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*Review of International Law in the U.S.
Supreme Court: Continuity and Change* by
David L. Sloss, Michael D. Ramsey, and
William S. Dodge (eds.)

Riddhi Dasgupta*

I.
INTRODUCTION

The multi-essay book *International Law in the U.S. Supreme Court: Continuity and Change* by editors David L. Sloss, Michael D. Ramsey, and William S. Dodge¹ is an evolutionary tale of the United States Supreme Court's interaction, and sometimes tense confrontation, with international law. Depending on the time period, posture, and issue facing the Court's jurisprudence, the Court has been both solicitous and hostile toward international law. Going forward, the common trends must be coalesced and analyzed for the benefit of the Court, practicing attorneys, and the public. This review highlights the well-organized historical odyssey of some aspects of public international law in the Supreme Court of the United States and in American jurisprudence generally.

The editors are well-suited to the task: Sloss is a Professor at Santa Clara University School of Law whose scholarly interest concerns the application of international law to domestic tribunals; Ramsey is the Hugh and Hazel Darling Foundation Professor at the University of San Diego School of Law where his work is at the cutting edge of constitutional law, foreign relations law, and international business law; and Dodge is a Professor at the University of California Hastings College of the Law specializing in international law, international transactions, and international dispute resolution as well as serving

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1. DAVID L. SLOSS, MICHAEL D. RAMSEY, & WILLIAM S. DODGE eds., *INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE* (2011) [hereinafter SLOSS, ET AL., *INTERNATIONAL LAW IN THE U.S. SUPREME COURT*].

as Co-Reporter for the American Law Institute's Restatement (Fourth) of Foreign Relations Law: Jurisdiction and Judgments. Each editor is a leader in his field and retains significant experience as a practitioner to temper the theoretical bent with constructive practical advice.

In Part I, this review will introduce the work and its various chapters and then proceed to consider the book's many strengths. In Part II, the review addresses the book's omissions and proposes areas for improvement, which the editors and others are invited to take up in future publications. Namely, this review suggests that the editors might have better integrated the two differing schools of constitutional thought into their discussion on international law: evolutionary and static, or "originalist" constitutional interpretation. The editors might have also included an expanded scope of the appearance of international law in the Supreme Court, and addressed private international law issues such as commercial and investment arbitration. Not only would this have been the more comprehensive course of action, it might also have pointed out how to reconcile the philosophical tension between constitutional and commercial conservatism and eventually converted conservative skeptics of international law into active stakeholders.

This review concludes with commendation for the editors and with a positive recommendation about this book to scholars as well as laypersons wishing to learn more about the historical and prospective role of international law in the US polity.

II.

SUMMARY

A. Structure and Highlights of the Book

In consolidating academic contributions from twenty international law scholars, including themselves, the three editors have charted a highly organized chronological course. Part one of the book addresses public international law in the US Supreme Court from the Founding Era to 1860. Part two discusses public international law in the Court from the Civil War to 1900. Subsequently, part three frames the treaties, customary international law, the interpretive role of public international law, and doctrinal change relating to international law in the Supreme Court from 1900 to the Second World War. Part four discusses the same issues from the Second World War to the new millennium. Finally, part five discusses treaties, customary international law, and other international law issues after 2000.

Part one, "From the Founding to the Civil War," discusses the origins of international law in the US Constitution and the US Supreme Court. The editors, in their co-authored article "International Law in the Supreme Court to 1860," state that "[n]ational honour," which "the Revolutionary generation took quite seriously," as much as foreign and economic policy objectives induced the

founders to attend to the law of nations.² Particularly strategic was the framer's consideration that "[c]omplying with the law of nations was important for a small, weak country trying to avoid trouble."³ In short, both "interest and duty" made plain this imperative.⁴ If the Constitution follows the flag, then the Supreme Court follows the Constitution.

The book illustrates this point through the lens of the following question: did the Constitution and the Judiciary Act of 1789, when omitting the law of nations as a decisional rule "mean to foreclose that practice or to assume its continued operation?"⁵ In that pursuit, the editors look to the law of nations in admiralty, criminal law, general common law, federal statutes, the President's role in the constitutional design, and the Supreme Court's emerging positivism.⁶ Then the editors shift their focus to the role of international law as a tool of construction in the hands of the Supreme Court, as the Court tried to preserve the nation's hard-won independence and help build the new nation.⁷ In that role, the editors point out, the Court was a collaborative partner with the other branches and "generally strove to facilitate compliance with the nation's international legal obligations or, at least, to avoid noncompliance."⁸

Part two, "From the Civil War to the Turn of the Century," expounds on treaties, customary international law, and international law as an interpretive tool in the US Supreme Court from the Civil War to 1900. In that historically fascinating age, the Supreme Court showed little hesitation in applying most treaty provisions in domestic courts unless the Court found that there were "jurisdictional or political constraints to judicial review," or that certain treaty provisions were "non-self-executing."⁹ When construing treaties, good faith and liberal construction were the Supreme Court's *modus operandi*. The Supreme Court's treaty interpretation and general approach to customary international law had several hallmarks: greater acceptance that individual treaty rights were derivative in character; differential treatment of European versus non-European treaties; and the "deliberate blending" of positive and natural law principles affirmed by the Court during this era.¹⁰

Part three, "From the Turn of the Century to World War II," explains that "continuity, consolidation, and completion" characterize the development of the

2. *International Law in the Supreme Court to 1860*, in SLOSS, ET AL., *INTERNATIONAL LAW IN THE U.S. SUPREME COURT*, *supra* note 1, at 7.

