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But Maybe Everything That Dies Someday Comes Back

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"BUT MAYBE EVERYTHING THAT DIES SOMEDAY COMES BACK"[1]

THE DEATH OF TREATY SUPREMACY: AN INVISIBLE CONSTITUTIONAL CHANGE. By David L. Sloss.[2] New York: Oxford University Press. 2016 pp. xiv + 472. $85.00.

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Among the latest challenges to our constitutional order is the swift rise of a "post-factual" culture. Politicians, pundits, bloggers, and the tweetocracy now regularly do more than make arguments unsupported by facts or even outright lie. Now they proudly advance views based on "alternative facts" that show an indifference to the very idea of truth versus falsehood. As the philosopher Harry Frankfurt wrote, this is especially pernicious, because it undermines the basis for almost any discourse.[4] As many have pointed out in the last year, democratic debate on matters of public policy simply cannot proceed unless there is some widespread agreement that some matters constitute facts which form a basis to govern and some matters are fiction, on which not so much.

An uncomfortable truth is that a similar phenomenon has long characterized perhaps the most heavily footnoted, elite, academic speciality there is: legal scholarship. The lack of peer review, the urgent need for timely publication, and perhaps a preference for theory all offer temptations to cut corners. Law's distinctly adversarial nature adds an incentive to employ whatever convinces, regardless of its grounding in reality. Perhaps

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4. *See* HARRY G. FRANKFURT, ON BULLSHIT (2005).

nowhere does this remain truer than in the use of history in constitutional interpretation.[5]

David Sloss's exemplary *The Death of Treaty Supremacy* offers an antidote and a challenge. Typical of Professor Sloss's work, it reflects prodigious research capable of recovering forgotten chapters of constitutional history and challenging the conventional wisdom. *The Death of Treaty Supremacy* does both. Today, standard doctrine holds that "non-self-executing" treaties that require implementation by Congress cannot themselves bind the states, notwithstanding the Supremacy Clause's declaration that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[6] Sloss's antidote demonstrates that for over a century and a half, this was not the case. Instead, the Supremacy Clause meant what it said. All treaties, whether requiring congressional implementation or not, bound state action. Change, almost unnoticed by the general public, came after World War II, when the United Nations Charter and other treaties protecting human rights, among other things, threatened Jim Crow in the South. Congress responded by floating what became known as the "Bricker Amendment," which would have eliminated this treaty supremacy rule. The amendment went down to narrow defeat, but with the cost of accepting a new constitutional understanding—that the treaty supremacy rule is an optional rule that applies only to "self-executing" treaties.

With this account comes the challenge. On what theory is the death of treaty supremacy legitimate? Sloss has identified one of the few specific doctrines that real facts indicate commanded a near consensus among the Founders. He has also shown how that doctrine prevailed for over 150 years. Its death, however, did not obviously come through any conventional or even unconventional means of constitutional amendment. The change did not come through Article V. Nor did it obviously occur through various theories of informal constitutional change. There has yet to be fundamental evolution in relevant constitutional custom or tradition, still less one manifested by a consistent line of case law.

5. Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995) [hereinafter Flaherty, *History "Lite"*].

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

Nor can what occurred be easily deemed even a minor "constitutional moment." One reason informal theories run into trouble, as Sloss points out, is the paucity of contemporary debate around treaty supremacy's demise. This is in part what he means by an "invisible constitutional change" (p. 8).

This dramatic departure from text and history is not without certain ironies. In recent years, conservative "sovereigntists," who are skeptical about receiving international norms into U.S. domestic law, have likewise been conservative with respect to constitutional interpretation. More often than not they have at least attempted—often poorly—to ground their positions with some mixture of text, original understanding, and ongoing constitutional tradition. "Internationalists," with certain exceptions, have often entered the lists with arguments based upon the imperatives of modern international relations.[7] Sloss marshalls an exceptionally rigorous historical account to make the case for treaty supremacy overwelming. *The Death of Treaty Supremacy* may not fully answer all the defenders of this particular execution. It does, however, shift the burden to those who seek to defend the de facto amendment as de jure.

