

# Constitutions, International Law, and the Settlement Function of Law: A Schema for Further Reflection

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### I. LAW AND SETTLEMENT OF MORAL CONTROVERSY<sup>1</sup>

Imagine a community living in a defined geographical area. Its members generally believe that their actions should be guided by moral norms, and they generally comply with those norms as they understand them. And, from our external vantage point, we believe that they are indeed subject to moral norms and should comply with them, both in dealing with each other and with those outside their community.

This community, however, lacks something important to its moral welfare. It lacks a mechanism for authoritative settlement of moral controversies—those controversies that inevitably arise over just what the governing moral norms are and how they apply in various factual

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1. The arguments in the next eleven paragraphs are more fully elaborated in LARRY ALEXANDER & EMILY SHERWIN, *THE RULE OF RULES* chs. 1–4 (2001).

circumstances, as well as controversies that inevitably arise over what the factual circumstances are in which they find themselves. These controversies can produce huge costs.

First, they impede coordination with others. What Alpha believes he is morally obligated to do will often depend upon what he believes Beta will do. If Alpha's understanding of moral norms and factual circumstances differs from Beta's, then it is likely that Alpha will fail to predict Beta's actions, and vice versa. And this failure will often mean that they will fail to coordinate their actions and end up failing to do what they, by their own lights, believe is morally optimal. Moral and factual controversies produce failures of coordination, which in turn produce moral costs.

Second, moral controversies can lead to violence. Alpha believes he has a right to put a dam on the river through his land. Beta, downstream, believes that *he* has a right to unimpeded flow. Both refuse to compromise and stand on their rights. Alpha builds the dam, and Beta, believing he has a right to use self-help to defend his rights, attempts to destroy Alpha's dam. Alpha attempts to prevent it. You get the picture. The resulting struggle is morally suboptimal on either's account of morality.

And third, moral controversies may produce moral costs due to lack of factual expertise. Alpha believes he has a moral obligation not to pollute the river, but he also believes that the pesticide he sprays on his crops is not a pollutant. Beta believes it is. Alpha and Beta both lack scientific expertise. Alpha believes that the costs in time and material resources required for him to obtain expert opinion about his pesticide are greater than the material costs his pesticide will cause if he sprays. He therefore sprays without getting such an opinion. He turns out to be wrong about the pesticide.

Authoritative settlement of these controversies will be a moral benefit to this hypothetical community. By authoritative settlement, I mean a decision by some person or institution that is accepted by the community as definitive of what they are obligated to do. By each of their moral lights, a mechanism for authoritative settlement will be morally preferable to its absence; or at least that is so within a range of possible such mechanisms. (Some mechanisms, such as a dictatorship, drawing straws, or rule by the least educated, will appear to be morally worse than anarchy.)

Now how exactly do mechanisms for authoritative settlement eliminate or reduce the moral costs of lack of coordination, violence, and expertise? If the authoritative settling institution issued only the "Spike Lee" edict—"Henceforth, everyone shall on every occasion do the right thing"—the community's moral situation will not have improved. For it is precisely controversy over what "the right thing" is that creates the need for settlement. Thus, the Spike Lee edict fails to settle.

What settlement requires are norms that are more determinate and thus less controversial in terms of their content and their applications than are the moral norms themselves. Settlement requires concrete decisions (“Beta has a right to enjoy Alpha’s dam”) and determinate rules (“None of the following pesticides may be used within a quarter mile of a river”).

Note now the looming paradox. Rules and decisions representing authoritative settlements will only perform their moral functions by simplifying moral requirements. Thus, what these rules and decisions dictate will diverge in a range of cases from what morality requires. But these rules and decisions can only perform their moral function and authoritatively settle what ought to be done if those persons subject to them look only to them and not to the moral norms on which they are based. (Otherwise, the very moral controversies that necessitated them would arise again.)

If we call “law” those rules that represent authoritative settlements of what to do, then law’s moral function is to exclude morality from its subjects’ consideration in determining what to do. But in so doing, law will inevitably diverge from morality and thus dictate actions that are morally wrong or morally suboptimal. And if moral reasons are always supreme, then we, as rule subjects, will have moral reasons to depart from rules of authoritative settlement that we, as authorities, have moral reasons to promulgate. We thus have an inevitable “gap” between the requirements of the rules we morally should establish and the requirements of morality—a gap that I do not believe can be closed.

