:

But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. . . . A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.¹²⁸

Nevertheless, there are a variety of issues about whether particular treaty provisions “prescribe a rule by which the rights of the private citizen or subject may be determined,” and when such a right is “of a nature to be enforced in a court of justice.”¹²⁹ For instance, the treaty may not create an individual right, sovereign immunity may preclude bringing suit, and even individual rights may not be domestic law because they are not self-executing provisions of a treaty.

Not every provision of a treaty creates an individual right in citizens. In the *Head Money Cases*, Justice Miller pointed out that nations and not individuals are the parties to a treaty, and nations enforce most treaties through negotiations in which courts play no role.¹³⁰ Many treaty provisions are designed for government enforcement, and individuals may lack standing to raise them. For example, treaties banning nuclear weapons testing or providing mutual support in the event of hostilities are for the political branches to enforce.

Even if a treaty contains a provision for individual rights, citizens may be barred by sovereign immunity from suing to enforce treaty provisions. States have sovereign immunity from suit by individual citizens, except in

individuals—have rights and duties).

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

128. *Head Money Cases*, 112 U.S. at 598–99.

129. *Id.* at 599.

130. *See id.* at 598.

limited situations.¹³¹ Foreign nations also have sovereign immunity from suits under FSIA in many instances.¹³² Nevertheless, citizens can assert the privilege or immunity of treaty rights in private litigation or as a defense to block application of state laws that violate treaty provisions. Citizens may even be able to enjoin enforcement of such laws without raising the specter of sovereign immunity.¹³³

Perhaps the most important limit on treaty enforcement is the distinction between self-executing and non-self-executing provisions. As the Court said in *Foster v. Neilson*:

Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in Courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.¹³⁴

An agreement that requires further action by its terms, or the terms of its ratification, is not self-executing.¹³⁵ Thus, many treaties do not create immediately applicable domestic law. Agreements that require the appropriation of money will not be effective domestically until Congress

131. See U.S. CONST. amend. XI; *Hans v. Louisiana*, 134 U.S. 1, 18–21 (1890) (holding sovereign immunity precludes suits by citizens against their own states even though the Eleventh Amendment is limited to suits against a state by citizens of another state); see also *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996) (Indian tribe barred from suing state by Eleventh Amendment despite statute enacted under Indian Commerce Clause conferring jurisdiction); *Monaco v. Mississippi*, 292 U.S. 313, 330–32 (1934) (holding that foreign states are also barred from suing states for money damages). The Court would probably treat a treaty as it treats legislation enacted under other congressional powers and, thus, the citizen is unlikely to be able to sue the state for its violation of treaty provisions.

132. See *supra* note 100 and accompanying text.

133. See *Ex parte Young*, 209 U.S. 123, 168 (1908) (injunction to restrain state official is not a suit against the state contrary to sovereign immunity).

134. *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829), *overruled in part on other grounds by* *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833) (modifying the treaty construction in *Foster* based upon textual variances brought to light by subsequent translation of original Spanish version of treaty).

135. See 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(4)(b) (1987) (providing that a treaty is non-self-executing “if the Senate in giving consent to a treaty . . . requires implementing legislation”).

has appropriated the money.¹³⁶ Similarly, Congress must enact a statute before conduct can be a federal crime. Other agreements may be merely hortatory or too vague for judicial enforcement.¹³⁷ Such non-self-executing agreements are binding under international law, but courts of the United States will not enforce them unless their provisions have been implemented by further action of Congress.

Although self-executing treaties are law that must be followed by state courts, the federal government is not equally bound to observe them. As Justice Miller said in the *Head Money Cases*, “there is nothing in this law which makes it irrevocable or unchangeable. In this respect, the Constitution gives it no superiority over an act of Congress, which may be repealed or modified by an act of a later date.”¹³⁸ Thus, Congress may pass a law that conflicts with a treaty provision, and the subsequent statute prevails over the treaty as a matter of United States law.¹³⁹ Even when breach of a treaty is a breach of international law, it is not a breach of United States law for the President or Congress to act within their constitutional powers and breach an international treaty.¹⁴⁰ These results are a consequence of entrusting the entire treaty power to the federal government, while giving it authority to accomplish other ends that may be inconsistent with an agreement it initially made. However, as long as the

136. See U.S. CONST. art. I, § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law. . .”).

137. See Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L L. 695, 713–15 (1995) (discussing the dilemma facing courts and individuals seeking enforcement when a treaty’s provisions merely encourage legislative action or are too vague to determine what conduct constitutes violation).

138. *The Head Money Cases*, 112 U.S. 580, 599 (1884).

139. *Id.*

140. There remains a significant question whether and under what circumstances a President may terminate a treaty. Compare John Yoo, *Politics as Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CAL. L. REV. 851, 873 (2001) (reviewing FRANCES FITZGERALD, *WAY OUT THERE IN THE BLUE: REAGAN, STAR WARS AND THE END OF THE COLD WAR* (2000)) (asserting Presidential power to terminate), with Michael P. Van Alstine, *The Judicial Power and Treaty Delegation*, 90 CAL. L. REV. 1263, 1271–72 n.57 (2002) (suggesting limits on power to terminate treaties that create individually enforceable rights); see also Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 655–56 (2000) (arguing that executive branch power to unilaterally terminate a treaty is still an unsettled issue). In many instances, courts would be reluctant to intervene with decisions of the Executive Branch. See *Goldwater v. Carter*, 444 U.S. 996 (1979) (vacating Court of Appeals’ decision on President’s termination of a treaty with Taiwan as moot). Nevertheless, the issue could be different with respect to provisions conferring individual rights, especially in establishing commercial law.

treaty has not been altered by inconsistent action on the federal level, the states are bound by its terms.¹⁴¹

The Court's recent decision in *Medellín v. Texas* dramatically illustrates the difference between self-executing and non-self-executing treaty provisions by imposing significant limits on presidential power to implement treaties or to resolve international disputes.¹⁴² The Court held that the provision in the United Nations Charter by which the United States agreed to comply with decisions of the ICJ was not self-executing, and that ICJ decisions were not laws of the United States until Congress enacted a law enforcing them.¹⁴³ Because they were not domestic law, the President lacked power to enforce them.¹⁴⁴

Ernesto Medellín, a Mexican national, was arrested in Texas for the rape and murder of two young women.¹⁴⁵ He was advised of his right to an attorney, but not of his rights under the Vienna Convention on Consular Relations to have the Mexican consulate notified of his detention.¹⁴⁶ He confessed, was later convicted of capital murder, and his conviction was affirmed on appeal.¹⁴⁷ He first raised the Vienna Convention claim in postconviction proceedings, but the state court held the claim was barred because he had failed to raise it at trial or on direct review.¹⁴⁸

Mexico filed an application in the ICJ with respect to Medellín and fifty other Mexican nationals facing the death penalty (including Avena, who was first alphabetically).¹⁴⁹ In the *Avena* case, the ICJ said that the right to consular notification under the Vienna Convention was an

141. See *Hauenstein v. Lynham*, 100 U.S. (10 Otto) 483, 488–89 (1879).

142. *Medellín v. Texas*, 128 S. Ct. 1346 (2008).

143. *Id.* at 1356–57; see also *id.* at 1368 (“The President has an array of political and diplomatic means available to enforce international obligations, but unilaterally converting a non-self-executing treaty into a self-executing one is not among them. The responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress.”).

144. *Id.* at 1368.

145. *Id.* at 1354.

146. *Id.*; see also Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

147. *Medellín*, 128 S. Ct. at 1354.

148. *Id.* That was a sufficient ground according to the Supreme Court's opinion in *Breard v. Greene*, which held that state procedural rules could bar the defendant from raising a breach of a self-executing provision of a treaty. *Breard v. Greene*, 523 U.S. 371, 375 (1998) (per curiam).

149. *Medellín*, 128 S. Ct. at 1352.

individual right, that the United States had violated it, and that the United States must review the convictions to determine whether the violation of the Convention prejudiced the defendants—the U.S. could not allow procedural default rules to bar such a review.¹⁵⁰ However, in 2006 the Supreme Court held in *Sanchez-Llamas v. Oregon* that rights under the Convention were subject to state court procedural default rules.¹⁵¹

Because *Sanchez-Llamas* precluded Medellín from arguing that the Convention required review of his conviction, he argued instead that the United States was bound by Article 94(1) of the Charter of the United Nations, which states that “[e]ach Member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which it is a party.”¹⁵² Further, he argued that his case was governed by a memorandum issued by President Bush enforcing the ICJ decision, which stated that the United States would discharge its international responsibilities by having state courts give effect to the ICJ decision in *Avena* with respect to the fifty-one Mexican nationals involved in that application in accordance with general principles of comity.¹⁵³

The Supreme Court rejected Medellín’s contentions.¹⁵⁴ It held the

150. *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 59–60, 70–72 (Mar. 31).