3. *Id.*

4. *Id.*

5. *Id.* at 23.

6. *Id.* at 23-37.

7. *Id.* at 44-51.

8. *Id.* at 50.

9. Duncan B. Hollis, *Treaties in the Supreme Court to 1860*, in SLOSS, ET AL., *INTERNATIONAL LAW IN THE U.S. SUPREME COURT*, *supra* note 1, at 55.

10. David J. Bederman, *Customary International Law in the Supreme Court, 1861-1900*, in SLOSS, ET AL., *INTERNATIONAL LAW IN THE U.S. SUPREME COURT*, *supra* note 1, at 95.

law of treaties during this period. Even though the kinds and number of treaties rose dramatically in this early part of the twentieth century, the Supreme Court did not retreat from the core precepts of its treaty law jurisprudence, such as the judicial duty to apply treaties as governing law, the “last-in-time” rule, the principle of territorial acquisition, and the Executive’s privilege to determine the treaty signatories and partners of the United States. During this period, the Supreme Court also established what we today consider the building blocks of its international law jurisprudence: a “purposive approach” to construction that is designed to further “amicable relations” with the United States’ fellow signatories as well as a “presumption in favor of a liberal recognition of individual rights secured by treaties.”¹¹ Also in part three, Professors Michael P. Van Alstine and Edward A. Purcell, Jr.¹² present their contrasting views about the precedential and doctrinal changes generated by the significant treaty power case concerning migratory birds and the police power of states, *Missouri v. Holland* (1920).¹³ *Holland’s* shaping of the national discourse on the treaty power and the ramifications of like debates are the important subjects of debate in this portion of the book.

Part four, “From World War II to the New Millennium,” explains the ways in which the Supreme Court’s jurisprudence replaced international law principles of territorial sovereignty with reasonableness, fairness, and equality considerations. This era witnessed the rise of federal power through the Commerce Clause and the Necessary and Proper Clause under the appointees of President Franklin D. Roosevelt and until the epoch of the Chief Justice William H. Rehnquist-led Supreme Court, from approximately 1937 to 1995.¹⁴ Moreover, the book points out that the decline in Austinian sovereignty was manifest in the Supreme Court’s attitude to diminishing federal power as well as rising deference to the Executive branch in customary international law cases.¹⁵ Nonetheless, another trend line was reflected by the Supreme Court’s greater willingness to consider international human rights treaties and norms to which the United States had obligated itself, not necessarily to expand rights under those treaties, but rather to interpret various provisions of the US Constitution

11. Duncan B. Hollis, *Treaties in the Supreme Court to 1860*, in SLOSS, ET AL., INTERNATIONAL LAW IN THE U.S. SUPREME COURT, *supra* note 1, at 193-94.

12. Edward A. Purcell, Jr., *Varieties and Complexities of Doctrinal Change: Historical Commentary, 1901-1945*, in SLOSS, ET AL., INTERNATIONAL LAW IN THE U.S. SUPREME COURT, *supra* note 1, at 286; Michael P. Van Alstine, *Treaties in the Supreme Court, 1901-1945*, in SLOSS, ET AL., INTERNATIONAL LAW IN THE U.S. SUPREME COURT, *supra* note 1, at 199.

13. 252 U.S. 416.

14. SLOSS, ET AL., INTERNATIONAL LAW IN THE U.S. SUPREME COURT, *supra*, at 353. In 1937, Roosevelt’s first Supreme Court appointee Hugo Black solidified the Court’s pro-New Deal majority, affirmed the supremacy of federal power over individuals, corporations and states, and moved past the *Lochner v. New York*, 198 U.S. 45 (1905) era’s insistence on liberty of contract. The Rehnquist Court decision, in *United States v. Lopez*, 514 U.S. 549 (1995), ended this streak.

15. *Id.* at 376.

such as the Eighth Amendment's Cruel and Unusual Punishment Clause and the Fourteenth Amendment's Due Process Clause.¹⁶

Finally, part five, "International Law and Constitutional Interpretation after 2000," finds the aforementioned trends to be of continuing relevance and draws attention to the "self-executing" treaty debate as well as the extraterritorial application of US laws.¹⁷ Some latent as well as expressly-stated fears have been about the future of the United States' "national identity" once its judges become "active participants in the dialogue on human rights . . ."¹⁸ Overall, the editors and authors cover adroitly what they have sought out to cover, which is not to say that their scope is perfect. This review addresses those significant omissions and the attending opportunity costs.