Some might think that if we have moral reasons to promulgate authoritative rules—that is, if we have moral reasons to have “law”—then surely we must have moral reasons to follow its dictates. Now it is true that if Alpha’s disobeying law would lead to law’s authoritativeness being completely undermined, then Alpha would have a moral reason to obey law that would override any moral reason he might have to disobey it. (I continue to assume that the mechanisms of authoritative settlement produce laws that fall within a range of moral acceptability that makes them preferable to anarchy.) And in many cases, the moral benefits of disobedience will be outweighed by the moral costs of undermining lawfulness in others. But there is a difference between “it’s right because of the effects of violating the law” and “it’s right *because it’s the law*.” If everyone reasons the first way, authoritative settlement has not occurred. And the same moral costs that authoritative settlement

was meant to avert will arise, for everyone will know that everyone else is still reasoning morally rather than accepting the law as conclusive of their obligations. Therefore, the cost of undermining lawfulness will be nil, lawfulness never having been truly established.

Nor does the “incorporation” of morality into law offer a way out of this practical dilemma.<sup>2</sup> The typical way morality is incorporated into law is in the form of standards. Standards can be characterized as: “Do what is morally best within the space bounded by legal rules and subordinated to authoritative decisions regarding how the standard applies.” In other words, in standards, morality operates only in the interstices of what has been authoritatively decided. Morality is treated by the law as legally subordinate—as one would expect.

But some believe that “the gap” can be closed by making consistency with morality a necessary or sufficient condition of legal validity. And indeed, doing so would eliminate “the gap,” but it would do so by eliminating authoritative settlement and hence, law. For then the same moral controversies for which law is the moral antidote would resurface in the form of legal controversies. The reason this is often overlooked is that those who assert some moral test for legal validity assume that there will be an authoritative decision reached regarding whether that moral test has been satisfied. However, if morality really were a test of legality, then no decision regarding whether that test were satisfied would itself settle the matter authoritatively. For the decision itself would be valid only if *it* were consistent with morality, and the original moral controversy would continue.

## II. LAW AND CONSTITUTIONS

What would be necessary for us to say of this community—or any other community—not only that it had “law,” but also that it had a “constitution”? Put differently, what distinguishes ordinary law from constitutional law?

In my view, there is no noncontroversial distinction between ordinary law and constitutions, at least if the constitutions we are discussing go beyond the hortatory or precatory and purport legally to obligate. Both ordinary law and constitutions are the products of authoritative settlement.<sup>3</sup> Constitutions could be distinguished from ordinary law on either of two axes: in terms of relative position on the chain of validity

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2. The arguments of the next two paragraphs are more fully elaborated in Larry Alexander & Frederick Schauer, *Law's Limited Domain Confronts Morality's Universal Empire*, 48 WM. & MARY L. REV. 1579 (2007).

3. See ALEXANDER & SHERWIN, *supra* note 1, at ch. 3.

or in terms of relative entrenchment.<sup>4</sup> The United States Constitution, for example, is both higher on the validity chain than statutory law and treaties, which are themselves higher on the validity chain than, say, administrative rules, common law decisions, and state and local statutes.<sup>5</sup> (Of course, one could look at parts of the U.S. Constitution—the amendments—as being lower on the validity chain than the original Constitution, which contains Article V and its rules governing adoption of amendments,<sup>6</sup> just as one could view Article VII, governing the ratification of the Constitution, as higher on the validity chain than the rest of the Constitution.<sup>7</sup> On the other hand, once Article V or Article VII has been complied with, one might say that those measures adopted in pursuance of their terms now rank equally high on the validity chain.)

Alternatively, constitutions might be distinguished from ordinary law by relative degrees of entrenchment against change. Again, the U.S. Constitution is more entrenched than are statutes, administrative rules, and other non-constitutional law.