151. *See Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2687 (2006). The Court stated that “[n]othing in the structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on our courts.” *Id.* at 2684. It concluded that “claims under Article 36 of the Vienna Convention may be subjected to the same procedural default rules that apply generally to other federal-law claims.” *Id.* at 2687; *see also Medellín*, 128 S. Ct. at 1352–53 (“In *Sanchez-Llamas v. Oregon* . . . we held that, contrary to the ICJ’s determination, the Vienna Convention did not preclude the application of state default rules.”) (citation omitted). In addition to the procedural bar, the Court held that even if consular notification was a self-executing provision of the Convention, the Convention did not provide any particular remedy for a breach. *See Sanchez-Llamas*, 126 S. Ct. at 2678. In this case, the Vienna Convention did not require the suppression of evidence obtained before consular notification. *Id.*

152. *See Medellín*, 128 S. Ct. at 1354 (quoting U.N. Charter art. 94(1)).

153. *See id.* at 1353, 1367 (citing President George W. Bush’s Memorandum for the Attorney General (Feb. 28, 2005), the text of which is available at <http://www.whitehouse.gov/news/releases/2005/02/20050228-18.html>). The case was initially filed immediately after Bush’s memorandum, but the writ of certiorari was dismissed as “improvidently granted” because the state courts had not yet heard the motion filed after the memorandum. *See Medellín v. Dretke*, 544 U.S. 660, 662 (2006).

154. *See Medellín*, 128 S. Ct. at 1357 (“Because none of these treaty sources creates binding federal law in the absence of implementing legislation, and because it is uncontested that no such legislation exists, we conclude that the *Avena* judgment is not automatically binding domestic law.”); *see also id.* at 1372 (“The President’s

obligation of the United States to comply with a decision of the ICJ was not self-executing, but required congressional legislation.¹⁵⁵ It then held that the President lacked authority to implement non-self-executing treaty provisions because only Congress could make such provisions the law of the United States.¹⁵⁶

The Court in *Medellín* indicated that treaty provisions must “clearly” accord the treaty domestic effect in order for them to be self-executing.¹⁵⁷ Whether treaty provisions should be presumed to be self-executing or presumed not to be self-executing has been a controversial issue.¹⁵⁸ Although the Court’s insistence on the clarity of the treaty’s language and the need for political responsibility suggests a presumption against self-executing treaties, the Court said “neither our approach nor our cases require that a treaty provide for self-execution in so many talismanic words”¹⁵⁹ The Court continued, “[o]ur cases simply require courts to decide whether a treaty’s terms reflect a determination by the President who negotiated it and the Senate that confirmed it that the treaty has

Memorandum is not supported by a ‘particularly longstanding practice’ of congressional acquiescence The Executive’s narrow and strictly limited authority to settle international claims disputes pursuant to an executive agreement cannot stretch so far as to support the current Presidential Memorandum.”) (citations omitted).

155. *See id.* at 1356–57.

156. *See id.* at 1368; *see also supra* note 143 and accompanying text.

157. *See Medellín*, 128 S. Ct. at 1369.

158. *See* Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT’L L. 760, 760 (1988) (arguing that the distinction between self-executing and non-self-executing treaties is inconsistent with the Constitution); David Sloss, *Schizophrenic Treaty Law*, 43 TEX. INT’L L.J. 15, 16 (2007) (exploring the varied criteria for determining whether a treaty is self-executing under nationalist and transnationalist models and arguing against the nationalist position); David Sloss, *When Do Treaties Create Individually Enforceable Rights? The Supreme Court Ducks the Issue in Hamdan and Sanchez-Llamas*, 45 COLUM. J. TRANSNAT’L L. 20, 110–13 (2006) (analyzing the widespread acceptance in the lower courts of the nationalist presumption against self-executing treaties and the Supreme Court’s need to resolve the issue in favor of the transnational model); Carlos Manuel Vázquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154, 2156–58 (1999) (arguing that text and doctrine support a presumption that treaties are self-executing); Vázquez, *supra* note 126, at 1114–61 (arguing that the doctrine of self-executing treaties is a mask for other distinct issues a court must examine in determining whether individuals can enforce a particular treaty); John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999) (examining Framers’ intent and arguing against judicial enforcement of treaties that are within the scope of congressional powers unless Congress enacts further implementing legislation).

159. *Medellín*, 128 S. Ct. at 1366.

domestic effect.”¹⁶⁰ It distinguished the cases finding treaties to be self-executing on the basis of the particular facts and treaty language involved.¹⁶¹ The same may be said of *Medellín* itself, in which the finding of non-self-execution resulted from a number of different factors, including the term “‘undertakes to comply,’”¹⁶² the express provision of a diplomatic rather than judicial remedy,¹⁶³ and the views of the executive branch.¹⁶⁴

Given past decisions that found treaties to be self-executing, clear statements of rights should presumptively be understood as self-executing. The Court has given effect to such statements in previous decisions and, therefore, the President and the Senate may be presumed to understand that they have domestic effect.¹⁶⁵ The privileges or immunities perspective suggests that citizens have a fundamental right to have their nations act internationally on their behalf, which seems to support the view that individual rights provisions should be presumed self-executing. Other factors or constitutional history might be persuasive to the contrary, but the contribution of the Privileges or Immunities Clause to the debate is to urge participants to consider the individual as the object of government acts.

D. Customary International Law

[T]he question is as much within the province of the State court, as a

160. *Id.*

161. *See id.* at 1364–65.

162. *Id.* at 1358 (quoting U.N. Charter at 94(1)); *see id.* at 1373 (Stevens, J., concurring in the judgment) (“[T]he best reading of the words ‘undertakes to comply’ is, in my judgment, one that contemplates future action by the political branches.”).

163. *Id.* at 1359.

164. *See id.* at 1361 (“The Executive Branch has unfailingly adhered to its view that the relevant treaties do not create domestically enforceable federal law.”).

165. *See, e.g.,* *Kolovrat v. Oregon*, 366 U.S. 187, 191 (1961) (held property disposition to only living heirs, who resided in Yugoslavia, was valid under an 1881 treaty between the United States and Serbia); *Jordan v. Tashiro*, 278 U.S. 123, 128–30 (1928) (holding that alien freedom to engage in business enterprise is based upon treaty construction in which obligations of the treaty should be liberally construed); *United States v. Rauscher*, 119 U.S. 407, 420 (1886) (holding in regard to the extradition of the defendant that “in the treaty now under consideration, [the enumeration of offenses] is so specific, and marked by such a clear line in regard to the magnitude and importance of those offenses, that it is impossible to give any other interpretation to it than that of the exclusion of the right of extradition for any [other offenses]”); *see also* Michael P. Van Alstine, *Federal Common Law in an Age of Treaties*, 89 CORNELL L. REV. 892, 914–16 & nn.139, 142–43 (2004) (canvassing Supreme Court opinions upholding self-executing treaties).

question . . . of the law of nations, of which that court is bound to take notice, as it is of the courts of the United States. And . . . it is [a subject] in which we [the Supreme Court] have no right to review their decision.¹⁶⁶

Customary international law is another international privilege or immunity of citizens of the United States. International law consists of treaties and customary law.¹⁶⁷ In *The Paquete Habana*, Justice Gray wrote that “[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.”¹⁶⁸ Although Article VI of the Constitution states that treaties are the supreme law of the land in the United States, there is no similar statement about customary international law.¹⁶⁹ Unlike treaties, customary law is not created by express agreement ratified by the Senate or by the actions of a politically responsive domestic body, but “from a general and consistent practice of states followed by them from a sense of legal obligation.”¹⁷⁰ Nations are bound internationally by customary law through the consent they manifest in their statements or actions, including

166. *Ker v. Illinois*, 119 U.S. 436, 444 (1886).

167. A subspecies of the treaty is the rule made by an international body of which the nation is a member—the membership is likely to be a treaty obligation, but the specific principle or rule established by the body may or may not be binding upon the member nations. See TRIMBLE, *supra* note 107, at 121–22 (explaining that while the non-self-executing nature of a treaty may allow Congress to change the scope of treaty commitments and thus “effectively determine the scope of U.S. obligations under international laws,” domestic and foreign political pressures can force compliance with such a principle or rule).

