

# The Federalism Implications of International Human Rights Law

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## I. Introduction

The reemergence of judicially enforceable federalism may be the most significant doctrinal development of the Rehnquist Court.<sup>1</sup> Due principally to the reinvigoration of limits on the two cornerstones of modern congressional power—the Commerce Clause<sup>2</sup> and the Fourteenth Amendment’s Enforcement Clause<sup>3</sup>—the Supreme Court, for the first time since the New Deal, has taken seriously the notion that the national government is one of enumerated powers that do not extend to matters of truly local concern.

The Court’s current thinking in this area can be distilled into the following postulates: non-economic intrastate matters cannot be regulated by Congress under the Commerce Clause; such matters similarly cannot be regulated under the Enforcement Clause unless they amount to or threaten the violation of a Fourteenth Amendment right by a state actor. Together, these principles seemingly place large categories of local conduct beyond the regulatory reach of the national government.

But all may not be as it seems. It is unsurprising that judicial decisions limiting the scope of certain enumerated powers would prompt a search for other powers justifying the disabled regulatory authority. This is, after all, the history of the federal civil rights laws,<sup>4</sup> and the increasing frequency of cases involving the Enforcement

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<sup>1</sup> The Supreme Court began its federalism revival in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), and has decided at least one significant federalism case in nearly every Term since. The Court’s decisions have placed limits on the scope of Congress’s enumerated powers, *see, e.g., United States v. Lopez*, 514 U.S. 549 (1995) (Commerce Clause); *City of Boerne v. Flores*, 519 U.S. 1088 (1997) (Enforcement Clause of the Fourteenth Amendment), and restricted the means by which Congress can apply laws within its enumerated powers to the States, *see, e.g., Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *Printz v. United States*, 521 U.S. 898 (1997).

<sup>2</sup> U.S. CONST. art. I, § 8, cl. 3. The Supreme Court famously countenanced a broad interpretation of Congress’s power to regulate commerce among the several States in the period between the New Deal and the Court’s decision in *Lopez*. *See, e.g., Perez v. United States*, 402 U.S. 146 (1971); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Wickard v. Filburn*, 317 U.S. 111 (1942).

<sup>3</sup> U.S. CONST. amend. XIV, § 5. In a series of cases under the Voting Rights Act, the Court endorsed an expansive interpretation of Congress’s power to enforce the Fourteenth Amendment, with the broadest statement of that power appearing in *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

<sup>4</sup> The Civil Rights Act of 1964 was enacted and upheld as an exercise of the Commerce Clause power, *see Katzenbach v. McClung*, 379 U.S. 294 (1964), even though similar legislation had been invalidated when defended as an exercise of the Enforcement Clause power, *see The Civil Rights Cases*, 109 U.S. 3 (1883).

Clause<sup>5</sup> is itself due in part to the federal government's efforts to justify under that provision what *Seminole Tribe* and *Lopez* prohibit it from doing under the Commerce Clause. And, in fact, the Supreme Court's recent federalism jurisprudence has coincided with other developments in the law that promise to give back to the national government much of what the Court's decisions have taken away.

The national government's foreign affairs power would seem an unlikely candidate for such an undertaking, given that the focus of such power (one would think) is on matters of national import and international relations, not local concern. Yet over the past several decades, all three branches of the federal government have adopted, somewhat uncritically, components of a modern, internationalist vision of human rights that allows for regulation, under federal law, of the relationships between individuals and their own governments and countrymen. With little fanfare, the groundwork has thereby been laid for a broad national power to protect individuals from misconduct, however local in nature, deemed by the government to violate international human rights norms.

This paper explains why those concerned with the structural elements of domestic federalism ought to care about these developments in international human rights law.<sup>6</sup> To do so, it focuses on the national government's putative power to incorporate international human rights norms into federal law. Part II describes the nature of international law and surveys the developments that have made international human rights norms enforceable within the U.S. legal system. Part III looks at the consequences of these developments with respect to the national government's power to regulate local activities that it cannot otherwise reach under the Supreme Court's recent federalism decisions. Finally, Part IV examines the constitutional issues surrounding the national government's use of its foreign affairs powers to protect human rights.

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<sup>5</sup> The Supreme Court decided just one case interpreting the substantive scope of the Enforcement Clause power between 1971 and 1996, *see City of Rome v. United States*, 446 U.S. 152 (1980), but has since decided six such cases, *see Board of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000); *United States v. Morrison*, 120 S. Ct. 1740 (2000); *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999); *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999); *City of Boerne*, 519 U.S. 1088, and granted *certiorari* in a seventh, *see Nevada Dep't of Human Resources v. Hibbs*, 122 S. Ct. 2618 (2002) (mem.).

<sup>6</sup> In doing so, it does not lay claim to complete originality. As discussed below, elements of the expansive view of the foreign affairs power have been searchingly criticized by others. *See, e.g., infra* notes 60 & 84 and accompanying text. This paper also takes no position on the desirability of these legal developments from a foreign policy perspective, another matter that has received a significant amount of attention in certain quarters. *See, e.g.,* Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT'L L. 457 (2001); Sonni Efron, *U.S. Wants Suit by Indonesians Dismissed*, L.A. TIMES, Aug. 7, 2002, at A7 (discussing State Department argument that permitting villagers to seek damages in federal court for human rights abuses in Indonesia would harm U.S. foreign policy interests).

## II. International Human Rights Law as Federal Law

To the domestic lawyer accustomed to dealing with the laws of particular jurisdictions, the concept of “international law” may seem somewhat obscure. According to the American Law Institute’s Restatement of the Foreign Relations Law of the United States:

“International law is the law of the international community of states. It deals with the conduct of nation-states and their relations with other states, and to some extent also with their relations with individuals, business organizations and other legal entities.”<sup>7</sup>

There being no international lawmaking body, the rules of international law are derived from agreements between nations and from what is known as “customary international law,” an unwritten body of norms that “results from a general and consistent practice of states followed by them from a sense of legal obligation.”<sup>8</sup> Traditionally viewed solely as a tool for the resolution of disputes between consenting nations, international law expanded in the wake of the Holocaust to include norms designed to protect individual human rights, *i.e.*, the “freedoms, immunities, and benefits which, according to widely accepted contemporary values, every human being should enjoy in the society in which he or she lives.”<sup>9</sup> Thus, it is now generally accepted by scholars and commentators that international law prohibits genocide, torture, racial discrimination, prolonged arbitrary detention and a variety of other abusive behavior, at least where practiced by state actors.<sup>10</sup> The second half of the twentieth century also saw the rise of the notion of peremptory or *jus cogens* norms, *i.e.*, rules of international law that are universally binding even the absence of consent.<sup>11</sup> It was not long before these two

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<sup>7</sup> RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES pt. I, ch. 1, intro. note, at 16 (1987) [hereinafter RESTATEMENT].