III. DISCUSSION

A. Contributions Made by the Book

The chronological structure does not come at the cost of thematic discussion. By structuring certain chapters, particularly in part five, as a "Main Essay" followed by several "Response Essays," the editors have handled effectively and clearly what could have obfuscated the book's complex messages. At the end of the discussion, the reader has no doubt of its central thesis: the Supreme Court has gradually become more and more reluctant to apply treaties to restrain government action, but has gone in the diametrically opposite direction in relation to deciphering the Constitution's meaning in light of international law.¹⁹ Historically there has always been judicial conflict with the political branches over various preferences in international law usage, but never has this inter-branch conflict been greater than in relation to the previous decade's war-on-terror cases—notably the iconic *Hamdi/Rasul*, *Hamdan*, and *Boumediene* trifecta.²⁰

The strategic decision by the editors to acknowledge the dramatic changes over the twentieth century and the projected changes to come over the next few decades is particularly farsighted and commendable. Nonetheless, there remains something of a befuddling element present here. The editors must be aware that the wave of the future in international law, as in international imperialism, is through foreign investments and mercantilism. That projected future deserves

16. U.S. CONST. amend. V.

17. SLOSS, ET AL., *INTERNATIONAL LAW IN THE U.S. SUPREME COURT*, *supra*, at 317.

18. Melissa A. Waters, *Judicial Dialogue in Roper: Signalling the Court's Emergence as a Transnational Legal Actor?*, in SLOSS, ET AL., *INTERNATIONAL LAW IN THE U.S. SUPREME COURT*, *supra* note 1, at 523.

19. SLOSS, ET AL., *INTERNATIONAL LAW IN THE U.S. SUPREME COURT*, *supra* note 1, at 604.

20. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); and *Boumediene v. Bush*, 553 U.S. 723 (2008).

more in-depth treatment than what is currently provided in the book. Not only are the consequences in this legal area great in purely monetary terms, they might also raise to irreconcilable heights the uneasy relationship between high commerce and legal conservatism in the United States *à la* international law. This point goes largely unaddressed.

Among the book's merits, the editors pull no punches when characterizing the early Supreme Court's practice of "look[ing] to international law" as "more scattered and opportunistic than with statutory interpretation."²¹ Similarly, Professor Paul B. Stephan candidly acknowledges the socio-political and economic undercurrents that may have affected the Supreme Court's perception and application of international law: "[I]n a world where the United States suddenly was a triumphant superpower, the views of other state parties about the meaning of their commitments might have meant little."²² These muscular critiques of prevailing legal doctrine add vibrancy and robustness to dialogue for the sake of doctrinal clarity going forward.

It is also refreshing that with some frequency the scholar-essayists have admitted to the law's trans-substantive ground-rules that render "unifying patterns" less than "self-evident."²³ Indeed, they openly assert that "[s]o complex are the [Supreme] Court's machinations, one is tempted to admit defeat and say that the cases are simply too compartmentalized, deal with areas that do not consistently trigger predictable ideological passion, and are too idiosyncratic to hazard any grand theory."²⁴ The compartmentalization and the very fact-specific focused criticisms of the Supreme Court's jurisprudence are sufficiently anodyne. But references to an "ideological passion" are a different matter altogether.²⁵ Whether or not the reader agrees with the accuracy of the premise, most jurist-epistemologists would find "ideological passion" to be an illegitimate execution of the judicial power. How can an impartial arbiter pronouncing on "what the law is"²⁶ indulge an "ideological passion" channeling her judgment? Did Alexander Hamilton, in *The Federalist* No. 78, not maintain that "[t]he judiciary . . . ha[s] neither FORCE nor WILL but merely judgment?"²⁷ It is quite a powerful charge from which the book does not shy away. Finally, the book's comprehensive and even-handed treatment of most substantive issues leaves it in good stead.

21. *International Law in the Supreme Court to 1860*, in SLOSS, ET AL., INTERNATIONAL LAW IN THE U.S. SUPREME COURT, *supra* note 1, at 41.

22. Paul B. Stephan, *Treaties in the Supreme Court, 1946-2000*, in SLOSS, ET AL., INTERNATIONAL LAW IN THE U.S. SUPREME COURT, *supra* note 1, at 321.

23. Martin S. Flaherty, *Global Power in an Age of Rights: Historical Commentary, 1946-2000*, in SLOSS, ET AL., INTERNATIONAL LAW IN THE U.S. SUPREME COURT, *supra* note 1, at 437.