168. *The Paquete Habana*, 175 U.S. 677, 700 (1899). Justice Gray’s statement came in a case that involved the legality of the capture of two fishing vessels, the *Lola* and the *Paquete Habana*, during the United States blockade of Cuba in the Spanish-American War. The Court held the capture of the ship was illegal under international law. *Id.* at 713–14. However, the Navy had orders to abide by international law and, therefore, the Court’s statement that international law is part of United States law was not critical to the decision. Further, *The Paquete Habana* was decided before *Erie Railroad Co. v. Tompkins*, 306 U.S. 64 (1938), and probably considered international law to be part of the general common law and not specifically federal common law.

169. See U.S. CONST. art. VI.

170. 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987); see also TRIMBLE, *supra* note 107, at 177 (“Customary international law is defined as the practice states follow out of a sense of legal obligation.”).

consent implied by their failure to announce their rejection of a well-established norm.¹⁷¹ The Executive, as the international representative of the United States, plays a major role in both defining and creating customary international law.¹⁷² But the Executive's participation in creating, defining, and assenting to customary international law does not necessarily make customary law binding domestically in state or federal United States courts.

Customary international law prevails over state law only if the Constitution or the constitutionally authorized federal government body incorporates it into federal law. There are a number of areas in which the Court has found that customary international law has been adopted in the United States, but there is great controversy over whether it should be considered enforceable without an express decision of a federal political body.¹⁷³

1. *Express Federal Incorporation of Customary International Law*

The Constitution specifically provides that Congress has power “[t]o define and punish Piracies and Felonies committed on the high Seas, and

171. Pronouncements by the Department of State are significant indications as to the views of the United States on whether particular practices are customary international law. Some of the common subjects of customary international law include the immunity of diplomats, the reach of national jurisdiction off the coast of a state, and the acknowledgment of the validity of acts by a state within a foreign state. *See* TRIMBLE, *supra* note 107, at 177–86 (discussing the operation of these subjects in the United States). Some subjects of customary law are also subjects of treaties—the treaties indicate both practice and international obligation, but bind only their signatories. Non-parties, however, may follow the practices specified in the treaty and do so because they believe that the conduct is required by international law. *See* Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 679–80 (1986) (explaining that a rule of a treaty might become applicable to a non-party under customary international law because of that party's action or acquiescence in accordance with the general practice of party states—even though the non-party had no direct part in the rule-making). This may result in creating a customary rule binding on non-parties.

172. *See* TRIMBLE, *supra* note 107, at 177–84; Michael P. Van Alstine, *Executive Aggrandizement in Foreign Affairs Lawmaking*, 54 UCLA L. REV. 309, 318–19 (2006) (“[T]he president possesses a near monopoly over the creation of sovereign obligations of the United States” and “serve[s] as the formal representative[] of the United States in international organizations.”).

173. Even its strongest proponent has expressed uncertainty over the basis for finding that customary international law is law of the United States. *See* LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 237–38. (2d ed. 1996).

Offenses against the Law of Nations.”¹⁷⁴ This is the only express recognition of customary international law in the Constitution, and it empowers Congress to define and punish violations of customary international law. The power to punish offenses like piracies and felonies suggests a focus on the criminal responsibility of individuals rather than punishing violations by nations, which are abstract entities.¹⁷⁵ Nevertheless, the language is broad enough to sustain legislative authority to define customary international law and assure obedience to it. As Chief Justice Waite said in connection with a federal law punishing the counterfeiting of foreign currency:

A right secured by the law of nations to a nation, or its people, is one the United States as the representatives of this nation are bound to protect. Consequently, a law which is necessary and proper to afford this protection is one that Congress may enact, because it is one that is needed to carry into execution a power conferred by the Constitution on the Government of the United States exclusively.¹⁷⁶

Such statutes, when they confer rights on individual citizens of the United States, are privileges or immunities of citizens of the United States.

a. *Statutes and Treaties.* Although the Constitution grants the power to define the law of nations to Congress, other federal entities also define or enforce it. Courts use customary international law to construe statutes and treaties. The source for the application of customary law is the act of Congress (statute) or President and Senate (treaty), but the basis for the decision is the court’s presumption that the source of the law was derived in the context of international customs and norms that would naturally be included in the law’s interpretation.¹⁷⁷

Some statutes specifically reference customary international law, and the Court must determine its substance in order to apply the statute.¹⁷⁸

174. U.S. CONST. art. I, § 8, cl. 10.

175. See 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 66–73 (photo. reprint 1979) (1769); see also G. Edward White, *A Customary International Law of Torts*, 41 VAL. U. L. REV. 755, 763–69 (2006).

176. *United States v. Arjona*, 120 U.S. 479, 487 (1887).

177. See *infra* note 180 and accompanying text.

178. See, e.g., 18 U.S.C. § 1651 (2000) (“Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.”); Foreign Sovereign Immunities Act of 1976 § 4(a), 28 U.S.C. § 1605(a)(3) (2000) (“A foreign state shall not

The Court also interprets other statutes in the light of customary international law and uses customary international law to fill gaps in the statutory scheme.¹⁷⁹ Most importantly, the court uses customary international law to interpret ambiguous statutes. At the dawn of the nineteenth century, Chief Justice Marshall insisted in *Murray v. Schooner Charming Betsy* that “an act of congress ought never to be construed to violate the law of nations if any other possible construction remains”¹⁸⁰

Customary international law may be used in treaty interpretation as well.¹⁸¹ For example, Justice Miller used customary international law in *United States v. Rauscher*.¹⁸² Although the treaty did not expressly forbid it, Miller construed an extradition treaty with Great Britain to prohibit proceeding against an extradited person on a charge that was not in the warrant of extradition.¹⁸³ As part of his analysis, Justice Miller cited writers on international law.¹⁸⁴ Miller noted that “according to the doctrine of publicists and writers on international law, the country receiving the offender against its laws from another country had no right to proceed against him for any other offence than that for which he had been delivered up.”¹⁸⁵ He then concluded that “this treaty did not intend to depart in this respect from the recognized public law which had prevailed in the absence of treaties”¹⁸⁶

be immune from the jurisdiction of courts of the United States or of the States in any case in which rights in property taken in violation of international law are in issue”); see also Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869, 919–20 (2007) (discussing the federal piracy statute and FSIA).

179. Bradley, Goldsmith & Moore, *supra* note 178, at 919–21. The authors refer to lower court decisions on the FSIA and to *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 623 (1983), as examples of the use of customary international law as a gap filler in the interpretation of statutes.

180. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (“It has also been observed that an act of congress ought never to be construed to violate the law of nations if any other possible construction remains, and, consequently, can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country. These principles are believed to be correct”).

181. See Bradley, Goldsmith & Moore, *supra* note 178, at 921–22.

182. *United States v. Rauscher*, 119 U.S. 407 (1886).

183. *Id.* at 419–20, 424.

184. *Id.* at 416–17 (citing law review articles and treatises).

185. *Id.* at 419.

186. *Id.* at 420.

b. *Federal Common Law.* Even when Congress has not enacted a substantive law, courts use customary international law to resolve issues within their jurisdiction—such as admiralty cases and disputes between states—where the federal courts are authorized to make federal common law.¹⁸⁷ After *Erie Railroad Co. v. Tompkins*, “there is no general federal common law,”¹⁸⁸ but there are specific areas ancillary to the Constitution or federal statutes in which the federal courts must decide issues, and they may use customary international laws as norms for the rules they create. Another example of this federal common law is *Sosa v. Alvarez-Machain*, in which the Court found that aliens could bring tort actions under the Alien Tort Claims Act¹⁸⁹ for violations of customary international law.¹⁹⁰

The Court said the Alien Tort Act was intended merely as a jurisdictional grant and was not intended to create substantive causes of action.¹⁹¹ However, the drafters understood that there were actions at common law for violation of international law in at least three instances: violation of safe conduct, infringement of the rights of ambassadors, and piracy.¹⁹² The Supreme Court held that this expectation of the Congress that drafted the statute was a “limited, implicit sanction”¹⁹³ for the Court to find customary international law as a common law action in certain

187. The judicial power of the United States in Article III, Section 2, extends to “all Cases of admiralty and maritime Jurisdiction” and to “Controversies between two or more States.” U.S. CONST. art. III, § 2. In resolving conflicts in these areas, the Court may turn to customary international law as a rule of decision. See Bradley, Goldsmith & Moore, *supra* note 178, at 915–19.

188. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

189. 28 U.S.C. § 1350 (2000) (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”).

190. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). Dr. Alvarez-Machain had been kidnapped in Mexico and brought to the United States to stand trial for allegedly abetting the torture of an American drug enforcement agent. *Id.* at 697–98. He was found not guilty and returned to Mexico. *Id.* at 698. He then filed suit in federal district court against Jose Francisco Sosa, a DEA agent involved in his kidnapping. *Id.* Alvarez-Machain also filed suit against the federal government under the Federal Tort Claims Act. *Id.* The Federal Tort Claims Act suit failed because the waiver of the sovereign immunity of the United States does not apply to any claim “arising in a foreign country.” *Id.* at 699 (quoting 28 U.S.C. § 2680(k)). The Court decided that the tortious event occurred in Mexico, regardless of the fact that it was planned in California. *Id.* at 704.

191. *Id.* at 713–14.

192. *Id.* at 720.

193. *Id.* at 712.

circumstances: “Accordingly, we think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.”¹⁹⁴

Although the Court concluded that the claim of Alvarez-Machain did not satisfy this standard of a norm defined with specificity and accepted by the civilized world, the Court asserted its jurisdiction to apply customary international law as an inference from the action of Congress.¹⁹⁵

The federal courts are not empowered to apply customary international law in every case, but only to use it as a source for the rules that they are otherwise empowered to create in the narrow areas of federal common law. States may also apply customary international law in cases when there is concurrent or even no federal jurisdiction.

c. *Executive Action.* The Court has held that the President has power in foreign affairs as the chief executive of the nation.¹⁹⁶ In this respect, the President may deal with matters that are governed by international law in order to comply with its command as long as he is acting with the support of Congress or within his independent powers. For example, the behavior of the Executive in suggesting immunity for foreign heads of state arguably defines and enforces customary international law.¹⁹⁷ Diplomatic immunity may be connected to the President’s power to receive ambassadors and other public ministers.¹⁹⁸

Presidential agreements with foreign nations that are not treaties under the Constitution are still internationally binding. Where the agreement is within the power of the President in foreign relations, it binds states.¹⁹⁹ Such agreements may create enforceable rights in United States

194. *Id.* at 725.

195. *See id.* at 738.

196. *See* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319–20 (1936) (the Constitution vests in the president “plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations”).

197. *See* Bradley, Goldsmith & Moore, *supra* note 178, at 922–24; Harold Hongju Koh, Commentary, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1839–40 (1998) (discussing the interaction between customary international law, executive policy, the courts, and Congress in the area of sovereign immunity).

198. *See* U.S. CONST. art. II, § 3 (“[H]e shall receive Ambassadors and other public Ministers . . .”).

199. *See* United States v. Pink, 315 U.S. 203, 230 (1942) (international

citizens and thus be a privilege or immunity of citizens of the United States. When Congress legislates to implement the terms of an executive agreement, its legislation will likely be valid, and it erases any questions as to the validity of the agreement under executive power alone.²⁰⁰ The line between treaties and the legitimate agreements of the executive has been a wavering one, little tested in the courts until recently.²⁰¹

However, the *Medellín* decision limited the President's role in defining and enforcing customary international law when Congress is silent, and the President lacks any relevant independent power granted by the Constitution.²⁰² In *Medellín*, the United States government argued that even if the President had no power to enforce the ICJ decision on the Vienna Convention, the President could act to resolve an international dispute with Mexico by directing state courts to review the cases of the Mexican nationals involved in the ICJ decision.²⁰³ The Supreme Court disagreed. When there is such a dramatic effect on the traditional

compacts and treaties, like the assignment of claims concurrent with recognition of Soviet Union, have the same "dignity" as a treaty); *United States v. Belmont*, 301 U.S. 324, 326–27 (1937) (United States can sue on assignment of Soviet claims "effected by an exchange of diplomatic correspondence" and contrary state policies must give way); *see also* *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 416 (2003) ("[V]alid executive agreements are fit to preempt state law, just as treaties are . . .").

200. If the President acted constitutionally, implementation by Congress is "necessary and proper for carrying into Execution . . . Powers vested by this Constitution in the Government of the United States." U.S. CONST. art. I, § 8, cl. 18. If the President exceeded constitutional authority, the implementing legislation would still likely be constitutional as an exercise of one of the powers expressly granted to Congress, such as the regulation of commerce with foreign nations or the power to tax and spend for the general welfare. U.S. CONST. art. II, § 8, cl. 13. If the agreement was a treaty ratified by the Senate, Congress may implement it even though it would otherwise be beyond congressional power. *See Missouri v. Holland*, 252 U.S. 416, 435 (1920) (upholding a treaty and implementing a statute protecting migratory birds against state harms).

201. *See Medellín v. Texas*, 128 S. Ct. 1346, 1368 (2008) (holding the President lacked power to override a state law to settle an international dispute based on non-self-executing aspects of a treaty); *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (upholding the suspension of claims against Iran pursuant to an executive agreement with Iran); *see also* *Van Alstine*, *supra* note 172, at 345–48 (arguing that the power to create executive agreements should not equal a general presidential lawmaking power under a careful analysis of *Garamendi*).

202. *See Medellín*, 128 S. Ct. at 1368 ("The President's authority to act, as with the exercise of any governmental power, 'must stem from an act of Congress or from the Constitution itself.'" (citing *Dames & Moore*, 453 U.S. at 668; *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952))).

203. *See id.* at 1371.

operations of state government, the resolution of international problems must come from Congress. The Court said the precedents supporting presidential resolution of civil claims were not a sufficient basis to find congressional acquiescence for his intervention in state criminal processes.²⁰⁴ “The President may comply with the treaty’s obligations by some other means, so long as they are consistent with the Constitution.”²⁰⁵ In *Medellín*, the Court made it clear that the power of the President to make a legal rule that is binding domestically is limited, even if that rule is designed to facilitate international relations. The lawmaking power still resides primarily with Congress.²⁰⁶

While *Medellín* seems to demand congressional authorization for the President to be able to make law domestically, it does not question the ability of the Executive to act in a manner that would bind the nation under international law. Even if such behavior does not create directly enforceable domestic law that would displace all conflicting state law, it establishes foreign policy that still may preclude state laws targeted at obstructing that policy.²⁰⁷ For example, presidential foreign policy pronouncements may not override generally applicable state laws, but state laws that target specific foreign policies trespass on the nation’s foreign relations power.

2. *The Dormant International Law Power*

While there is universal agreement that customary international law is federal law when the appropriate federal actor adopts it, there is controversy over its applicability as law when neither Congress nor the executive has acted to adopt it. Some believe that courts should not apply customary international law unless the political branches specifically authorize the court to do so.²⁰⁸ Others argue that the political branches are

204. *See id.* at 1371–72.

205. *Id.* at 1371.

206. *See* Van Alstine, *supra* note 172, for an excellent discussion of the limits on presidential power.

207. *See id.* at 350 (“It may be correct to observe that, in its capacity as the external representative of the nation, the national executive may create foreign affairs norms of sufficient force to preclude affirmative state interference.”).

208. *See* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 817–20 (1997) (arguing that customary international law should not have the same status as federal common law, thus requiring authorization for the courts to apply it); Jack L. Goldsmith & Eric A. Posner, *Understanding the Resemblance Between Modern and Traditional Customary International Law*, 40 VA. J. INT’L L. 639, 640–41 (2000)

bound by customary international law.²⁰⁹ The *Sosa* case touched off further debate on whether customary international law is federal common law.²¹⁰ *Medellín* seems to suggest that Congress must act specifically in order to make international law domestically binding unless there is a self-executing treaty provision, but *Medellín* focused on presidential power and issues of remedy after breach.²¹¹ It did not consider customary international law except in connection with an attempt to get around the non-self-executing nature of a treaty provision.

This Article proposes a modified dormant Law of Nations Clause, analogizing the role of the court under the Law of Nations Clause to its role under the Commerce Clause. The issue arises at the point where the breach would occur—where a law that violates customary international law is applied—not at the remedial stage after breach has occurred. The federal obligation to protect citizens abroad provides the source for the inference that customary law should be obeyed in the absence of contrary intent. Where state law is not general but targeted at the conduct of foreign citizens or states in a manner that violates customary international law, it

(arguing that customary international law does not influence national behavior—the faulty basis on which modern proponents of customary international law application premise their ideas—and thus courts should not be able to apply it without authorization); TRIMBLE, *supra* note 107, at 670–71 (arguing that customary international law is not equal to constitutional common law, and thus should only be applied by the political branches of our government and not the judiciary).