<sup>8</sup> *Id.* § 102(2). “General principles common to the major legal systems” of the world also “may be invoked as supplementary rules of international law where appropriate.” *Id.* § 102(4).

<sup>9</sup> *Id.* § 701, cmt. a.

<sup>10</sup> *See id.* § 702. The extent to which international law condemns such conduct when committed by non-governmental actors is disputed, but there is a definite trend towards the view that it does. *See, e.g., Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995) (“[C]ertain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.”); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 445 (D.N.J. 1999) (“No logical reason exists for allowing private individuals and corporations to escape liability for universally condemned violations of international law merely because they were not acting under color of law.”); Jordan J. Paust, *Human Rights Responsibilities of Private Corporations*, 35 VAND. J. TRANSNAT’L L. 801, 801-17 (2002).

<sup>11</sup> *See* Alfred P. Rubin, *Actio Popularis, Jus Cogens and Offenses Erga Omnes?*, 35 NEW ENG. L. REV. 265 (2001).

twentieth-century innovations converged, with the field of *jus cogens* coming to be dominated by the emerging new human rights norms.<sup>12</sup>

The mechanisms for the enforcement of international law outside of the U.S. legal system are beyond the scope of this paper.<sup>13</sup> The focus here, rather, is on what Professor Koh has called “legal internalization,” *i.e.*, the process by which “international norm[s] [are] incorporated into the domestic legal system through executive action, legislative action, judicial interpretation, or some combination of the three.”<sup>14</sup> In recent years, all three branches of the federal government have claimed the power to incorporate international human rights norms into domestic U.S. law and thereby to make the violation of such norms a violation of federal law. The remainder of this Part examines the means by which they have done so.

### **A. Internalization of International Human Rights Norms by the Courts**

The story of the federal judiciary’s incorporation of international human rights norms into domestic federal law begins with the Second Circuit’s interpretation of the Alien Tort Statute (the “ATS”) in the landmark case of *Filartiga v. Pena-Irala*.<sup>15</sup>

The ATS, enacted as part of the Judiciary Act of 1789, provides that “[t]he 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.”<sup>16</sup> Essentially moribund for nearly two hundred years,<sup>17</sup> the ATS was invoked as the basis

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<sup>12</sup> See Karen Parker & Lyn B. Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT’L & COMP. L. REV. 411, 427-43 (1989).

<sup>13</sup> International law is often enforced in transnational courts established by agreements between nations. For example, the International Court of Justice, the principal judicial organ of the United Nations, hears disputes between nations that have accepted its jurisdiction. See International Court of Justice General Information - The Court at a Glance (June 7, 2002) (available at <http://www.icj-cij.org/icjwww/igeneralinformation/icjgnot.html>). Similarly, the International Criminal Court has been established to try incidents of genocide, crimes against humanity, war crimes and aggression committed by, or within the jurisdiction of, signatory nations. See Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, art. 126, 37 I.L.M. 999. For an examination of transnational enforcement issues, see Harold H. Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397 (1998).

<sup>14</sup> Koh, *supra* note 13, at 1414.

<sup>15</sup> 630 F.2d 876 (2d Cir. 1980).

<sup>16</sup> 28 U.S.C. § 1350. The original language provided that the federal district courts “shall also have cognizance . . . of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.” Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77.

<sup>17</sup> See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 812-13 & n.21 (D.C. Cir. 1984) (Bork, J., concurring).

for statutory subject-matter jurisdiction in *Filartiga* by citizens of Paraguay who filed suit in federal court in New York against a Paraguayan police official for his alleged torture of their relative. The case reached the Second Circuit following the district court's dismissal for lack of jurisdiction.

With respect to statutory jurisdiction, the Second Circuit held that the ATS's threshold of a "tort . . . in violation of the law of nations" was met where the plaintiffs alleged the violation of any "established norms of the international law of human rights."<sup>18</sup> Whether the ATS's grant of federal court jurisdiction over such a lawsuit was constitutional presented a more difficult question. An act of Congress may not, of course, expand the jurisdiction of the federal courts beyond that set forth in Article III of the Constitution.<sup>19</sup> And because all parties to the suit were aliens, there was no Article III diversity jurisdiction.<sup>20</sup> Nor was there a readily apparent basis for federal-question jurisdiction because, as the Second Circuit recognized,<sup>21</sup> the ATS is a jurisdictional statute that does not itself create any rights under federal law.<sup>22</sup>

The Second Circuit nevertheless concluded that the plaintiffs' claims did arise under the laws of the United States. In doing so, the court relied on a series of nineteenth-century pronouncements by the Supreme Court that international law is "part of the law of the land"<sup>23</sup> and "part of our law."<sup>24</sup> The import of these statements, the

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<sup>18</sup> *Filartiga*, 630 F.2d at 880. For a discussion of the sources used to determine whether a human rights norm is established, see *infra* note 29.

<sup>19</sup> See *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 491 (1983).

<sup>20</sup> See *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303, 303 (1809). Nor did *Filartiga* belong to the category of "cases affecting ambassadors, other public ministers and consuls," U.S. CONST. art. III, § 2, which were among the principal suits contemplated by the ATS, see *Tel-Oren*, 726 F.2d at 813-14 (Bork, J., concurring).

<sup>21</sup> *Filartiga*, 630 F.2d at 887.

<sup>22</sup> See *Mesa v. California*, 489 U.S. 121, 136 (1989) (explaining that a "pure jurisdictional statute" is not an independent source of Article III "arising under" jurisdiction). That the ATS is a pure jurisdictional statute is clear from its placement in the Judiciary Act and from the plain meaning of both the original language and the current text. See Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 592-97 (2002) (rejecting the theory that the ATS is anything but jurisdictional). Nor is there any indication that Congress intended to delegate to the courts the power to create common law rules as in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957). See *Filartiga*, 630 F.2d at 887 (rejecting application of *Lincoln Mills* to the ATS). Accordingly, it is a mistake to view the ATS, as some courts and commentators have, see, e.g., *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1474-75 (9<sup>th</sup> Cir. 1994), as an exercise of Congress's Article I power to define and punish offenses against the law of nations. Cf. *The Propeller Genesee Chief*, 53 U.S. (12 How.) 443, 451-52 (1851) (holding that "it would be inconsistent with the plain and ordinary meaning of words, to call a law defining the jurisdiction of certain courts of the United States" an exercise of Congress's commerce powers).