24. *Id.*

25. *Id.*

26. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

27. THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

*B. A Missed Chance: The Merger between Public International Law
and US Constitutional Conservatism and Libertarianism*

The book's somewhat unimodal analysis leaves out the conservative—originalist and conservative purposivist—perspectives on the Constitution and their interplay with international law. The Declaration of Independence sets the stage by exhorting that the United States must be responsive to the “[o]pinions of [hu]mankind.”²⁸ Its follow-up legal document, the Constitution explicitly recognizes international law when empowering Congress to “define and punish . . . Offences against the Law of Nations.”²⁹ Chief Justice, John Jay, who tellingly was one of the authors of *The Federalist Papers*, wrote: “by taking a place among the nations of the earth,” the United States had “become amenable to the laws of nations.”³⁰ The law of nations is but one component of international law, the other primary component being international treaties and agreements.³¹

In fact, at the turn of the twentieth century in a landmark case, *The Paquete Habana* (1900),³² Justice Horace Gray famously asserted that “[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice” This, however, is not a freewheeling power of courts operating under the US Constitution.³³ Rather, the default principle is that “resort must be had to the customs and usages of civilized nations” only “where there is no treaty, and no controlling executive or legislative act or judicial decision”³⁴ This is in keeping with the pragmatic yet principled approach to construing official policies that the great Chief Justice John Marshall had laid down in 1804: “an act of Congress ought never to be construed to violate the law of nations,” nor the Constitution,³⁵ “if any other possible construction remains”³⁶ The *raison d’être* is that, since the Judiciary has only so much precious capital to expend against its coordinate branches before the courts become irritants that are perceived to add little value, inter-branch constitutional conflict ought to be minimized.³⁷

28. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

29. U.S. CONST. art. I, § 8, cl. 10.

30. *Chisholm v. Georgia*, 2 U.S. 419, 474 (1793).

31. David L. Sloss et al, *International Law in the Supreme Court to 1860*, in SLOSS, ET AL., *INTERNATIONAL LAW IN THE U.S. SUPREME COURT*, *supra* note 1, at 12-13.

32. 175 U.S. 677.

33. *Id.* at 700.

34. *Id.*

35. *Hooper v. California*, 155 U.S. 648, 657 (1895) (“The elementary rule is that every reasonable construction must be resorted to in order to save a statute from unconstitutionality.”).

36. *Murray v. The Charming Betsey*, 6 U.S. 64, 118 (1804).

37. *Ex parte Randolph*, 20 F. Cas. 242, 254 (C.C.D. Va. 1833) (No. 11, 558) (stating that because no questions of “greater delicacy” than constitutional ones could arise, “if the case may be determined on other points, a just respect for the legislature requires, that the obligation of its laws should not be unnecessarily and wantonly assailed.”); *Ashwander v. Tennessee Valley Auth.*, 297

This is just *one* version of American legal history's interplay with international law. It is also the disproportionately predominant version covered in the book. By contrast, a conservative, strict constructionist view of the "law of nations" term contained in the Constitution might be credibly strained to include some limited *jus cogens* precepts, that is non-negotiable basic principles or "peremptory norms" of international law.³⁸ To some conservative scholars, this imperfect solution would be a "legitimate compromise" which maintains "much of the [Offense] Clause's original meaning while preventing it from being used to eliminate the boundary between state and federal authority."³⁹ In short, it is an acceptable triangulation: pragmatism and principle satisfied, equities balanced.⁴⁰

However, countenancing a dramatic expansion of the federal police power, particularly through the operation of criminal law, is beyond the pale.⁴¹ It would encroach on the states' traditional sphere of regulating such behavior in protecting the health, safety, welfare, or morals. There might be a structural anomaly as well. A policy objective that might never win the assent of two-thirds of the Senate (required for treaties) but might win the assent of a simple majority and even the filibuster-proof majority of the Senate *and* win the assent of a simple majority of the House of Representatives (required for statutes) might obligate both States and private legal entities to certain international norms, thus rendering the Constitution's Treaty Clause effectively superfluous.⁴² In such a scenario, a constitutional crisis might be brought about by an overzealous and despotic Presidency — who may well be driving the synergy to

U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.").

38. Vienna Convention on the Law of Treaties, Jan. 27, 1980, art. 53, 1155 U.N.T.S. 332, 344. A non-exhaustive list contains genocide, slavery, murder, torture, prolonged arbitrary detention, racial discrimination, and United Nations Charter principles prohibiting the use of force. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 41 (1990) (Introductory Note to Chapter 2), § 702 cmt. n.

39. Michael T. Morley, Note, *The Law of Nations and the Offenses Clause of the Constitution: A Defense of Federalism*, 112 YALE L.J. 109, 113 (2002) [hereinafter Morley, *The Law of Nations and the Offenses Clause of the Constitution*].

40. *Id.*, at 113, n. 20. Morley suggests merely that principle has an interstitial component of pragmatism, which is important to honor.

41. *United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1252 (11th Cir. 2012) ("Private [17] criminal activity will rarely be considered a violation of customary international law because private conduct is unlikely to be a matter of mutual legal concern.") (referring approvingly to *Flores v. S. Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003)).