Most frequently, as with the U.S. Constitution, rank on the validity chain and degree of entrenchment go hand in hand. It is theoretically possible to have the ultimate rules governing validity be easier to change than some of the rules they validate, and I have been told that is the case in some countries. But it is easy to see why that might prove impractical. If one had a relatively entrenched lower level rule and a relatively unentrenched higher level one, the former could be repealed merely by taking the easier route of repealing the latter (and then reinstating the latter once repeal of the former had been accomplished).<sup>8</sup>

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4. See Larry Alexander, *Constitutions, Judicial Review, Moral Rights, and Democracy: Disentangling the Issues*, in *EXPOUNDING THE CONSTITUTION* 119 (Grant Huscroft ed., 2008); Larry Alexander, *Constitutionalism*, in *CONTEMPORARY DEBATES IN POLITICAL PHILOSOPHY* 283 (Thomas Christiano & John Christman eds., 2009); *Constitutionalism and Democracy: Understanding the Relation*, in *THE SUPREME COURT AND THE IDEA OF CONSTITUTIONALISM* 161 (S. Kautz et al. eds., 2009).

5. “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . .” U.S. CONST. art. VI, § 2.

6. See U.S. CONST. art. V.

7. See Michael Steven Green, *Legal Revolutions: Six Mistakes about Discontinuity in the Legal Order*, 83 N.C. L. REV. 331 (2004).

8. See *supra* note 4.

### III. INTERNATIONAL RELATIONS

Thus far, I have discussed law and morality only as they relate to a single hypothetical community. But because my topic is international law and its relation to domestic constitutions, I shall now widen my lens and assume the existence of other communities.

The most important feature of this inter-community view is that fundamentally, it is not different from the intra-community one. When they interact, people from different communities are subject to the same moral norms as they are when they interact within their own communities. Justice and “the Right” govern all human interactions without regard to geography, ethnicity, religion, and the like—although Justice and the Right might be sensitive to these and various other human differences in their application. And if Justice and the Right dictate that, within a range, promises be kept and that reasonable expectations not be dashed, those obligations are applicable to both individual and communal acts vis-à-vis individuals from other communities and those communities themselves.

What is also true when we adopt the international perspective is that the same moral imperative to establish mechanisms for authoritative settlement of moral controversies operates, though perhaps with less force. Recall that authoritative settlement mechanisms are morally preferable to their absence only if they are sufficiently reliable so that they risk less moral error than will occur in their absence. If the proposed institutions for authoritative settlement are too prone to moral or factual errors, or too likely to be despotic, oppressive, or corrupt, international anarchy may seem morally preferable. And this is particularly the case if the community whose acceptance of international settlement mechanisms at issue is quite confident in its own moral views, militarily strong enough to deter violent conflict with others over moral controversies, and distrustful of mechanisms of authoritative settlement beyond its control. Because the very purpose of authoritative settlement is to exclude moral considerations in determining what one should do and to make the terms of the authoritative settlement conclusive of the matter, setting up any mechanism for authoritative settlement involves moral risk. The risk may be worth running in return for the moral benefits of settlement in the case of intra-community moral conflict. But the risk may be greater and the benefits smaller in international relations, especially for the militarily strong and morally confident.

## IV. INTERNATIONAL LAW AND AUTHORITATIVE SETTLEMENT

The function of law is to settle moral controversy. Law tells us what we are obligated to do (and how to alter, when it is possible, what we are obligated to do). Law therefore occupies the same terrain as morality, which law must exclude from consideration by law's subjects when they determine how they should act given a legal norm covering the matter. If law did not purport to be conclusive of subjects' moral duties and rights on the matters it regulates, law could not accomplish its function of settling moral controversy. That does not mean, of course, that in drafting laws, *lawmakers* should not advert to morality. That would be absurd. What it does mean is that law's *subjects* are expected to follow the law and not morality even if they believe the law's dictates differ from morality's.

I repeat this account of law because it bears on the status of international law. Some believe that international law is oxymoronic because of the absence of international mechanisms of enforcement. Whether there is such an absence I will put aside because the premise of this argument is incorrect. Law's existence does not depend on institutions of enforcement. It depends only on acceptance of mechanisms for authoritative settlement. (Law is necessary because we are not all-knowing gods, not because we are not angels.)<sup>9</sup> And if there are transnational mechanisms that have been accepted as mechanisms of authoritative settlement, then within the scope of their accepted authority, there is international law.

For there to be international law, then, there must be acceptance by those subject to it of the mechanisms by which their obligations are authoritatively determined. Those mechanisms might include not only institutions that legislate or that declare the content of the obligations, but also institutions that adjudicate the meaning and application of those obligations when their meaning or application is controverted. (The same institutions might serve both as law-makers/declarers and as adjudicators, as common law courts do in countries with common law.)