<sup>23</sup> *The Nereide*, 13 U.S. (9 Cranch) 388, 422 (1815), quoted in *Filartiga*, 630 F.2d at 887.

court explained, is that the same established norms of international law that satisfied the jurisdictional threshold of the ATS are a part of “the common law of the United States,” and that claims for their violation therefore “aris[e] under . . . the Laws of the United States” within the meaning of Article III.<sup>25</sup> Accordingly, the plaintiffs were permitted to pursue their claims.

Nearly every court to confront the matter since has followed *Filartiga* in sustaining jurisdiction over similar suits.<sup>26</sup> These lawsuits follow a typical pattern: an alien victimized by a repressive government in his country of origin files suit in the United States against foreign officers and private citizens said to have participated in any number of human rights abuses.<sup>27</sup> With the number of such suits burgeoning in recent years, the United States is rapidly becoming a forum for the adjudication of human rights grievances from around the world,<sup>28</sup> with its courts actively engaged in development of a federal common law of international human rights.<sup>29</sup>

## **B. Internalization of International Human Rights Norms by Congress**

In enacting the ATS as a jurisdictional statute, Congress did not exercise any of its Article I foreign affairs powers.<sup>30</sup> Most observers believe, however, that Congress may

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<sup>24</sup> *The Paquete Habana*, 175 U.S. 677, 700 (1900), *quoted in Filartiga*, 630 F.2d at 887.

<sup>25</sup> *Filartiga*, 630 F.2d at 885-87. The Second Circuit’s conclusion that international law is federal common law immediately made the ATS’s jurisdictional grant (and its alien plaintiff limitation) superfluous, however, because causes of action arising under federal common law can be brought (by aliens and U.S. citizens alike) pursuant to the federal-question jurisdictional statute, 28 U.S.C. § 1331.

<sup>26</sup> *See, e.g., Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 164-65 (5<sup>th</sup> Cir. 1999); *Abebe-Jira v. Negewo*, 72 F.3d 844, 847-48 (11<sup>th</sup> Cir. 1996). The exception is the D.C. Circuit, which held (without a majority rationale) that *Filartiga*-style claims are not justiciable in federal court. *See Tel-Oren*, 726 F.2d at 775 (per curiam).

<sup>27</sup> In recent years, for example, such lawsuits have been filed against individuals and corporations for their alleged complicity in war crimes in Bosnia, *see Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); anti-union violence in Colombia, *see Sinaltrainal v. Coca-Cola Co.*, No. 01-03208-CIV (S.D.N.Y. filed July 21, 2001); environmental degradation in Papua New Guinea, *see Tamuasi v. Rio Tinto, plc*, No. 00-CV-3208 (N.D. Cal. filed Sept. 6, 2000); human rights abuses in Nigeria, *see Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000); and slavery in Burma, *see Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000).

<sup>28</sup> *See* Elizabeth Amon, *Coming to America: Alien Tort Claims Act Provides a Forum For the World*, NAT’L L.J., Oct. 19, 2000, at 1.

<sup>29</sup> In adjudicating these lawsuits, courts generally follow *Filartiga*’s directive to determine the current content of an “evolving” international law by looking to the works of domestic and foreign jurists, the practices of nations, international conventions, treaties and agreements, and judicial decisions from around the world. *See Filartiga*, 630 F.3d at 880-81; RESTATEMENT, *supra* note 7, at § 103.

<sup>30</sup> *See supra* note 22.

act to internalize international human rights norms through its infrequently used power “[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.”<sup>31</sup> Indeed, in ostensible reliance on that power, Congress acted partially to codify the result of *Filartiga* through the passage of the Torture Victim Protection Act of 1991 (the “TVPA”).<sup>32</sup>

The TVPA creates a statutory cause of action for certain specified violations of international human rights law. Section 2 provides:

“An individual who, under actual or apparent authority, or color of law, of any foreign nation—(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual’s legal representative, or to any person who may be a claimant in an action for wrongful death.”<sup>33</sup>

The TVPA is more modest in several respects than the federal common law developed under *Filartiga*. First, as the quoted language demonstrates, only two categories of human rights abuses—torture and extrajudicial killing—are actionable. Second, the TVPA by its terms is limited to the official acts of persons acting under color of law of a foreign nation, whereas the common law of *Filartiga* has developed to prohibit certain acts by private individuals.<sup>34</sup> Third, the TVPA does not apply to corporations.<sup>35</sup> Fourth, the TVPA contains an express statute of limitations and a requirement that a plaintiff exhaust adequate and available local remedies before bringing suit in the United States.<sup>36</sup>

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<sup>31</sup> U.S. CONST., art. I, § 8, cl. 10. The few congressional statutes to have rested on the Define and Punish Clause include prohibitions on interference with the diplomatic rights of ambassadors, *see* An Act for the Punishment of certain Crimes against the United States, ch. IX, §§ 25-28, 1 Stat. 112, 117-18, the counterfeiting of a foreign government’s securities, *see United States v. Arjona*, 120 U.S. 479 487, 488 (1887), and war crimes during wartime, *see Ex Parte Quirin*, 317 U.S. 1, 27 (1942).

<sup>32</sup> Pub. L. No. 102-256, 106 Stat. 73 (1992), *reprinted in* 28 U.S.C. § 1350 (1994). The House Report states that Congress acted to “establish an unambiguous and modern basis for a cause of action that has been successfully maintained under [the ATS].” H.R. Rep. No. 102-367, at 3 (1992). The Senate Report makes clear that Congress believed that its power to enact the TVPA was derived from the Define and Punish Clause. *See* S. Rep. No. 102-249, at 5-6 (1992).

<sup>33</sup> TVPA § 2(a).

<sup>34</sup> *See supra* note 10.

<sup>35</sup> *See Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 382 (E.D. La. 1997), *aff’d on other grounds*, 197 F.3d 161 (5<sup>th</sup> Cir. 1999).

<sup>36</sup> TVPA § 2(b)-(c).



Despite these limitations, the TVPA has become an important weapon in the arsenal of plaintiffs seeking redress for human rights abuses.<sup>37</sup> The statute will likely serve as a model for future acts of Congress seeking to broaden the class of human rights abuses for which remedies are available under federal law.