42. U.S. CONST. art. II, § 2, cl. 2. The Treaty Clause was designed to relieve "[t]he Founder[s]' . . . anx[iety]" and "to avoid treaty violations because such violations threatened to provoke wars and otherwise complicate relations with more powerful nations. The founders also wanted to establish a reputation for treaty compliance to induce other nations to conclude beneficial treaties with the new nation." See Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 617-18 (2008) (footnotes omitted).

win approval for the domestic incorporation of the international law norm. When one House of the Congress is expelled from the operation, the process can no longer be called “congressional.” Instead, because the President is the first mover in such a scheme, the operation’s attributes are likely best characterized as “presidential.” Although Hamilton, writing in *The Federalist* No. 70, observed that “[e]nergy in the executive is a leading character in the definition of good government,” “energy” cannot be allowed to become a tyrannical force that usurps the prerogatives of other constitutional actors.⁴³ Unfortunately, this entire chain of reasoning and consequences is absent from *International Law in the U.S. Supreme Court*.

C. How Economic Libertarianism and the Investment Arbitration Angle Might Have Enriched the Book

Economic libertarians too have a complaint to register. *International Law in the U.S. Supreme Court* does not really address the commercial dimensions of international law beyond the historical connections with nineteenth-century imperialism and “gunboat diplomacy.”⁴⁴ The “unbundling of global production” since the 1990s has spurred international investments and their arbitration to an unprecedented volume.⁴⁵ Were the editors to focus on this phenomenon, they would have found much ground to cover in the areas of private international law and the investment-arbitration sphere of public international law. In the editors’ defense, of course, the Supreme Court has not yet engaged with a significant volume of private international law. Still, the reader could be forgiven for being misled by the book’s ambitious title: *International Law in the U.S. Supreme Court*, rather than *Public International Law in the U.S. Supreme Court*. Moreover, this omission might be related to the editors’ proclivity for dissecting the public international law features of the governor-governed relationship.

Even as a public international law publication, though, the book has a significant deficiency. Economic libertarians have promoted international agreements that enable foreign investments and allow expeditious legal claims to be assessed by impartial tribunals under favorable procedural and substantive law. They have largely been successful, and this strategy has prompted some international investment tribunals to ambitiously head off into *terra incognita* by

43. THE FEDERALIST NO. 70, p. 471 (A. Hamilton) (addressing the President’s national security powers) (Clinton Rossiter ed., 1961); see THE FEDERALIST NO. 34, at 175 (A. Hamilton) (“the circumstances which may affect the public safety are [not] reducible within certain determinate limits, . . . it must be admitted, as a necessary consequence that there can be no limitation of [Presidential] authority which is to provide for the defense and protection of the community in any matter essential to its efficiency.”).

44. SLOSS, ET AL., *INTERNATIONAL LAW IN THE U.S. SUPREME COURT*, *supra*, at 541-46.

45. Richard Baldwin, *Globalisation: The Great Unbundling(s)*, Prime Minister’s Office, Economic Council of Finland (2006), available at <http://appli8.hec.fr/map/files/globalisationthegreatunbundling%28s%29.pdf>.

mandating not just pecuniary relief for the victorious parties but also injunctive relief to enjoin enforcement of the state's policies.⁴⁶

Since international investment arbitration, as a component of public international law, is the most prominent commercial area that the editors largely omitted, this review focuses on its potential. In 1929, the International Chamber of Commerce (ICC) and the League of Nations created the maiden proposal to protect investors: the Draft Convention on the Treatment of Foreigners.⁴⁷ Although the Draft Convention was rejected, the emergence of investment arbitration had commenced, and it soon took on a life of its own.⁴⁸ The flow of FDI into developing and transitional economies has been steadily growing, and in 2011 reached the peak of \$776.562 billion.⁴⁹ The same year, the global FDI in-flow reached \$1524.422 billion.⁵⁰ To vindicate their legal rights reposed in the capital that has flowed into a host nation, investors may file a request for arbitration. Had the editors of *International Law in the U.S. Supreme Court* focused on the contemporary commercial aspects of public international law, they might have deduced that these public welfare effects—and what some have called “human rights backsliding”—might be ominous.⁵¹

Fragmentation, both among domestic courts and among international tribunals, is far from the only similarity between the two systems. In at least nine

46. *Micula v. Romania*, ICSID Case No. ARB/05/20, Award (2008), at ¶ 167 (stating that a remedy must be expressly precluded in order to be available to the Tribunal: “the Tribunal finds no limitation to its powers to order restitution in the BIT, the instrument on which the consent of the parties is based. While Article 4 of the BIT dealing with expropriation only mentions compensation, it does not rule out restitution. Moreover, the rest of the BIT provisions do not preclude a tribunal from ordering restitution, if and when appropriate, for a violation of other substantive provisions.”).

47. League of Nations, “Responsibility of States for Damage Caused in Their Territory to the Person or Property of Foreigners,” Conference for the Codification of International Law, Bases of Discussion, vol. III, LN Doc C.75.M.69.1929.V (1929).