209. See Jordan J. Paust, *The President Is Bound by International Law*, 81 AM. J. INT'L L. 377, 378 (1987) (“The President must obey and faithfully execute supreme federal law whether it is customary or treaty-based.”).

210. See Martin S. Flaherty, *The Future and Past of U.S. Foreign Relations Law*, 67 LAW & CONTEMP. PROBS., Autumn 2004, at 169, 173 (“[I]nternational custom [is] part of enforceable federal law even in the absence of a statute.”); Harold Hongju Koh, *The Ninth Annual John W. Hager Lecture, The 2004 Term: The Supreme Court Meets International Law*, 12 TULSA J. COMP. & INT'L L. 1, 12 (2004) (arguing that customary international law must fit into federal common law because it is not state law, and if action by the political branches were required, it would have no status in United States law); Ralph G. Steinhardt, *Laying One Bankrupt Critique to Rest: Sosa v. Alvarez-Machain and the Future of International Human Rights Litigation in U.S. Courts*, 57 VAND. L. REV. 2241, 2259 (2004) (“[I]nternational law is part of our law and does not require further implementation by statute, treaty, or executive proclamation to be binding on domestic courts.”). *Contra* Bradley, Goldsmith & Moore, *supra* note 178, at 902–06 (positing that *Sosa* involved congressional authorization of the application of customary international law, and thus the Court did not support its application without such authorization).

211. See *Medellín* discussion *supra* Part III.C.

should be a violation of the dormant foreign affairs power.²¹² Just like executive foreign policy may mark off an area as beyond the proper functioning of the states, customary international law is a form of foreign policy supported at least inferentially by the federal government; thus, it preempts the operation of state governments in the field.

Further, this Article suggests that courts should invalidate even generally applicable state laws to the extent they violate customary international law, but this supremacy of customary international law over state law is subject to at least three types of limitations: the same concerns that render treaties non-self-executing; the requirements of ascertainment and specificity imposed in *Sosa* to respond to the uncertainty of customary law and the sovereignty of the states; and any indication by the federal government that the specific customary international law will not be followed domestically.

a. *The Implication of a Constitutional Presumption.* Even in the absence of a statute or express constitutional provision, the Court has found states were precluded from acting by the implications from specific constitutional provisions. For example, the Court has implied limits on state action from the Constitution's affirmative grant of power to Congress in foreign commerce and from the President's power in foreign affairs, even when those branches were silent.²¹³ The Court presumes that state discrimination against other states would run counter to the purpose of the grant of power unless Congress consents, and that some state regulations of foreign entities are incompatible with the President's power to deal with foreign nations. Similarly, the Court should find customary international law prevails over state laws if those laws conflict with the purpose of grants of power to other branches of the federal government.

International law is a means for the protection of the person and property of citizens abroad; thus, compliance with international law assists in the performance of an obligation owed by the federal government to its citizens.²¹⁴ Nations follow certain rules in order to encourage other nations to follow the same rules—cooperation may be in the self-interest of several nations, and establishing principles of customary international law is a method of signaling issues for cooperation.²¹⁵ For example, unless a state

212. See *supra* Part III.A.3.

213. See *supra* Part III.A.

214. See *supra* Part III.B.

215. Critics challenge the existence of customary international law—arguing

protects the diplomats of other nations, its own diplomats will be at risk. The same is true of the property of other countries. It is not that violation of international law will bring forth a direct coercive sanction, but that it tends to reduce the ability of the violating state to persuade other nations to abide by customary international law when it undermines the rules themselves. States follow international law in order to gain certain benefits, and ignoring its terms deprives the nation of the potential gains from adherence.

Therefore, the decision to breach international law should only be made for substantial reasons after considering the impact of the decision. Given the benefits from obedience to international law and the role of the nation in forming international law by its practice, it is appropriate to assume that the United States would choose to abide by international law as a normal matter. Further, customary law is built by state practice undertaken with the state's understanding that it is legally obligated to so act. Since customary international law is based on state behavior, it would be anomalous to assume that the United States would not engage in the same behavior as the vast majority of nations. Courts should make that same assumption—and, in fact, they often do so when construction of treaties and statutes is at issue.²¹⁶ One source for this presumption is Article I of the Constitution, which grants Congress the power to assure the enforcement of the law of nations.²¹⁷ That suggests that the power to breach international law should be a decision for the federal government, and that courts should presume that the national government obeys international law unless it indicates otherwise. The application of that presumption when the political branches are silent on an issue would invalidate state laws that violate customary international law. For these reasons, the Court was correct in *The Paquete Habana* to state that customary international law is part of United States law unless the President or Congress indicates otherwise.²¹⁸

At the very least, just as the Court upholds general state regulations

that nation-states simply do not act out of obligation but always pursue their self-interest and, therefore, one of the elements of customary international law is non-existent. See Goldsmith & Posner, *supra* note 208, at 654–66. Reciprocal behavior pursuant to a norm, however, should be a sufficient basis to find that customary international law exists and is a workable entity.

216. See *supra* Part III.D.1.a.

217. U.S. CONST. art. I, § 8, cl. 10 (“To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations.”).

218. See *The Paquete Habana*, 175 U.S. 677, 700 (1899).

under the Commerce Clause but strikes down those discriminatory against interstate or foreign commerce, the Court should strike down state laws that are directed at creating a violation of customary international law. For example, state legislation concerning illegal aliens is targeted at an international issue. Whatever the general validity of such laws, the state should not be able to act in such a way as to violate customary international law unless the federal government authorizes it.

b. *Limitations on the Application of Customary International Law.*

The state law targeted at creating a violation of customary international law presents the strongest case for invalidity under federal foreign affairs powers. It is analogous to the exercise of foreign policy by the President, which does not create a domestic law but supports a finding that state attempts to oppose that policy impermissibly intrude on a federal function.

The rationale for invalidating state violations of customary international law could be extended to generally applicable laws as well by analogy to the dormant Commerce Clause. The focus is not on the actions of the executive but the presumed will of Congress. However, such a presumptive application of customary international law would only override state law in very limited circumstances.

All the bases for refusing to apply treaty provisions can have their counterparts with respect to customary law: 1) sovereign immunity may block suits by individuals against governments; 2) customary law may not be self-executing but may require domestic agencies to first take action, such as when customary international law makes behavior criminal or requires expenditures; 3) customary international law may be too vague for enforcement or may be merely hortatory; and 4) customary law may be on a subject matter that is for the benefit of nations only, and citizens may lack standing to raise it.²¹⁹ If the customary law would not be enforceable as a treaty provision, it should not be enforceable when it has even less demonstrated support from political branches.²²⁰ As in *Medellín*, customary international law is not a viable means for evading the non-self-

219. See *supra* notes 124–141 and accompanying text.

220. Treaties may prevail over previously enacted federal statutes because the political process has followed the lawmaking procedure specified in the Constitution; customary international law does not have that virtue. It is a practice, and practices in conflict with statutes are violations of the law, not new law creations. Consequently, customary law does not override existing federal statutes, even if the custom was created after the statute was enacted.

executing nature of a treaty provision.²²¹

In addition, the difficulty of ascertaining the content of customary international law, as well as respect for the sovereignty of the states, cautions against application of customary international law to override general state law provisions unless it is very clear and specific in the particular case.²²² Because customary law derives from practice, its content is far more debatable than that of treaties. Different characterizations of that practice produce different principles, and the extent to which the practice is sufficiently accepted to become law will often be uncertain.

The Paquete Habana is an example both of the methodology used by courts to determine customary international law and the difficulty of the process. The Court ran through a history of state practices with regard to fishing boats during wartime, including agreements between belligerents and pronouncements by nations, and cited the views of a number of international law treatises before concluding that such boats cannot be taken.²²³ Nevertheless, three judges dissented over whether such a rule existed, or was merely behavior that was sometimes followed and was sometimes not.²²⁴ When the political branches do not pass on the content of customary international law, courts must look to other sources as they did in *The Paquete Habana*. These other sources include international agreements, the behavior of other nations, scholars' conclusions about state practice, and the behavior of the United States in general. There is general agreement on how customary international law is created, but no rule about how many nations must engage in a practice before it becomes binding on other nations, or what evidence demonstrates that the practice was done from a sense of legal obligation. While scholars may point to conventions and statements from political leaders as evidence of state practice, states often depart from the principles to which they pay lip service. Since customary international law is based on practice, courts should be looking to behavior at least as much as statements by nations. If the courts focus on the purpose of applying this law—keeping faith with the likely will of the political branches that control the foreign relations of the United States—they will understand that the practice of states counts more in binding governments than the pious hopes expressed. That is

221. See *supra* Part III.C.

222. See Trimble, *supra* note 171, at 713–15 (cautioning against application of customary law without affirmative support from the executive or the legislature because of the difficulty of ascertainment of proper foreign legal policy).