### C. Internalization of International Human Rights Norms by the President

A third method by which international human rights norms have been internalized in federal law is through the President's power (with the advice and consent of the Senate) to enter into international treaties.<sup>38</sup>

Like international law generally,<sup>39</sup> treaties historically regulated relations between nations, typically in the form of bilateral agreements.<sup>40</sup> But as with international law generally, the gross human rights abuses of the Holocaust led to a modified conception of the scope and purpose of international agreements. The principal change has been the rise of multilateral human rights agreements that are open for ratification by any nation and designed to regulate the treatment of individuals by their own governments and countrymen.<sup>41</sup>

The United States generally declined to ratify these new multilateral agreements in the decades following the end of World War II.<sup>42</sup> Among the reasons were concerns that the treaties might be interpreted to impose obligations on the States beyond those set forth in the Constitution and permit Congress to implement such treaties with legislation that would, in the absence of the treaties, be beyond the scope of Congress's enumerated powers.<sup>43</sup> These concerns were significant enough that a proposed constitutional

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<sup>37</sup> A statutory cause of action under the TVPA is often asserted in human rights litigation in conjunction with *Filartiga*-style common law claims. See, e.g., *Hilao v. Estate of Marcos*, 103 F.3d 767, 778-79 (9<sup>th</sup> Cir. 1996); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1347 (N.D. Ga. 2002).

<sup>38</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>39</sup> See *supra* notes 8-12 and accompanying text.

<sup>40</sup> See Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PENN. L. REV. 399, 400 (2000).

<sup>41</sup> See *id.* at 400, 410-15.

<sup>42</sup> See *id.* at 410-13.

<sup>43</sup> See, e.g., *Missouri v. Holland*, 252 U.S. 416, 432 (1920) ("If the treaty is valid there can be no dispute about the validity of the statute [implementing the treaty] under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government.").

amendment to limit the scope of the treaty power gained significant support in the 1950s.<sup>44</sup>

Since the late 1980s, however, the United States has ratified four major human rights treaties: the Genocide Convention,<sup>45</sup> the International Covenant on Civil and Political Rights,<sup>46</sup> the Torture Convention,<sup>47</sup> and the International Convention on the Elimination of All Forms of Racial Discrimination.<sup>48</sup> As their names suggest, these agreements generally require their signatories to provide a significant range of human rights guarantees, such as freedom from genocide, torture and arbitrary arrest and detention, freedom of association and the right to self-determination.

The United States' increasing willingness to ratify human rights treaties is premised on the inclusion in the ratification instruments of a series of reservations, understandings and declarations (collectively known as "RUDs") limiting the treaties' domestic effects.<sup>49</sup> Generally, such RUDs include, *inter alia*, declarations stating that the treaties are not self-executing (so that they cannot be enforced domestically without implementing legislation by Congress) and federalism understandings that preclude any increase of congressional power.<sup>50</sup>

In light of the RUDs and Congress's failure to pass implementing legislation, courts have uniformly held that individuals lack standing to invoke these treaties.<sup>51</sup> Thus, while the various treaties are frequently raised in human rights litigation, they do not provide a basis for additional legal relief. They are, however, used by courts as evidence

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<sup>44</sup> See DUANE TANANBAUM, *THE BRICKER AMENDMENT CONTROVERSY: A TEST OF EISENHOWER'S POLITICAL LEADERSHIP* (1988).

<sup>45</sup> The Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, 78 U.N.T.S. 277.

<sup>46</sup> The International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171.

<sup>47</sup> The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 23 I.L.M. 1027.

<sup>48</sup> The International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195.

<sup>49</sup> See Bradley & Goldsmith, *supra* note 40, at 400-01, 413-22.

<sup>50</sup> *Id.* at 416-22. Professors Bradley and Goldsmith persuasively refute the arguments of some scholars that treaty RUDs violate international law rules of treaty formation and the U.S. Constitution. See *id.* at 422-54; see also John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999) (demonstrating that treaty non-self-execution is consistent with the original understanding of the treaty power).

<sup>51</sup> See, e.g., *Igartua de la Rosa v. United States*, 32 F.3d 8, 10 n.1 (1st Cir. 1994) (*per curiam*); *Akhtar v. Reno*, 123 F. Supp. 2d. 191, 196-97 (S.D.N.Y. 2000).

of the content of international law for purposes of establishing common-law causes of action. Moreover, the historical concerns over such treaties and the extensive use of RUDs to limit their effect demonstrate that they are also viewed by the government as potentially powerful tools for directly internalizing international human rights laws into domestic law.

### **III. The Federalism Implications of the Internalization of International Human Rights Norms**

What does all this have to do with domestic federalism? While the focus of human rights litigation to date has been on abuses committed by and in foreign nations, all three methods of incorporating international human rights norms into federal law are premised on the existence of a federal power to enforce the modern conception of international law as a body of rules that govern relationships, not only between nations, but also between individuals and their governments and countrymen. And all three methods assume, either expressly or implicitly, that these modern international human rights norms, once incorporated into domestic law, bind domestic as well as foreign actors. In other words, to the extent international law *qua* U.S. law protects citizens of the Republic of Georgia from human rights abuses committed in Tbilisi, then it follows that such law also protects citizens of the State of Georgia from the same human rights abuses committed in Atlanta.

For now, the domestic application of international human rights law is largely theoretical. As noted above, the international human rights treaties entered into by the United States contain RUDs that, in effect, prevent them from having the force of law. The TVPA, Congress's only attempt to protect human rights under the Define and Punish Clause, by its terms extends *only* to wrongs perpetrated by persons acting under color of *foreign* law. And because the common law of *Filartiga* had its origins in ATS cases, which require alien plaintiffs, the potential for domestic application of that common law—which is just beginning to evolve beyond highly egregious conduct (such as genocide, slavery and torture) unlikely to occur in the United States—has only lately been realized. The few attempts to vindicate domestically rights said to arise under international human rights law have thus far been rejected by the courts.<sup>52</sup>

Nevertheless, it is easy to see the potential for a significant shift of power to the national government in this area. A future President might choose, with the Senate's approval, to enter into a broad human rights treaty without any RUDs making the treaty non-self-executing or preserving traditional limits on congressional power. A future Congress might pass another human rights statute based on the TVPA, this time omitting

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<sup>52</sup> See, e.g., *Buell v. Mitchell*, 274 F.3d 337, 370-76 (6th Cir. 2001); *White v. Paulsen*, 997 F. Supp. 1380, 1383-85 (E.D. Wash. 1998).

any exceptions for misconduct by public and private domestic actors. And it is only a matter of time before a federal court is receptive to a claim that certain domestic conduct violates a norm of international human rights law under *Filartiga*.