48. Compare *The Oscar Chinn Case* (1934), *Britain v. Belgium* (1934), P.C.I.J. Series A/B, No. 63 (the Permanent Court of International Justice, the precursor to today's International Court of Justice, held that investors and business owners have no substantial right of access to any market) with *Case Concerning Jenő Hartman* (1958), No. Hung.-717 (1958), United States Foreign Claims Settlement Commission (the Commission found that expropriation does occur when the government deprives the owner of access to use, enjoy or sell the property (regardless of who owns the title)).

49. See *Inward and Outward Foreign Direct Investment Flows, Annual, 1970-2012*, United Nations Conference on Trade and Development (UNCTAD), available at <http://unctadstat.unctad.org/TableViewer/tableView.aspx?ReportId=88>.

50. *Id.* Deriving by subtraction, the amount of FDI in-flow for developed countries is \$747.86 billion.

51. Katerina Linos & Andrew Guzman, *Human Rights Backsliding*, Cal. L. Rev. (forthcoming), at 37, available at www.law.berkeley.edu/files/Guzman-Linos_0930-2.pdf (explaining as part of their “theory of norm transmission” that human rights “backsliding can take place even though no state is obligated to reduce the level of human rights it provides.”); *UPS v. Canada*, UNCITRAL, Award on the Merits (rejecting similar claims by UPS by a 2-1 vote), May 24, 2007. International investment tribunals, it must be remembered, assemble their arbitrators differently than a domestic tribunal, and the substitution of one arbitrator for another may well have led to a victory for the corporation. And it may still be so for the health insurance provider who is one day challenging the public option.

fields of law—(i) Methods of Interpreting International Law Instruments; (ii) Exhaustion of Local Remedies; (iii) Continuous Nationality; (iv) Expropriation and Property Rights; (v) Fair and Equitable Treatment; (vi) Due Process; (vii) Non-Discrimination; (viii) International Minimum Standard; and (ix) Compensation—the exchange of ideas between the US legal system and the international law arena might prove mutually beneficial. The first three are efficiency-based, whereas the last six are substantive or equity-based on the merits. A common denominator among these fields concerns the cultural normativity that results from judge-made balancing, a circumstance reminiscent of the common-law tradition.

First, consider the US-international law convergences in the substantive jurisprudence. One similarity pertains to the varying degrees of deference owed by tribunals to the policy-making sovereign.⁵² The degree of deference depends, on both levels, on balancing the public interest asserted by the government with the abridgement of rights alleged by the claimant.⁵³ Yet another factor is that the Supreme Court’s Takings Clause jurisprudence⁵⁴ has a striking overlap with international law—implicating, *inter alia*, public purpose and use, legitimate expectations, degree of interference, government intent, the sole effects doctrine, deference, and compensation.⁵⁵ Determining an efficient and equitable

52. J. D. Mortenson, *The Meaning of “Investment”: ICSID’s Travaux and the Domain of International Investment Law*, 51 HARV. INT’L. L.J. 257, 312-13 (2010).

53. *Lemire v. Ukraine*, ICSID Case No. ARB(AF)/98/1, at ¶ 273, Decision on Liability (2010) (“balanc[ing] against the legitimate right of [the host State] to pass legislation and adopt measures for the protection of what as a sovereign it perceives to be its public interest.”).

54. *Kelo v. City of New London*, 545 U.S. 469 (2005) (if the area is blighted and the carefully considered development plan is designed to increase economic and social vitality, then it qualifies as constitutional “public use”); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241-42, 244 (1984) (although the State immediately transferred the taken property to private parties for redevelopment, the Court held that it “is only the taking’s purpose, and not its mechanics” with which the Court is concerned); *Berman v. Parker*, 348 U.S. 26, 35 (1954) (even though the property owner contended that his store was not itself blighted, the Court held that “community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis—lot by lot, building by building.”).

55. See, e.g., Y. Fortier & S. L. Drymer, *Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor*, 19 ICSID REV. 293, 326 (2004); *id.* at 305 (“in order to be considered an expropriation, the effect of a regulatory measure on property rights—that is, the required level of interference with such rights—has been variously described as: (1) *unreasonable*; (2) an interference that renders rights so *useless that they must be deemed to have been expropriated*; (3) an interference that deprives the investor of *fundamental rights of ownership*; (4) an interference that makes rights *practically useless*; (5) an interference *sufficiently restrictive* to warrant a conclusion that the property has been ‘taken’; (6) an interference that deprives, in whole or in significant part, the *use or reasonably-to-be-expected economic benefit* of the property; (7) an interference that *radically deprives* the economical use and enjoyment of an investment, as if the rights related thereto had ceased to exist; (8) an interference that makes *any form of exploitation of the property disappear* (i.e., it destroys or neutralizes the economic value of the use, enjoyment or disposition of the assets or rights affected); and (9) an interference such that the property can no longer be put to *reasonable use*.”) (emphasis in original).

allocation of costs, considering who pays, why, and the public and private benefits the use of property will promote or hinder are also salient.