223. See *Paquete Habana*, 175 U.S. at 686–714.

224. *Id.* at 715–21 (Fuller, J., dissenting).

particularly true when the United States has agreed to a declaration of principles but refused to submit to the jurisdiction of the body designed to decide issues under it.

The difficulty of determining whether a particular practice is customary international law does not excuse the failure to even attempt to ascertain it. In *Sosa*, the Court acknowledged both the difficulty and the ability of courts to apply customary international law.²²⁵ Decisions of international bodies, such as the ICJ, and United Nations resolutions are entitled to deference in determining the content of customary international law, but the application of customary international law in the United States is implemented by domestic courts, who determine the content of that law for themselves. The Supreme Court has already refused to accept a decision of the ICJ as decisive on treaty interpretation, and therefore it would not be likely to accept international bodies' decisions as determinative of customary international law.²²⁶ When the contours or force of a customary law principle are in doubt, it cannot be assumed that the federal government wishes to abide by it. In this sense, customary international law may be optional until it has passed an ill-defined threshold of both specificity and acceptance in practice. Both state and federal courts may apply customary international law in various situations where such law is in the stages of developing or is unclear. Even its application in that situation may be useful for interpretation of statutes or treaties or to resolve other issues within the court's jurisdiction; however, customary international law should not be used to invalidate state acts unless it is clearly established.

Once it passes that threshold, however, it should be considered mandatory on the states. Where neither Congress nor the Executive has taken a position on the content of customary international law, courts should only invalidate state behavior that violates clearly established customary law. When it does, a state's violation of international law should be held to be an interference with federal supremacy in foreign affairs.²²⁷ At the least, it should be a violation of federal supremacy for the state to act in a manner that is targeted at the customary international law rule.²²⁸

225. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725–31 (2004).

226. See *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2684 (2006) (“Nothing in the structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on our courts.”).

227. See *Zschernig v. Miller*, 389 U.S. 429, 432 (1968).

228. See *supra* Part III.A.3. Thus, even if courts uphold generally applicable state laws that incidentally violate customary international law, state laws targeted at

The application of customary international law in United States courts may nullify state statutes or state executive actions. Such an impingement on state sovereignty runs contrary to the “new federalism,” which stresses the sovereignty of the states.²²⁹ When the political branches of the federal government breach international law, it is seen, domestically, as a legitimate exercise of the political process. Hence, respect for state political choices should at least cause a court to pause before striking them down as violations of customary international law.²³⁰ A party seeking to avail itself of customary international law should bear the burden of proving the existence of the practice. It is not enough that a customary norm is emerging—it must be established customary law before it is appropriate to use it to strike down state law. Nevertheless, courts should not breach customary international law by giving legal effect to laws that violate it. State behavior should not prevail when it will promote disharmony that would defeat the purpose of the grants of foreign affairs power to the federal government. The tests established in *Sosa* for applying customary law should suffice for its application as a defense to state laws.²³¹

The *Restatement (Third) of Foreign Relations Law of the United States* states that customary international law is part of United States law.²³² Yet,

foreign relations that violate customary international law should be invalid.

229. See Bradley & Goldsmith, *supra* note 208, at 867–70 (arguing that displacement of state sovereignty is a basis for rejecting customary international law).

230. This concern influenced the analogous decision in *Medellín*, in which the Court found the President lacked power to override state criminal law to settle the dispute with Mexico over the treatment of accused Mexican nationals. See *Medellín v. Texas*, 128 S. Ct. 1346, 1371–72 (2008). The Court acknowledged the President has the authority to comply with an international treaty obligation outside of a non-self-executing treaty—as long as the treaty is consistent with the Constitution—and that the President has indeed utilized “executive agreements to settle civil claims between American citizens and foreign governments or foreign nationals.” *Id.* at 1371. However, the Court distinguished these cases from the Presidential Memorandum at issue in *Medellín* when it stated:

[T]he Government has not identified a single instance in which the President has attempted (or Congress has acquiesced in) a Presidential directive issued to state courts, much less one that reaches deep into the heart of the State’s police powers and compels state courts to reopen final criminal judgments and set aside neutrally applicable state laws.

Id. at 1372.

231. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).

232. 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 111–15 (1987); see also Louis Henkin, *International Law as Law in the*

opposing scholars cite Justice Miller's decision in *Ker v. Illinois* as support for their argument that states do not have to follow customary international law unless Congress or the President have acted to make it part of federal law.²³³ However, *Ker* may instead illustrate the quite different principle that states are not bound domestically by customary international law rules if the federal government itself violates them.²³⁴

For purposes of determining whether United States citizens have privileges or immunities in customary international law within the United States, it is critical to determine whether the federal government is following or disregarding such law. In *The Paquete Habana*, Justice Gray wrote, "where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations"²³⁵ The comment implies that customary law does not bind the legislature or the executive domestically, although it may apply when they do not act. If the federal government chooses to disregard customary international law, it may do so—just as statutes enacted by Congress supersede treaties. Nations are bound by customary international law through their acquiescence in practice. If the federal government acts contrary to customary international law, it has indicated its unwillingness to be bound domestically; therefore, states should also not be bound by that provision of customary law. Some scholars argue that the President is bound to enforce customary international law because he is to enforce the law, and the customary international law is federal common law; however, if the basis for application of customary international law is a presumption of intent in the foreign relations area, the chief officer with respect to foreign affairs acts with discretion in determining what policy should be, and he is not bound domestically.²³⁶

Ker may serve to highlight the principle that states are not bound domestically by customary international law rules if the federal government itself violates them. In *Ker*, the original alleged violation of

United States, 82 MICH. L. REV. 1555, 1555 (1984) ("International law became part of 'our law' with independence in 1776.").

233. See Bradley, Goldsmith & Moore, *supra* note 178, at 884 & n.74 (citing *Ker v. Illinois*, 119 U.S. 436, 444 (1889), as a "pre-*Erie* decision suggesting that CIL [customary international law] was not federal law").

234. See *infra* notes 237–45.

235. *The Paquete Habana*, 175 U.S. 677, 700 (1899).

236. See generally Editorial Comment, *Agora: May the President Violate Customary International Law?*, 80 AM. J. INT'L L. 913 (1986); *Agora: May the President Violate Customary International Law? (Cont'd)*, 81 AM. J. INT'L L. 371 (1987).

customary international law was performed by an agent of the federal government.²³⁷ A federal agent seized Frederick Ker in Peru, took him back to the United States forcibly, and turned him over to state authorities for trial.²³⁸ After his conviction in state court, he filed a writ of error to the Supreme Court claiming violation of the extradition treaty with Peru and denial of due process of law.²³⁹ The Court found the circumstances of his seizure did not invalidate the trial, nor was the trial a denial of due process of law.²⁴⁰ It also found the seizure was not undertaken pursuant to the treaty, and therefore the subsequent trial itself was not a treaty violation.²⁴¹ Miller then said that the Court would not decide how far the circumstances of Ker's seizure could be used as a defense in state trial, "for in that transaction we do not see that the Constitution, or laws, or treaties of the United States guaranty him any protection."²⁴² But Miller added that:

[The issue of whether forcible seizure is a defense to the trial] is as much within the province of the State court, as a question of common law, or of the law of nations, of which that court is bound to take notice, as it is of the courts of the United States. And though we might or might not differ with the Illinois court on that subject, it is one in which we have no right to review their decision.²⁴³

Miller went on to note his expectation that the agent who seized Ker would be subject to punishment under Peruvian law and would be liable in a state action for tort.²⁴⁴ His statement that the law of nations is within the province of the state court, scholars argue, shows that Miller and the Court understood that "the law of nations" was an issue of general law and not of federal law.²⁴⁵ Miller's conclusion that the Supreme Court could not review the decision of the Illinois court on the law of nations supports that

237. *Ker*, 119 U.S. at 438–39.