In these ways, the three branches' ostensible foreign affairs powers could be used to achieve domestic ends otherwise unattainable under the Supreme Court's Commerce and Enforcement Clause precedents. For example, Congress cannot use its Commerce and Enforcement Clause powers to regulate criminal punishments imposed by the States unless those punishments violate the Eighth Amendment.<sup>53</sup> Yet if a federal court, Congress or the President determines that the death penalty violates international human rights norms, then under the theories of internalization discussed above, any of them could prohibit the States from imposing that penalty by incorporating (via common law, statute or treaty) the relevant norms into federal law. In fact, several international law scholars have argued that applications of the death penalty violate international law and are therefore already illegal under federal common law.<sup>54</sup> Similarly, if local acts of gender-motivated violence by private parties are deemed to violate international human rights law, then the courts, Congress and the President can regulate such acts through their foreign affairs powers, notwithstanding the Supreme Court's recent ruling that Congress lacks the power to regulate such acts under the Commerce and Enforcement Clauses.<sup>55</sup> Again, a number of commentators have urged this result.<sup>56</sup>

The national government's potential use of its foreign affairs powers to regulate local activity is particularly troublesome because of the nature of modern international law. Despite the sources of international law set forth in *Filartiga* and the Restatement, there is neither an authoritative arbiter of international law nor an objective method for determining the norms incorporated therein, making international human rights law

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<sup>53</sup> Such regulations would have an insufficient connection to interstate commerce, and Congress lacks the power to expand the substantive scope of the rights protected by the Eighth Amendment. See *City of Boerne*, 519 U.S. at 527-28.

<sup>54</sup> See, e.g., Julian S. Nicholls, Comment, *Too Young to Die: International Law and the Imposition of the Juvenile Death Penalty in the United States*, 5 EMORY INT'L L. REV. 617, 651-52 (1991) (arguing that the juvenile death penalty violates federal common law); cf. Christian A. Levesque, Comment, *The International Covenant on Civil and Political Rights: A Primer for Raising a Defense Against the Juvenile Death Penalty in Federal Courts*, 50 AM. UNIV. L. REV. 755, 790-91 (2001) (arguing that the ICCPR prohibits the juvenile death penalty); Beth Stephens, *Federalism and Foreign Affairs: Congress's Power to "Define and Punish . . . Offenses Against the Law of Nations,"* 42 WM. & MARY L. REV. 447, 552 (2000) (arguing that congressional legislation banning States from carrying out the juvenile death penalty is "exactly the situation contemplated by the [Define and Punish] Clause").

<sup>55</sup> *United States v. Morrison*, 120 S. Ct. 1740 (2000) (invalidating Violence Against Women Act).

<sup>56</sup> See, e.g., Mary Ann Case, *Reflections on Constitutionalizing Women's Equality*, 90 CALIF. L. REV. 765, 774 n.56 (2002); Jordan J. Paust, *Human Rights Purposes of the Violence Against Women Act and International Law's Enhancement of Congressional Power*, 22 HOUS. J. INT'L L. 209 (2000).

necessarily indeterminate. Scholars and commentators have argued that international law protects, or may soon protect, rights relating to an incredibly broad range of topics, including (in addition to those discussed above) education, employment, property and sexual orientation.<sup>57</sup> International law “evolves,” moreover, on the basis of the views of entities, such as domestic and foreign jurists, foreign and transnational courts and treaty-making bodies, that are “neither representative of the American political community nor responsive to it.”<sup>58</sup> Under these circumstances, the potential for anti-democratic judicial activism in connection with the creation of a federal common law of international law cannot be overstated. Congress and the President, at least, will need a degree of popular support to use international law to aggrandize national power at the expense of the States, but that support is far less than would be needed to amend the Constitution to delegate such authority to the national government directly.

#### **IV. Objections to the Internalization of International Human Rights Norms Into Domestic Federal Law**

Any interpretation of the United States’ *foreign* affairs powers resulting in such a profound shift of regulatory authority over local affairs from the States to the national government warrants closer examination. This Part examines a number of objections to the three methods of internalization described in Part II.

##### **A. Federal Common Law**

Of the three mechanisms used for internalization of international human rights norms into federal law, *Filartiga*’s holding that such norms are to be applied by courts as federal common law stands on the weakest footing. In taking out of context and relying on statements by the Supreme Court that international law is “part of our law” and “part of the law of the land,”<sup>59</sup> the Second Circuit made a crucial analytical mistake.<sup>60</sup> Each of those statements was made prior to the Supreme Court’s seminal ruling in *Erie Railroad Co. v. Tompkins* that “[t]here is no federal general common law.”<sup>61</sup> Before *Erie*,

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<sup>57</sup> 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, 841 & nn. 170-71 (1997) (providing examples of such arguments).

<sup>58</sup> Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 U.C.L.A. L. REV. 665, 721 (1986).

<sup>59</sup> See *supra* notes 23-24 and accompanying text.

<sup>60</sup> *Filartiga*’s conceptual misstep has been criticized in depth. See Bradley & Goldsmith, *supra* note 57, at 849-70; Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260, 2263-65 (1998); Arthur M. Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205, 1239-50 (1988).

<sup>61</sup> 304 U.S. 64, 78 (1938).

international law (like the law of torts and contracts) had been part of a federal general common law that, though not itself raising a federal question, provided the rules of decision for federal courts otherwise having jurisdiction over a case.<sup>62</sup> Pronouncements about the law of nations in the pre-*Erie* cases relied on by the Second Circuit in *Filartiga* involved such an application of general common law in cases over which the federal courts had an independent Article III jurisdictional basis (such as diversity or admiralty),<sup>63</sup> and simply had no bearing on the actual question presented in *Filartiga*, i.e., whether “international law” arises under the laws of the United States within the meaning of Article III. In fact, the Second Circuit (and the other courts to consider the issue) simply missed or ignored numerous nineteenth- and early twentieth-century Supreme Court decisions that hold, unequivocally, that “international law” is not federal law.<sup>64</sup>

In contrast to the “federal general common law” repudiated in *Erie*, there is a modern, limited form of federal common law that has the status of federal law. Consistent with the post-*Erie* notion that federal courts are powerless to apply law not derived from a sovereign source, however, modern federal common law applies only where necessary to further “a genuinely identifiable (as opposed to judicially constructed) federal policy.”<sup>65</sup> That there is no such policy favoring the wholesale creation of causes of action for violations of international human rights law is confirmed both by the political branches’ cautious and incremental approaches to this field and by modern Supreme Court decisions.<sup>66</sup>

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<sup>62</sup> See *Huntington v. Attrill*, 146 U.S. 657, 683 (1892) (explaining that if a “question of international law” arises in federal court, “it is one of those questions of general jurisprudence which that court must decide for itself,” but if it is decided in State court, “the Constitution and laws of the United States have not authorized” Supreme Court review).