Second and on a related point, there are many logistical and procedural similarities between the international and US courts. They illustrate the importance of efficiency and economy interests of both litigants and tribunals. These similarities include the shared importance in facilitating the roles of special masters⁵⁶ and amici curiae,⁵⁷ in improving the applications of vehicles such as the exhaustion of local remedies, class actions, mass claims, and counterclaims,⁵⁸ and in developing a contractual process that more effectively balances the preference towards party autonomy in contract negotiations with making allowances for socioeconomic disparities among the parties.⁵⁹ Whether or not these considerations deserve to be adopted is not the point; rather, they should be discussed comprehensively.

The editors had an opportunity to map out the future of international economic law and its impact on the US Supreme Court's jurisprudence. In doing so, the editors could have attended to the discussion about the future of the intersection of commerce, libertarian and originalist conservatism, and the role of international law in the United States. The editors might have pointed out a potential battleground between corporatist conservative pragmatism and originalist theoretical conservatism: while the former may strategically prefer to transpose *modern* international law principles to the US constitutional universe (and with great efficacy), to the latter's philosophical allegiances this

56. *Id.* at 413 (stating one view that “joint experts agreed upon by the parties ten[d] to ‘work out far better’ than *tribunal* appointments of the experts, confidentiality advisors, and special masters. As evidence, many of them pointed to the “superb” performance of Professor John R. Crook as confidentiality advisor in the recent *Softwood Lumber Dispute*.”) (referring to United States v. Canada, LCIA, Case No. 111790, at ¶¶ 49-50 (2012)) (emphasis in original).

57. For international tribunal procedures on this question, see R. Moloo, *The Quest for Legitimacy in the United Nations: A Role for NGOs?*, 16 UCLA J. INT'L L. & FOREIGN AFF. 1, 27-28 (2011); UPS v. Canada, Decision on Intervention as *Amicus Curiae*, at ¶¶ 35-43 (2001) (construing its UNCIRAL Article 15(1) power to grant it the authority “to investigate and determine the matter subject to arbitration in a just, efficient and expeditious manner”). For procedures of the US Supreme Court on this issue, see Paul M. Collins, *Amici Curiae and Dissensus on the U.S. Supreme Court*, 5 J. EMPIRICAL LEGAL STUD. 143 (2008).

58. B. K. Gathright, *A Step in the Wrong Direction: The Loewen Finality Requirement and the Local Remedies Rule in NAFTA Chapter Eleven*, 54 EMORY L. J. 1093, 1121 (2005); *Ambatielos Claim* (Greece v. United Kingdom), 23 I.L.R. 306, 335 (1956) (the International Court of Justice required that before bringing an international claim a claimant “should have exhausted the possibilities of appealing to a higher court against any adverse decision of a lower one.”). Other possible alternatives for adoption into investment agreements are waiting periods, “local-court-first” requirements, and “fork-in-road” (making a binding choice between tribunal paths at a later stage in the dispute) provisions.

59. RIDDHI DASGUPTA, INTERNATIONAL INTERPLAY, at 214 (2013). Other possible improvements might be structurally improving the growing conflict-of-interest problem among adjudicators, managing continuous nationality (internationally), addressing corporate veil (US federal courts, particularly in diversity jurisdiction suits) problems, and making more widely available the anti-suit injunctions.

course is anathema. For instance, the broad vagaries of due process do not, at least from an originalist viewpoint, carry a substantive component or even a procedural component beyond the original understanding in 1791 (in cases where federal action is being scrutinized) or 1868 (same for state action).⁶⁰ Conservatism will then face a difficult test of method-based fidelity, being forced to adjust to the evolutionary “law of nations” or to stay the course of a static constitutional regime. The consequences for internal, almost introspective, tension between these two iconic camps of conservative thought—Scylla and Charybdis—should be addressed in a sequel edition.

IV. CONCLUSION

Overall, the editors, Professors Sloss, Ramsey, and Dodge, deliver cogently on their commission. Interested readers should find this book enormously enriching and should consider giving *International Law in the U.S. Supreme Court: Continuity and Change* their thoughtful attention. This is not to say that this multi-essay book does not suffer from its limitations, notably the failure to account for the interaction between private international law and US domestic law.

The international legal academia in the United States must take a broader view of conservative and libertarian arguments than it previously has. A parting word is that like US policy writ large, US jurisprudence is subject to the scrutiny of “a candid world.”⁶¹ Whatever the predominant inclination of the international law academia in the United States, the populace at large is much more philosophically diverse. The international law paradigm in the United States will benefit immensely from conservative, libertarian, and commercial voices. International law is not going anywhere, and constitutional conservatism (of whichever stripe) arguably asserts the prevailing narrative at the highest echelons of the Judiciary these days. The same might be said of the present Supreme Court’s insistence on resolving disputes in a pro-corporate direction suffused with a penchant for consumer welfare-maximization.⁶² It should not, therefore, come as a stunning surprise when most judicial conservatives in the United States embrace certain business-friendly attributes of international

60. See, e.g., *BMW v. Gore*, 517 U.S. 559, 600 (1996) (Scalia, J., dissenting) (“At the time of adoption of the Fourteenth Amendment, it was well understood that punitive damages represent the assessment by the jury, as the voice of the community, of the measure of punishment the defendant deserved.”).