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9. See Larry Alexander, "With Me, It's All er Nuthin,'" *Formalism in Law and Morality*, 66 U. CHI. L. REV. 530, 539, 549 (1999).

Now, is there in fact international law? As I understand the matter—and I am sure this is highly oversimplified—international law is deemed to have the following sources: treaties and other agreements among nations; behavior of nations that generates binding norms; and perhaps the declarations of international tribunals, organizations, and intellectuals. Norms generated by the last two sources are called customary international law.<sup>10</sup>

Treaties are relatively unproblematic. It is generally accepted that people can assume obligations by some procedure for tokening the assumption of obligations. “I promise” is, of course, the commonplace method.

There are moral limits to the obligations we can assume and to which others can hold us. “I promise to commit murder”; “I promise to give you money that belongs to another”; “I promise to pollute the atmosphere”: these promises do not produce obligations in the promisor or rights in the promisee.

What holds for natural persons also holds for corporate bodies, including states, though not without some complications. An assumption of obligations by a state, for example, may be quite just and morally permissible vis-à-vis other states but unjust vis-à-vis some of the promisor state’s own citizens. (Think of odious debts incurred by nations governed despotically for the benefit of the despot and his cronies.) Still, there may be indirect consequentialist reasons to deem a state morally bound to its agreements even when those agreements work some injustices internally. If one’s state could not bind itself to its agreements internationally, were any one of its citizens wronged by its compliance, then it would be unlikely to be viewed by other states as a reliable treaty partner, and everyone might be worse off as a consequence. Indeed, treating treaties as binding might have the identical indirect consequentialist justification as law in general: Just as authoritative settlements will depart from what morality would directly dictate but yet be morally preferable to their absence, so too might the authority to enter binding treaties.

In the United States, of course, there are *legal* limits to the binding force of treaties. The President and the Senate cannot bind the United States to treaty obligations that conflict with the Constitution, at least as a matter of United States law.<sup>11</sup> *Reid v. Covert*<sup>12</sup> makes that clear.

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10. See THOMAS BUERGENTHAL & SEAN D. MURPHY, PUBLIC INTERNATIONAL LAW: IN A NUTSHELL 18–34 (2007).

11. As a matter of international law, however, our treaty obligations may be regarded as binding by other nations even if those obligations exceed constitutional limits on the treaty power. However, because we, the people of the United States, have not accepted constitutionally *ultra vires* treaties as authoritative settlements of our



(*Missouri v. Holland*,<sup>13</sup> however, raises the question of how far the treaty authority extends with respect to the Constitution's federal structure.)

These constitutional limits on treaty obligations are not coterminous with, but are much less restrictive than moral limits on treaty obligations. The President and Senate have constitutional authority to bind the United States to quite iniquitous obligations, whether iniquitous to foreigners or to citizens. Of course, they should not do so and would rightly be censured if they did. But they are constitutionally at liberty to enter into any treaty that is not violative of constitutional constraints. And, as argued previously, just as there are good moral reasons to have authoritative settlement mechanisms—law—that may deviate from the morally optimal in what they prescribe, there may be good moral reasons for the President and Senate to be able to bind the country in ways that are morally unfortunate, especially given that there are constitutional limits on the treaty power.

In terms of their status as domestic law of the United States, treaties, at least if they are self-executing, are constitutionally on a par with federal statutes.<sup>14</sup> They are supreme over inconsistent state laws but, as mentioned above, inferior to the Constitution. With respect to laws of equal status—other treaties and federal statutes—the “last in time” rule of superiority prevails.<sup>15</sup>

At this point I should say a word about the concept of “sovereignty.” Although there are several accounts of sovereignty on offer, I choose to characterize sovereignty in terms of the accepted mechanisms for authoritative settlement. If those mechanisms are all contained within a given community, then the community is legally obligated only by laws of its own making. (Its moral obligations are, of course, another story.) I regard such a community as fully sovereign.

Are treaties consistent with the full sovereignty of the United States? Well, in one sense, they are. After all, they are subordinate to the Constitution. Moreover, even if their terms do not permit unilateral

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international obligations, those obligations are not international *law* from our perspective. See U.S. CONST. art. VI.