<sup>63</sup> For example, *The Paquete Habana* and *The Nereide*, see *supra* notes 23-24, were admiralty cases.

<sup>64</sup> See, e.g., *N.Y. Life Ins. Co. v. Hendren*, 92 U.S. 286, 286-87 (1875) (holding that “the law of nations” does not present “any Federal question”); *Oliver Am. Trading Co. v. Mexico*, 264 U.S. 440, 442-43 (1924); *Huntington*, 146 U.S. at 683; *Ker v. Illinois*, 119 U.S. 436, 444 (1886); cf. 5 Op. Att’y Gen. 691, 692 (1802) (“doubt[ing] the competency of the federal courts” to hear “an aggravated violation of the law of nations” in the absence of a congressional “statute recognizing the offence”). Indeed, the Second Circuit in *Filartiga* essentially adopted the reasoning of Justice Bradley, the sole *dissenting* Justice in *New York Life*. See 92 U.S. at 287-88 (Bradley, J., dissenting) (arguing that “unwritten international law” is part of the “laws of the United States”).

<sup>65</sup> *O’Melveny & Meyers v. F.D.I.C.*, 512 U.S. 79, 89 (1994); cf. *D’Oench, Duhme & Co. v. F.D.I.C.*, 315 U.S. 447, 472 (1942) (Jackson, J., concurring) (observing that “[f]ederal common law implements the federal Constitution and statutes, and is conditioned by them”).

<sup>66</sup> For example, in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), the Supreme Court held that the act of state doctrine (which prevents certain foreign official acts from being challenged in U.S. courts) has the status of modern federal common law. But the Court made clear that the doctrine, with its “‘constitutional’ underpinnings,” originated not in international law but in constitutional separation of powers principles. *Id.* at 422-24. In fact, in holding that the act of state doctrine applied

In short, the endeavor by the courts to create a federal common law of international human rights is completely misguided, and ought to be rejected.

## **B. The Define and Punish Clause**

Unlike the federal courts' creation of a body of human rights common law, Congress's putative power to enact human rights legislation such as the TVPA is premised on a specific enumerated power. For this reason, even some of *Filartiga* harshest critics have concluded that, if *Filartiga* were overturned, "Congress . . . would still have the power to authorize the application of [customary international law]"—presumably including international human rights law—"as domestic federal law."<sup>67</sup> However, whether Congress's power to define and punish "Offences against the Law of Nations" extends to violations of modern international human rights law is a question that is not free from serious doubt.

Very little has been written on the meaning of the Define and Punish Clause, with the principal debate concerning whether congressional power thereunder is limited to the enactment of penal legislation.<sup>68</sup> That question, with its focus on the manner by which Congress may regulate, is beyond the scope of this paper. The concern here is with the proper *objects* of regulation under the Clause, and the answer to that question requires an understanding of the original meaning of the phrase "Law of Nations."

As noted in Part II, unlike the modern conception of international law, which extends to the relationships between private individuals and their own governments and countrymen, the law of nations at the time of the Founding was concerned with interstate

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even where the foreign act violated international law, *Sabbatino* "declared the ascertainment and application of international law beyond the competence of the courts of the United States," *id.* at 439 (White, J., dissenting), and "did not consider international law to be part of the law of the United States in the sense that United States courts must find and apply it as they would have to do if international legal rules had the same status as other forms of United States law," Harold G. Maier, *The Authoritative Sources of Customary International Law in the United States*, 10 MICH. J. INT'L L. 450, 463 (1989).

<sup>67</sup> Bradley & Goldsmith, *supra* note 57, at 871.

<sup>68</sup> Compare Stephens, *supra* note 54, at 508-19 (arguing that Congress is empowered under the Clause to enact civil legislation) with Charles D. Siegal, *Deference and Its Dangers: Congress' Power to "Define . . . Offenses Against the Law of Nations,"* 21 VAND. J. TRANSNAT'L L. 865, 866-67 (1988) (arguing that the Clause permits only penal legislation). That Congress's power under the Clause extends only to penal legislation was the view of the Department of Justice when Congress debated passage of the TVPA. See Hearing on S. 1629 and H.R. 1662 Before the Subcomm. on Immigration and Refugee Affairs of the Senate Comm. on the Judiciary, 101<sup>st</sup> Cong., 2d Sess. 12, 13 (1990) (prepared statement of John O. McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice).

relations. Emmerich de Vattel, a natural law theorist with significant influence on the Founding generation, stated, “[t]he Law of Nations is the science which teaches the rights subsisting between nations or states and the obligations correspondent to those rights.”<sup>69</sup> James Kent, echoing this theme in the early part of the nineteenth century, defined the law of nations as “that code of public instruction which defines the rights and prescribes the duties of nations in their intercourse with each other.”<sup>70</sup>

Thus, the law of nations was the means “by which alone all controversies between nation and nation can be determined.”<sup>71</sup> This is not to say that individuals did not have rights and obligations under international law. Eighteenth-century courts applied the law of nations (as general common law<sup>72</sup>) to matters where the conduct of private citizens touched upon relations between nations, such as where one nation’s citizens injured or affronted the dignity of another nation or its officers or citizens.<sup>73</sup> Blackstone provided examples of such matters, noting that “[t]he principal offence against the law of nations . . . are of three kinds; 1. Violation of safe-conducts; 2. Infringement of the rights of ambassadors; and, 3. Piracy.”<sup>74</sup> Another area in which the law of nations regulated the

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<sup>69</sup> EMMERICH DE VATTEL, THE LAW OF NATIONS § 3 (Joseph Chitty ed. & trans., Phila., T. & J.W. Johnson & Co. new ed. 1852) (1758). For Vattel’s influence on American thought, see Douglas J. Sylvester, *International Law As Sword or Shield? Early American Foreign Policy and the Law of Nations*, 32 N.Y.U. J. INT’L L. & POL. 1, 67 (1999).