61. DECLARATION OF INDEPENDENCE (U.S. 1776).

62. Constitutional Accountability Center, *Open for Business: Tracking the Chamber of Commerce’s Supreme Court Success Rate from the Burger Court through the Rehnquist Court and into the Roberts Court*, (2011), available at <http://theconstitution.org/think-tank/issue-brief/open-business-tracking-chamber-commerces-supreme-court-success-rate-burger>; Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1430 (2013); ROBERT BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978).

economic law and interpret the Constitution in light of those principles.⁶³ Nor is a directional pull necessarily illegitimate unless there has been an explicit presumption that such a pull is not influencing the analysis. The tension between the originalist method of constitutional interpretation keeping out the international ethos and the corporatist preferences will be fascinating to observe. It might even presage the new frontier of constitutional conservative thought.

In a future edition, the editors might be advised to add analyses discussing these new debates and directions. Consequently, the editors and their readers would be able to envision that those who had hitherto been international law's critics, and virtually written off by progressive constitutionalists, might become international law's "qualified" champions due to sincere concerns of sovereignty deficit.⁶⁴ The editors and their readers might also appreciate more fully that the neat philosophical fault-lines do not always hold true. For intellectually sound reasons, sometimes progressive constitutionalists in America sweepingly distrust foreign judicial proceedings,⁶⁵ and once in a while conservatives harmonize domestic decisions with foreign courts' interpretations of the same treaty.⁶⁶ A manageable truce remains possible and even probable.

Some jurists believe that international law has become über-"American[ized],"⁶⁷ meaning that the US legal system's values and processes are imported into international law through what is sometimes seen as a one-way pipeline.⁶⁸ American conservatives and progressives might show the collective

63. Depending on how the Supreme Court resolves *Bond v. United States*, *cert. granted*, 133 S. Ct. 978 (2013), this term, it may become necessary to decide the same questions apropos of the treaties into which the United States has entered.

64. Compare Kal Raustiala, *Rethinking the Sovereignty Debate in International Economic Law*, 6 J. INT'L ECON. L. 841 (2003) (arguing that typically nations that fear their sovereignty is being eroded by international organizations are already suffering from a corrupted domestic system while international organizations actually help them reclaim their sovereignty) with M. Sornarajah, *Power and Justice: Third World Resistance in International Law*, 10 SING. Y.B. INT'L L. 19, 32 (2006) (arguing that, generally speaking, international law systems are not worthwhile because of the domestic sovereignty that is abdicated).

65. SLOSS, ET AL., INTERNATIONAL LAW IN THE U.S. SUPREME COURT, *supra* note 1, at 549; see, e.g., *Small v. U.S.*, 544 U.S. 385, 390 (2005) (Justice Breyer's majority opinion observing that foreign or at least Japanese legal proceedings "somewhat less reliably identify] dangerous individuals for the purposes of U.S. law where foreign convictions, rather than domestic convictions, are at issue.").

66. See, e.g., *Olympic Airways v. Husain*, 540 U.S. 644, 658 (2004) (Scalia, J., dissenting) ("Today's decision stands out for its failure to give any serious consideration to how the courts of our treaty partners have resolved the legal issues before us."); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting in part) ("[E]ven where the presumption against extraterritoriality does not apply, statutes should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law.").

67. See, e.g., W. W. Park, *Arbitrators and Accuracy*, 1 J. INT'L DISP. SETTLEMENT 25 (2010) ("Evidentiary tools in [international] arbitration should balance sensitivity towards cost and delay against the parties' interest in due process and correct decisions); *id.* at 27.

68. This is not to say that the international adjudicative process does not need transparent streamlining. Even the best-informed lawyers find it difficult to predict how a specific tribunal might

willingness to learn from international law as well. This fortress ensconcing the “law of nations” might augment its legion of defenders and the consequent intellectual sturdiness—or a host of reasons might counsel differently. In any case, the “law of nations” and the conservative and libertarian legal traditions will be mutually enriched.

respond to close jurisdictional (“ritual[istic]”) questions, rendering the international “legal syste[m]” rather a “mystery . . . [that is] baffling to everyday citizens” and is “preside[d] over” by “priests” (and comprehended exclusively by the cognoscenti in the field). BRUCE M. NASH, ALLAN ZULLO & KATHRYN ZULLO, *THE NEW LAWYER’S WIT AND WISDOM: QUOTATIONS ON THE LEGAL PROFESSION*, IN BRIEF 238 (2001) (quote of Henry Miller).