12. *Reid v. Covert*, 354 U.S. 1 (1957) (striking down action taken in pursuance of a treaty but in violation of the Bill of Rights).

13. *Missouri v. Holland*, 252 U.S. 416 (1920) (upholding federal enforcement of a treaty covering matters beyond Congress's enumerated powers).

14. See *supra* note 5.

15. See MICHAEL D. RAMSEY, *THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS* 166–68 (2007).

termination, as a domestic matter, they may be abrogated by the President or by a later statute.<sup>16</sup>

Still, treaties that do not permit unilateral termination may continue to obligate the United States as a matter of international law even if the treaty has been abrogated domestically by the President or by a later inconsistent statute. Even so, that continuing international obligation cannot be considered inconsistent with the full sovereignty of the United States. After all, it was acquired as a result of voluntary actions taken in pursuance of, and consistently with, the Constitution. Just as contractual obligations are consistent with an expression of the autonomy of the individual contractors, so too are treaty obligations consistent with national sovereignty.

Suppose, finally, that a treaty negotiated by the President and ratified by the Senate were to delegate the authority to declare international obligations on some topics to some supranational tribunal. Would *that* treaty be consistent with full sovereignty of the United States, and would it be constitutionally valid?

Let us distinguish two types of delegations to supranational institutions and two types of legal consequences. The two types of delegations are delegations to *interpret* voluntary commitments and delegations to *enact* or *declare* obligations (that cannot be traced to voluntary commitments). The two types of legal consequences are those for the domestic law of the United States and those for international law.

Treaty delegations to international tribunals that are to interpret the treaty obligations are probably within the constitutional authority of the President and Senate. And if the treaty obligations are self-executing, or Congress has passed the requisite legislation, then the international tribunal's interpretations would be enforceable domestically by U.S. courts. (I withhold judgment on whether a treaty could bind U.S. courts to follow a treaty interpretation by a supranational body that the U.S. courts regard as erroneous and unreasonable.)

So long as the delegation concerns interpretation, it is consistent with the full sovereignty of the United States; the United States would be bound only by the obligations it has voluntarily assumed through processes accepted as authoritatively settling how it can do so.

Consider, now, treaties that delegate law-enacting or law-declaring authority to some international tribunal. (I consider law-declaring to be tantamount to law-enactment if the declaration is based on factors other than the voluntary assumption of obligations.) Were such a treaty constitutionally valid, it would appear to represent the voluntary

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16. *Id.* at 155–73.

surrendering of full U.S. sovereignty. After all, as a consequence of such a treaty, authoritative settlement of what the United States, its citizens, or both, are obligated to do would now be determined by foreigners.

This matter is perhaps more complicated, however. If the delegation of law-enactment authority is retractable—the treaty can be terminated at any time—then the delegation is probably consistent with retention of full sovereignty, especially if termination deprives the international law-enacting body of any authority to determine either U.S. domestic law or U.S. international (legal) obligations. (Matters are less clear if treaty termination affects only U.S. domestic law but not international law, a matter I take up when I take up customary international law.)

If the treaty is permanent in effect, then it is a voluntary surrender of sovereignty and similar to the absorption of one country by another—though in this case only a partial one—limited to the extent of the authority granted the law-enacting international institution. (Think of the surrender of full but not all sovereignty by the states of the United States in ratifying the Constitution.)

The constitutional question is more vexed. Would such a surrender of some degree of sovereignty by treaty be constitutional, or would a treaty delegating lawmaking authority to a supranational body be constitutionally invalid? Although this issue is surely not free from doubt, it would seem that if the treaty were deemed to have delegated lawmaking authority to the international institution, the treaty would be constitutionally *ultra vires*, at least with respect to the international institution's *domestic* authority. Although the constitutional limits on Congress's and the President's authority to delegate lawmaking functions—authoritative settlement of obligations—to other institutions and to private parties is a hotly contested one,<sup>17</sup> if there are such limits, delegations to supranational bodies would be a prime candidate for violation of those limits.<sup>18</sup>

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17. On delegations to private parties, see *Washington ex rel Seattle Trust Co. v. Roberge*, 278 U.S. 116 (1928); *Cusack Co. v. City of Chicago*, 242 U.S. 526 (1917); *Eubank v. City of Richmond*, 226 U.S. 137 (1912). On delegations to private parties to enforce federal law through *qui tam* actions, see *Vermont Agency of Natural Res. v. United States*, 529 U.S. 765 (2000). On delegation of legislative power to non-legislative bodies, see Larry Alexander & Saikrishna Prakash, *Reports of the Delegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297 (2003).