238. *Id.*

239. *Id.* at 439–40.

240. *Id.* at 440.

241. *Id.* at 441–43. In *United States v. Rauscher*, Miller's opinion for the Court held that a defendant in federal court who was brought to court from Great Britain pursuant to an extradition treaty with that nation could preclude his trial for any offense other than the ones for which he was delivered pursuant to the treaty. *United States v. Rauscher*, 119 U.S. 407, 430 (1886).

242. *Ker*, 119 U.S. at 444.

243. *Id.*

244. *Id.*

245. See 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, 813–16 (1998).

position, although he also said the state court was “bound to take notice” of the law of nations.²⁴⁶ Miller’s statements were dicta because Ker did not argue customary international law, but they may also be explained as specific to the case.

In *Ker*, the abduction was executed by an agent of the federal government and, thus, the federal government was complicit in the violation, if any violation indeed occurred. Consequently, the state was not bound by domestic law to follow customary international law, but it was free to do so in its own jurisdiction. After all, the state may choose to avoid breaching customary international law even when it may do so as a matter of domestic law. To the extent that customary international law is not binding on the states, a state’s application makes it state law rather than federal law. *Ker* indicated that customary international law to some extent does not bind the state, but the decision left open whether states could in some circumstances be bound by it.²⁴⁷

When the federal government acts entirely consistently with customary international law, but without enacting a law or acting in other ways to enforce it against the states, international law should be presumed to be the foreign policy of the United States. The political branches have the power to reject international law domestically. Therefore, they are ultimately responsible for the application of customary international law, even if they are silent and the courts take silence as assent.²⁴⁸ In this

246. *Ker*, 119 U.S. at 444.

247. The Supreme Court relied on *Ker* more than a century later when it held that Dr. Humberto Alvarez-Machain could be tried in federal district court after being kidnapped in Mexico and brought to the United States. *United States v. Alvarez-Machain*, 504 U.S. 655, 657, 660–62 (1992). Alvarez-Machain was charged with assisting in the torture of an American drug enforcement agent in Mexico. *Id.* at 657. Dr. Alvarez-Machain alleged that the U.S. government was involved in the decision to abduct him, and Mexico protested the abduction. *See id.* at 658, 669. The Court held that the extradition treaty with Mexico did not prohibit the abduction or the trial. *Id.* at 669–70. It concluded that even if the abduction violated general international law principles, the trial could still take place. *Id.* While the court was not entirely clear, it may have considered the executive to have the power to override customary international law. The kidnapping, after all, was part of the executive’s attempt to enforce the laws.

248. Critics contend that courts should deny authority to customary international law because it is created internationally by bodies and individuals not responsible to the domestic political process of the United States. *See Bradley & Goldsmith, supra* note 208, at 838–42 (discussing the development of customary international law and its progression away from the state practice requirement). But political power remains with the domestic political process if customary international

respect, the inference from the Law of Nations Clause is not significantly different from that of the dormant foreign Commerce Clause. Acknowledgement of customary international law as a restriction on state—but not federal—power when the federal political branches are silent is an act of deference to the federal political branches that simultaneously secures the place of the nation among the family of nations.

Because federal violations of customary international law indicate an unwillingness for that principle to bind the United States, any domestic court finding that a state is bound under customary international law requires two steps—determining the content of the customary international law, and determining that the United States federal government has acted consistently with that norm and has not indicated it would reject it.

E. *Customary International Human Rights Law*

Customary international law has traditionally been about the behavior of nations toward other nations. Nations engage in an international practice in order to encourage other nations to engage in the same practice and thus create reciprocal benefits. Treatment by a nation of its own citizens has historically been of less import to international law. Thus, the notion that federal power to represent the nation in international affairs would have consequences with respect to the treatment of citizens by their own states was not well recognized. Congress was expected to define international law in relation to international affairs, and there was no thought that the power might extend to domestic matters. But international law has developed in a new direction since World War II. The establishment of the United Nations and its organs and, more profoundly, the promulgation of the *International Covenant on Civil and Political Rights*²⁴⁹ mark a new turn toward the development of an international human rights law.²⁵⁰

If the domestic effect of customary international law is limited to establishing a presumed foreign policy for purposes of determining when the state has targeted an inappropriate foreign affairs area, it would not apply to the treatment of a state's own citizens. Even if the dormant

law is just the default position when the federal political branches of government have neither indicated that customary international law should be followed, nor suggested that it should not.

249. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171.

250. See Bradley & Goldsmith, *supra* note 208, at 831–32.

foreign affairs power is given the full effect contended in the previous Part, the United States has been careful to stipulate that its agreement to human rights documents will not carry internal effect, and that is sufficient to preclude application of the dormant Law of Nations Clause.²⁵¹ Further, even if customary international human rights did apply directly, it would have no effect. The application of customary international human rights laws to the states under the strict standards suggested here would have no current effect.²⁵² Every listed right would be a violation of the Bill of

251. Even if customary international law is part of United States law, there are reasons to be more wary of customary international human rights law. The presumption of international law applicability was justified as a measure to secure reciprocal obedience by other nations that would ultimately benefit the United States and its citizens in their dealings abroad. Unfortunately, getting other nations to treat their own citizens well does not have such apparent benefits for the United States. Further, while the Constitution says very little about international relations, it has a great many provisions regarding human rights. Thus, it is arguable that it should be the exclusive source for domestic law on the limits that human rights concerns impose on government. The meaning of human rights may be very different in the United States than in other countries. To the extent that international law scholars and courts are claiming customary international law based on the declarations of international bodies like the United Nations, rather than the actual practices of nations, they undercut at least one of the reasons for assuming the United States would comply with its terms. Further, the United States has been very reluctant to join political and civil rights compacts unless they are purely hortatory and create no binding obligation. Scholars have argued that the refusal to be bound internationally by agreements with respect to the way in which the United States treats its own citizens precludes the application of customary international human rights norms in United States courts. *See* Bradley & Goldsmith, *supra* note 208, at 869–70 (explaining the tactic of the United States government of attaching RUDs—reservations, understandings, and declarations—to ratifications of treaties so as not to disrupt current domestic law).

252. With respect to the content of customary international human rights law, there are a number of emerging principles but very few established principles sufficient to base a limit upon the action of states. The *Restatement (Third) of Foreign Relations Law of the United States* lists as established human rights principles the renunciation of “genocide, slavery or slave trade, murder or causing the disappearance of individuals, torture or other cruel, inhuman, or degrading treatment or punishment, prolonged arbitrary detention, systemic racial discrimination, or a consistent pattern of gross violations of internationally recognized human rights.” 2 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702(a)–(g) (1987). The Court in *Sosa* demanded more:

Even the Restatement’s limits are only the beginning of the enquiry, because although it is easy to say that some policies of prolonged arbitrary detentions are so bad that those who enforce them become enemies of the human race, it may be harder to say which policies cross that line with the certainty afforded by Blackstone’s three common law offenses.

Rights of our Constitution. Any state's behavior that violates customary international human rights law also violates the Constitution independently of any international norm. There is no reason to inquire into customary law because it is not decisive on the issue.

Nevertheless, customary international human rights may become law of the United States in at least two ways. It may influence the interpretation of United States constitutional provisions, and it may still provide a basis for Congress to legislate to enforce customary human rights law as the law of nations.

Customary international human rights may influence the interpretation of United States constitutional provisions. It is unlikely that the Court will find state practices satisfy due process of law when they vary from federal practices and are inconsistent with established customary international human rights. For example, many nations have repudiated the death penalty and some writers have argued that it, or some manifestations of it, violates customary international human rights law.²⁵³ Nevertheless, it has not achieved the acceptance in practice and specificity to meet the high standard of *Sosa*. Of course, the application of the death penalty under federal law is a clear indication that the United States does not consider the abolition binding. So far, the Court has resisted all attempts at blanket abolition, but it seems reasonable that it would shift this position were the federal government to abolish the death penalty for federal crimes, and the international community were to make it a clear

Sosa v. Alvarez-Machain, 542 U.S. 692, 737 (2004). Besides torture, genocide—as defined in the Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9, 1948, 78 U.N.T.S. 277 (“acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group”)—is surely such a violation, but few other acts will meet the demanding standard raised in *Sosa*.