<sup>70</sup> 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 1 (New York, O. Halsted 1826). It is sometimes said that the law of nations also referred to commercial fields like maritime law and the law merchant, *see, e.g.*, Bradley, *supra* note 22, at 599, but these areas are not what the Framers had in mind when using the term “law of nations.” As Vattel explained, “[t]he Romans often confounded the law of nations with the law of nature, giving the name of ‘the law of nations’ (*Jus Gentium*) to the law of nature [which included universal rules governing commercial transactions].” VATTEL, *supra* note 69, at vii-viii. By contrast, eighteenth-century commentators were “generally agreed in restricting the appellation of ‘the law of nations’ to that system of right and justice which ought to prevail between nations and sovereign states”, *i.e.*, to what the Romans called “right of embassies” and “*fecial law*.” *Id.* at viii.

<sup>71</sup> Justice James Iredell, Charge to the Grand Jury for the District of South Carolina (May 12, 1794), *reprinted in* GAZETTE OF THE UNITED STATES (Philadelphia), June 12, 1794, *quoted in* Sylvester, *supra* note 69, at 58.

<sup>72</sup> *See supra* notes 59-64 and accompanying text.

<sup>73</sup> *See Tel-Oren*, 726 F.2d at 813-14 (Bork, J., concurring); Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT’L L. 461, 475-80 (1989); John M. Rogers, *The Alien Tort Statute and How Individuals ‘Violate’ International Law*, 21 VAND. J. TRANSNAT’L L. 47, 49-50 (1988).

<sup>74</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 68, 72. Professor Rogers has taken issue with the characterization of piracy as a violation of the law of nations, on the grounds that a wrong committed by private individuals outside a nation’s jurisdiction “does not result in the violation of one state’s obligations to another.” Rogers, *supra* note 73, at 50. His theory is consistent with the Founding-era conception of the law of nations and explains why the Define and Punish Clause’s



conduct of private individuals was the field of prize, whereby warring nations (and their citizens) captured enemy merchant vessels.<sup>75</sup> Significantly, however, because the rights of individuals were necessarily tied to relations between nations, violations of the law of nations could not occur when the aggrieved parties were nationals of the acting state.

The United States' treatment of these issues prior to and just after the adoption of the Constitution is consistent with this understanding of the law of nations. In 1781, for example, the Continental Congress, itself lacking the necessary regulatory authority, passed a resolution recommending that the States punish "infractions of the laws of nations."<sup>76</sup> The resolution singled out, as the "most obvious" subjects of such legislation, violations of safe-conducts and passports granted by Congress to foreign subjects in times of war, acts of hostility against those in amity with the United States, infractions of the immunities of ambassadors and other public ministers, and treaty violations, recommending as well that the States create civil remedies for "injur[ies] done to a foreign power by a citizen."<sup>77</sup> A decade later, the newly empowered First Congress relied on the Define and Punish Clause to criminalize violations of safe-conducts and passports and affronts to and assaults on ambassadors and other public ministers.<sup>78</sup>

It seems clear, therefore, that congressional power under the Define and Punish Clause was understood to extend only to the regulation of conduct bearing on controversies between nations. Proponents of a congressional power to protect human rights under the Define and Punish Clause respond to this historical record by arguing that the term "Law of Nations" is flexible enough to include whatever the international community views as international law at a given period of time.<sup>79</sup> But while it may well be true that the content of the rules governing the relations between states can change over time, it is something entirely different to say that legislation need no longer be directed at such relations, but rather may extend to any object so long as that object is designated "international law" by Congress or the international community. The latter theory is not only at odds with appropriate interpretive methodologies,<sup>80</sup> but would also

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grant to Congress of the power to define and punish *both* "Offences against the Law of Nations" and "Piracies" is not redundant.

<sup>75</sup> See Joseph M. Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT'L & COMP. L. REV. 445, 451-67 (1995).

<sup>76</sup> 21 JOURNALS OF THE CONTINENTAL CONGRESS 1774—1789, at 1136 (Library of Congress 1912).

<sup>77</sup> *Id.* at 1136-37.

<sup>78</sup> See An Act for the Punishment of certain Crimes against the United States, ch. IX, §§ 25-28, 1 Stat. 112, 117-19 (1790).

<sup>79</sup> See Stephens, *supra* note 54, at 477-83.

unmoor the Define and Punish Clause from its limited purpose of allowing the national government to speak with one voice in the area of foreign relations.

Under an interpretation of the Define and Punish Clause faithful to its original meaning, therefore, Congress lacks the power to define as violations of the law of nations wrongs committed against individuals by their own governments or countrymen, or to provide remedies for those wrongs.

### C. The Treaty Power

On its face, the federal treaty power presents the best case for a national power to internalize international human rights law. The President is typically given considerable deference in his conduct of the nation's foreign affairs.<sup>81</sup> And unlike Congress's power under the Define and Punish Clause, the President's power under the Treaty Clause is not subject to an express subject-matter limitation, presumably permitting treaties to be made on any subject. Moreover, the Supreme Court has held that Congress's power to enforce a treaty (under the Necessary and Proper Clause<sup>82</sup>) is bounded only by the terms of the treaty, and not by the terms of Congress's other enumerated powers.<sup>83</sup>

However, there is reason to believe that the treaty power is not so unbounded. Recent scholarship has mustered convincing evidence from the Founding era that the Framers foresaw the arguments for an expansive use of the treaty power, and rejected them, instead understanding the word "treaties" to be a term of art referring to agreements concerning external matters relating to the United States' intercourse with foreign nations, such as war, peace, alliances, neutrality and commerce.<sup>84</sup> For example, in response to Anti-Federalist objections to the apparent breadth of the treaty power, James Madison explained that "[t]he object of treaties is the regulation of intercourse with foreign nations, and is external."<sup>85</sup> Thomas Jefferson similarly wrote (after

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<sup>80</sup> See Gary Lawson, *On Reading Recipes . . . And Constitutions*, 85 GEO. L. REV. 1823 (1997). The Seventh Amendment's guarantee of a jury trial "[i]n Suits at common law", U.S. CONST. amend. VII, provides a useful analogy. The Supreme Court has applied that right to causes of action not existing at the time the Amendment was adopted, but only if those causes of action are "analogous" to eighteenth-century common-law causes of action. See *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989).