18. There are some who see no constitutional problem with treaties' delegating domestic legal authority to international tribunals. I find that view quite problematic given the Constitution's carefully wrought structures for lawmaking.

With respect to the treaty's conveying authority to obligate the United States *internationally*, however, the question becomes whether the Constitution permits the United States to surrender by treaty part of its sovereignty. For unlike treaties under which the United States undertakes specific obligations, the treaties we are now considering represent agreements to be bound by whatever obligations the international tribunal declares. Some might view these two types of treaties as differing only by matters of degree, with agreement on specific obligations at one end of a continuum (no loss of sovereignty); agreement to whatever rules an international body formulates on a specific matter further along the continuum (partial loss of sovereignty); and agreement to whatever rules an international body formulates on any subject whatsoever at the far end of continuum (full loss of sovereignty). Others might see these differences as differences of kind rather than differences of degree; and they would probably deem valid only treaties undertaking specific obligations and reject as unconstitutional any treaties purporting to delegate lawmaking authority to an international body.<sup>19</sup>

Even if such treaties are constitutionally valid, and sovereignty can be surrendered by treaty, it is important to keep in mind that this is so only with respect to international matters. Any attempt to give an international tribunal authority to settle domestic matters would, as argued above, look to be inconsistent with the Constitution's allocation of lawmaking authority and thus be unconstitutional. Sovereignty on domestic matters—where final authority to settle domestic obligations resides—is in the Constitution and the structure it contemplates, and treaties remain subordinate to it insofar as domestic obligations are concerned.

Treaties are one source of international law. For some, they are perhaps the only source. (Again, no one disputes that morality governs relations between nations and their citizens; the question is where the mechanisms for authoritative settlement of international obligations reside.) But others recognize something called “customary international law,” or CIL.

I hesitate to wade into the vexed waters of controversies over CIL, so I will only dip a toe or two into them. One form of CIL, the least controversial, is represented by the behavior of states that is intended to conform to norms that other states also recognize and comply with, such as norms regarding the proper treatment of ambassadors, norms regarding surrender in battle, and so on. These norms might be conceptualized as

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19. In conversation, my colleague Mike Ramsey, Professor of Law, University of San Diego School of Law, stated that he takes a more permissive view on delegations of lawmaking authority to international bodies when the topic is the international legal obligations of the United States than he does when the topic is domestic legal consequences.

arising from implied agreements and thus may be assimilated to treaty-based obligations. (Some could also be regarded as merely concretized moral obligations arising from others' justifiable expectations.)

But there are other conceptions of CIL that move beyond norms to which states have explicitly or implicitly assented. Some even find CIL in the mere behavior of some sufficient number of states. Some find CIL in the pronouncements of the international lawyers, international tribunals, and other international organizations.

Eighteenth century views of CIL—the “Law of Nations”—was some amalgam of natural law and custom.<sup>20</sup> If for natural law we substitute morality, and for custom we substitute norms of behavior treated by all parties as binding, we get a picture of CIL that does not extend beyond what we have thus far discussed. Nations were only bound by their voluntary behavior or by morality—which, though not a matter of choice, nonetheless can never be evaded. Modern views of CIL, however, that extend its sources to the behavior of some sufficient number of states or to the pronouncements of international lawyers and tribunals, pose very serious issues.

First, is it at all clear that we—the citizens of the United States—have accepted these bodies as authoritative for settling our international obligations?

Second, if we have not accepted such bodies as authoritative, should we do so? Are we morally better off if we accept their determinations of our international obligations, or are we better off following our own moral lights and eschewing authoritative settlement that is beyond our control? I am sure different people will answer these questions differently. My point is that these are the questions that need to be answered.