253. See Michelle McKee, Note, *Tinkering with the Machinery of Death: Understanding Why the United States' Use of the Death Penalty Violates Customary International Law*, 6 BUFF. HUM. RTS. L. REV. 153, 154 (2000) (“[T]he abolition of the death penalty has evolved into customary international law and . . . the United States has continued to exercise the death penalty in a manner that violates customary international law and international agreements.”). The South African Constitutional Court reviewed comparative law in holding that the then-interim constitution prohibited capital punishment. *State v. Makwanyane & Another* 1995 (3) SA 391 (CC) at para. 33 (S. Afr.) (“Today capital punishment has been abolished as a penalty for murder either specifically or in practice by almost half the countries of the world including the democracies of Europe and our neighboring countries, Namibia, Mozambique and Angola.”). For further examples of cases in the United States court system see Curtis A. Bradley, *The Juvenile Death Penalty and International Law*, 52 DUKE L.J. 485, 490 n.14 (2002).

violation of customary international human rights. At that point, the direction internally, as well as internationally, would point against the death penalty, and the Court would be very likely to find the penalty violates due process; thus avoiding any direct application of customary international human rights law but also avoiding any conflict with it. This seems to be what happened in *Roper v. Simmons*, which held the juvenile death penalty unconstitutional.²⁵⁴ For the purposes of interpreting domestic provisions of the Constitution in cases when customary international law is only one factor in the decision, the Court will be much more liberal in its understanding of that law.²⁵⁵

Congress, of course, has power to define violations of customary international law, and it has done so for certain purposes in the Torture Victim Protection Act of 1991.²⁵⁶ But torture would seem to violate several provisions of the United States Constitution apart from the statute.²⁵⁷ There are only a small number of areas in which developing customary international human rights might differ from rights that the Court could find under the Bill of Rights. Some of those areas include: procedural blocks to vindication of human rights, indigenous rights, and finally, affirmative rights. These are unlikely to be found under the United States Constitution, but they could become customary international human rights law—enforceable through Congressional action.

One area in which customary international human rights law may develop is when there have been procedural blocks to basic human rights. A number of international bodies have found the United States in violation

254. *Roper v. Simmons*, 543 U.S. 551, 575 (2005).

255. See Bradley, Goldsmith & Moore, *supra* note 178, at 934–35.

256. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (2000)). Section 3(b)(1) states:

[T]he term “torture” means any act, directed against an individual in the offender’s custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind

Id.

257. See, e.g., U.S. CONST. amend. V (due process); *id.* at amend. VIII (“nor cruel and unusual punishments inflicted”).

of international law despite decisions by the United States courts that the victims were precluded by procedural bars from contesting the substantive issue. One example is provided by the consular access cases like *Medellín* and *Sanchez-Llamas* that have already been discussed. In *Mary and Carrie Dann v. United States*, the Inter-American Commission on Human Rights determined that the proceedings by which the United States contended that Western Shoshone rights in their ancestral lands had been extinguished were improper.²⁵⁸ The Commission found the United States had failed to apply the same just-compensation standard for the taking of lands as applied to others, and was in violation of the American Declaration of the Rights and Duties of Man.²⁵⁹ The decision had no domestic legal effect, but it indicates that international bodies may apply a different view of procedural requirements when basic human rights are at stake. While the precedents in *Dann*, *Medellín*, and *Sanchez-Llamas* reject international views of procedural defaults, repeated developments in customary international human rights decisions and national behavior may ultimately bring about a different view.

There are a whole series of claims that indigenous peoples make that are not yet customary international human rights law, but this too may change. Many are at the very early stage of a draft report of a United Nations subcommittee—far from acceptance as established customary international law. Nevertheless, the norms have developed sufficiently to receive some recognition in international forums and may eventually develop into a sufficiently specific and well-accepted norm as to constitute the kind of customary law that would meet the standard expressed in *Sosa*.²⁶⁰ While these norms would have only peripheral impact in the United States—because most law relating to Native Americans is federal law rather than state law—the rules would be unlikely to be incorporated as due process under the Bill of Rights because they are unique to a specific group of people, and the application of the individual rights guarantees of the Constitution have been universal. Thus, to the limited extent that states violate the norms, the application of customary international human rights law to the state would reach beyond express constitutional guarantees. Congress would thus have multiple bases for

258. *Dann v. United States*, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Ser.L/V/II.117, doc. 1 rev. ¶¶ 1–5 (2002) (merits decision), available at <http://www.cidh.org/annualrep/2002eng/usa.11140.htm>.

259. *Id.* at ¶¶ 170–72.

260. See S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 61–73 (2d ed. 2004).

acting.

A third area in which developing international human rights law would not be likely to fit existing constitutional provisions is in the creation of affirmative socioeconomic rights. The guarantees in the United States Constitution have been negative in character—prohibitions on state action and the restrictions of the Bill of Rights.²⁶¹ The late twentieth century has seen the development of affirmative guarantees in national constitutions—requiring states to provide specific things for their citizens, such as education and healthcare.²⁶² In some instances, national courts, such as the Supreme Court in South Africa, have enforced such affirmative guarantees despite the difficulty and delicacy of doing so.²⁶³ Affirmative rights will not become customary international human rights in the near future with the specificity and support in state practice required to satisfy the suggested standard. Nevertheless, affirmative rights may become almost universal in international resolutions and state practice in the more distant future. In that distant day, a privilege or immunity of a citizen of the United States may be to secure such affirmative rights from his state.

261. See, e.g., *Katzenbach v. Morgan*, 384 U.S. 641, 644 (1966) (prohibiting enforcement of New York election law “requiring an ability to read and write English as a condition for voting”).

262. See generally VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* 1661–1766 (2d ed. 2006) (discussing judicial enforcement of social welfare rights in Japan, South Africa, and Hungary); Mark S. Kende, *The South African Constitutional Court’s Embrace of Socio-Economic Rights: A Comparative Perspective*, 6 *CHAP. L. REV.* 137 (2003) (exploring the South African Constitution and South Africa’s enforcement of socioeconomic rights and critically examining American constitutional jurisprudence on socioeconomic rights in light of South African decisions); see also International Covenant on Economic, Social and Cultural Rights art. 12, Dec. 16, 1966, 993 U.N.T.S. 3 (recognizing the “right of everyone to the enjoyment of the highest attainable standard of physical and mental health”); *id.* at art. 13 (recognizing the “right of everyone to education”).

263. See *Minister of Health & Others v. Treatment Action Campaign & Others* 2002 (5) SA 721 (CC) (S. Afr.) (holding that the government is constitutionally obligated to plan and implement an effective and comprehensive program for the prevention of mother-child HIV transmission); *Government of the Republic of South Africa & Others v. Grootboom & Others* 2001 (1) SA 46 (CC) (S. Afr.) (holding that the state must take reasonable measures to provide access to adequate housing in order to uphold the constitutional obligation to housing); see also Mark S. Kende, *The South African Constitutional Court’s Construction of Socio-Economic Rights: A Response to Critics*, 19 *CONN. J. INT’L L.* 617, 617 (2004) (“The [South African] Constitutional Court . . . has done exactly what the U.S. Supreme Court has said courts cannot and should not do—enforce socio-economic rights.”).

IV. CONCLUSION

The privileges or immunities of citizens of the United States as envisioned by Justice Miller have a significant international component. The federal government is responsible for the preservation of the life, liberty, and property of its citizens abroad; protecting them from attack by foreign nations; and facilitating their commerce. One of the major means to accomplish this is through support of the international order—treaties and international institutions. The means for providing such privileges or immunities is in the discretion of the political branches of government. The concentration of power in the federal government, however, creates limits on state power to interfere with its citizens in the international arena. Thus, as Miller recognized, the dormant foreign Commerce Clause limits state regulations of foreign commerce, and the federal obligation to protect citizens also limits the states' role, given that treaties are enforceable in state courts by individuals. By taking the perspective of the fundamental rights of citizens, this Article concludes that: local government cannot boycott the goods and services of its citizens because they dealt with a boycotted nation; the right to travel internationally should be protected to a greater degree than other non-fundamental liberties; and treaties should be presumed to be self-executing.

The desirability of supporting international law as a means for securing the benefits for U.S. citizens suggests that support of customary international law, as well as treaty provisions, should be considered a privilege or immunity of citizens of the United States. Like the dormant Commerce Clause, the power to define offenses against the law of nations should give rise to a presumption that clear violations of specific customary international human rights laws conflict with the federal foreign affairs power and denies a privilege or immunity of citizens of the United States. This conclusion should not have any significant effect on outcomes in cases in the near term because all such violations would be violations of specific prohibitions in the Constitution as well; however, the principle may be a useful one to develop the protection of human rights for future generations.