<sup>81</sup> See, e.g., *Regan v. Wald*, 468 U.S. 222, 242 (1984).

<sup>82</sup> U.S. CONST. art. 1, § 8, cl. 18.

<sup>83</sup> See *supra* note 43 and accompanying text.

<sup>84</sup> See Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 411, 413-17 (1998).

<sup>85</sup> *Id.* at 413 (quoting *The Debates in The Convention of the Commonwealth of Virginia*, reprinted in 3 ELLIOT'S DEBATES 513 (Jonathan Elliot ed., 2d ed. 1888)).

ratification) that treaties “must concern the foreign nation party to the contract” and must “comprehend only those subjects which are usually regulated by treaty.”<sup>86</sup> On this understanding of the treaty power, the treatment of individuals by their own governments and countrymen is no more a proper subject of a United States treaty than it is a proper subject of Define and Punish Clause legislation.

A second plausible limitation on the treaty power relates to the method by which treaty provisions become binding as U.S. law. Based primarily on the reference to treaties in the Supremacy Clause,<sup>87</sup> conventional wisdom holds that the President and Senate may choose to make a treaty self-executing, such that its terms are enforceable domestically without any further congressional implementing legislation.<sup>88</sup> Examining the Founding-era evidence, Professor Yoo has challenged this conventional wisdom, making a persuasive case that the Framers understood the treaty power to require action by Congress to implement those aspects of treaties “that ordinarily would fall within the scope of Congress’s authority over legislation.”<sup>89</sup> In addition to its historical support, such a theory makes sense in light of the contractual nature of a treaty.<sup>90</sup> A contract between nations may create international obligations, subject to traditional transnational enforcement mechanisms,<sup>91</sup> but that is all it does on its own; further steps to carry out those obligations must be taken by the constitutionally appropriate actors.<sup>92</sup>

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<sup>86</sup> *Id.* at 415 (quoting Thomas Jefferson, *A Manual of Parliamentary Practice: For the Use of the Senate of the United States*, in JEFFERSON’S PARLIAMENTARY WRITINGS 420, 420 (Wilbur S. Howell ed., 1988)); see also THE FEDERALIST No. 75 (Alexander Hamilton), reprinted in 16 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 482 (John P. Kaminski & Gaspare J. Saladino eds., 1986).

<sup>87</sup> See U.S. CONST. art. VI, cl. 2.

<sup>88</sup> See, e.g., Carlos M. Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L L. 695, 706 (1995).

<sup>89</sup> Yoo, *supra* note 50, at 2094. See also John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218 (1999). But see *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 244 (1796) (suggesting that treaty obligations are self-executing).

<sup>90</sup> As Alexander Hamilton explained, “the power of making treaties is neither” legislative nor executive in nature, but rather has as its objects “CONTRACTS with foreign nations”, which are “not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign.” THE FEDERALIST No. 75 (Alexander Hamilton), reprinted in THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 86, at 482.

<sup>91</sup> See *supra* note 13.

<sup>92</sup> Under this theory, where the treaty obligation is executive in nature, such as the withdrawal or placement of U.S. troops or the settlement of legal claims against a foreign nation, it can be carried out by the President without congressional legislation. But to achieve “domestic legislative effects,” treaties need “congressional implementation.” Yoo, *supra* note 50, at 2085 (paraphrasing James Madison’s arguments during the House of Representatives debate about implementing legislation for the Jay Treaty).

On this theory, treaty provisions regulating the conduct of domestic actors cannot become effective without congressional legislation. But must such legislation fall within Congress's enumerated powers, or may Congress regulate any matter covered by a treaty? Notably, Article I does not expressly confer on Congress the power to carry treaty terms into effect. Rather, the congressional power to implement treaty terms is thought to come from the Necessary and Proper Clause.<sup>93</sup> The words of the Necessary and Proper Clause do not necessarily compel that conclusion, however, because the Clause gives Congress the power to enact laws for carrying into execution, not the *terms* of treaties, but the President's power "to *make* Treaties."<sup>94</sup> If, as noted above, there are significant constitutional differences between the making of a treaty and the execution of its terms, Congress may indeed be required to invoke one of its enumerated powers in order to execute a treaty. Whatever the merits of this argument as a textual matter, however, its acceptance would create a potentially large gap in the government's ability to meet the nation's treaty obligations (even with respect to traditional treaty subjects), and would require a sharp break from historical practice and settled Supreme Court precedent.<sup>95</sup>

Treaties present the most difficult questions concerning internalization of international human rights law. Contrary to the situations presented by judicial and congressional internalization, one cannot assert with confidence that the President lacks the power to internalize human rights norms via the treaty power. Yet a careful examination of the historical record and the Constitution's text and structure reveals that the existence of this power should not be taken for granted.

## V. Conclusion

In recent years, the various branches of the federal government have sought to extend their regulatory authority to govern the treatment of foreign citizens by their own governments and countrymen. In doing so, they have created questionable legal precedents that foretell a broad increase in the national government's domestic powers,

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<sup>93</sup> See *supra* notes 82-83 and accompanying text.

<sup>94</sup> U.S. CONST. art. II, §2, cl. 2 (emphasis added).

<sup>95</sup> The portion of the Supreme Court's holding in *Missouri v. Holland* relating to congressional authority, see *supra* note 43, was not novel. See *Neely v. Henkel*, 180 U.S. 109, 121 (1901) (holding that the Necessary and Proper Clause "includes the power to enact such legislation as is appropriate to give efficacy to any stipulations which it is competent for the President by and with the advice and consent of the Senate to insert in a treaty with foreign power"); *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 619 (1842) ("Treaties . . . often contain special provisions, which . . . require the interposition of congress to carry them into effect, and congress has constantly, in such cases, legislated on the subject; yet . . . the power is nowhere in positive terms conferred upon congress to make laws to carry the stipulations of treaties into effect; it has been supposed to result from the duty of the national government to fulfil all the obligations of treaties.").

an increase that threatens to compel the “conclu[sion] that the Constitution’s enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local.”<sup>96</sup> That this result could stem from the national government’s foreign affairs powers demonstrates the fallacy of the view that international law is an esoteric field, the study of which may be left exclusively to the community of international law scholars and practitioners. To the lawyer concerned with domestic federalism, international law has never been more relevant.

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<sup>96</sup> *Lopez*, 514 U.S. at 567-68 (internal citations omitted).