Indeed, even if we have accepted some international bodies as authorities regarding our international obligations, such acceptance can always be withdrawn if we believe anarchy to be morally preferable to authoritative settlement as it is currently realized. All law rests on moment-to-moment acceptance and is quite durable only because of the moral superiority of authoritative settlement over anarchy within a large range of authoritative settlement mechanisms. But when the mechanism seems suspect, and the moral costs of anarchy sufficiently low, one has moral reason to withhold acceptance of the mechanism's settlement authority.

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20. See RAMSEY, *supra* note 15, at 344–46.

In light of this analysis, it is worth considering the constitutional status of CIL. As I understand the issue, there are roughly three views of CIL's constitutional status. One view is that CIL is federal law, applicable in domestic courts, and preemptive of state and local law. In other words, on this view, CIL is on a par with treaties. (On all three views, CIL is not federal law if it conflicts with the Constitution—though to the extent CIL is “law” and not just morality, its apparatus for authoritative settlement are not those processes for legislation described in the Constitution.)

At the other end of the spectrum is the view that denies that CIL is federal law.<sup>21</sup> On this view, CIL could be incorporated by reference in a statute and enter our domestic law that way. Otherwise, CIL is not the law of the United States, and neither the courts nor the President has constitutional authority—much less a constitutional obligation—to enforce it. (Even incorporation by reference might be unconstitutional if the incorporation went beyond the CIL existing at the time of incorporation and extended to norms of CIL that are not based on norm-accepting behavior by the U.S. and become recognized or declared by some non-U.S. institution at a later date. Such dynamic incorporations of CIL could be seen as delegations of lawmaking authority to institutions beyond those of federal government and beyond our shores.)<sup>22</sup>

The middle view is that CIL has no domestic status as preemptive federal law but may bind the President, who can be censured or even impeached for noncompliance. Again, on this view, as on the preceding view, the United States is not fully sovereign, as authoritative settlement on some matters occurs through institutions that we accept as authoritative but that are not our own.

Let me conclude by briefly touching on another issue that bears some relationship to my main topic and that has been the source of some recent contention—the citation of foreign authorities in U.S. constitutional cases.<sup>23</sup> To me, the issues in any constitutional case are simply (1) what was the intended meaning of the constitutional clause in question and (2) how does that intended meaning apply to the facts at hand. It is difficult to see how, say, a 2001 decision of the European Court of Human Rights can be relevant to the intended meaning of a constitutional amendment

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21. For a comprehensive defense of this position, see Michael Stokes Paulsen, *The Constitutional Power to Interpret International Law*, 118 YALE L.J. 1762 (2009).

22. For an illuminating discussion of dynamic incorporation of another sovereign's laws, see Michael C. Dorf, *Dynamic Incorporation of Foreign Law*, 157 U. PA. L. REV. 103 (2008).

23. See, e.g., the debate between the dissent and majority, in *Roper v. Simmons*, 543 U.S. 551 (2005); *Id.* at 575–78 (Kennedy, J., majority opinion); *id.* at 622–28 (Scalia, J., dissenting).

ratified in 1791. For that matter, it is difficult to see how a U.S. Supreme Court decision subsequent to 1791 can be relevant unless one believes the justices possessed evidence of the intended meaning that is no longer available. (The decision can, of course, be treated as the authoritative settlement of that intended meaning if *stare decisis* prevails in constitutional decision making; but that is different from treating the decision as relevant evidence of that meaning.)

On the other hand, depending upon what that intended meaning is, later events might bear on its application. If the constitutional authors intended by some term such as “cruel” to refer to the “real nature” of cruelty—as, for example, Ronald Dworkin believes<sup>24</sup>—then post-1791 philosophical treatises, and perhaps learned opinion in general, might be probative of whether some practice is really cruel. The decisions of foreign courts or even foreign popular opinion could have some probative value—though I would think there would be much better sources of evidence than these. After all, what one would want to know is whether the issue involved in the constitutional case—say, the true nature of cruelty and whether a given punishment manifests it—was the same issue that the foreign court decided and about which foreign opinion was polled. Beyond that, one would be more interested, not in the decision’s or opinion’s bottom line, but in the quality of reasoning that produced it. Good reasoning is good reasoning whoever engages in it and where. That said, I have not been impressed with the use thus far of foreign citations in deciding U.S. constitutional cases.

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24. See RONALD DWORKIN, *FREEDOM’S LAW* 72–81 (1996).