THE SUPREME LAW FORMERLY KNOWN AS TREATY SUPREMACY

The metaphorical *Death of Treaty Supremacy* begins with the real death of Ernesto Medellin. On August 8, 2008, the State of Texas executed Medellin, a Mexican national convicted of capital murder. That execution violated the provisions of at least two treaties to which the United States is a party. First was the somewhat obscure Vienna Convention on Consular Relations. Article 36 of the Vienna Consular Convention holds that if a detained foreign national requests, "the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner."[8] In plain English, nationals arrested in one state have a right to be informed that

7. *See* STEPHEN A. SIMON, THE U.S. SUPREME COURT AND THE DOMESTIC FORCE OF INTERNATIONAL HUMAN RIGHTS LAW 180–82 (2016).

8. Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (entered into force with respect to the United States Dec. 24, 1969). *See also* DAVID L. SLOSS, THE DEATH OF TREATY SUPREMACY 311 (2016).

they can meet with members of their State's consulate. Typical of most U.S. domestic states, Texas never conveyed this information to Medellin. Unaware of the treaty, Medellin not surprisingly failed to raise it at trial or on direct appeal. When, with more informed counsel, he sought to do so on *habeas*, the Texas courts ruled that he had effectively waived the opportunity by his failure to raise the issue beforehand.[9] In similar circumstances, the Supreme Court had previously ruled that reliance on a domestic U.S. state's "procedural default rule" did not constitute a violation of the Convention.[10]

The International Court of Justice had already registered its disagreement with the United States' earlier position.[11] In a case known as *Avena*, Mexico brought an action against the United States on behalf of 51 Mexicans on death row in the United States who had not been informed of their Vienna Convention rights, including Medellin.[12] The ICJ held that the procedural default rule could not preclude review of cases in which the Vienna Convention had been violated. To the contrary, the Court directed the United States to reopen the conviction before a non-executive body. Relying on this decision, Medellin at the Supreme Court argued that the United States had to provide him with such a review. Further, he pointed to Article 94 of the U.N. Charter, the other relevant treaty. In particular, Medellin relied on Article 94, which states that "[e]ach Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."[13]

The Supreme Court rejected Medellin's claim. Among other things, it held that the U.N. Charter provision was not "self-executing," and so an Act of Congress was needed for ICJ decisions involving the United States to apply domestically. As such, the Charter failed to make the *Avena* decision binding on Texas. Likewise, the Court held that, without a federal statute, the President lacked any power to implement the ICJ decision against Texas. As Sloss says, with self-conscious understatement, "[t]he

9. Medellin v. Texas, 552 U.S. 491, 501–03 (2008).

10. Breard v. Greene, 523 U.S. 371 (1998) (rejecting Vienna Convention argument of Paraguayan national on death row in Virginia).

11. Avena and Other Mexican Nationals (Mex. v. U.S.), Judgment, 2004 I.C.J. 12, 55–60 (Mar. 31) [hereinafter *Avena*]; Germany v. United States (LaGrand), Judgment, I.C.J. 2001 I.C.J. 466, 495–98 (Jun. 27).

12. *Avena, supra* note 11, at 25.

13. U.N. Charter art. 94, ¶ 1.

Supreme Court based its decision on an understanding of the Constitution that differed sharply from the Framers' understanding" (p. 1). This entirely correct assessment in turn prompts the central question of his study: "How did we arrive at a shared understanding that the Constitution permits states to violate some treaties, even though the Framers purposefully adopted a Constitution that barred states from violating any treaties?" (pp. 1-2).

The stakes involved are both more and less than meets the eye. *Medellin* might matter more if the United States had signed more human rights treaties. Yet the nation that in many ways gave birth to modern international human rights law is often a notorious outlier for its failure to accede to treaties adopted by most of the rest of the world. Those few that we have ratified invariably come with reservations that more or less limit our commitments to no more than the rights already afforded by the Constitution. *Medellin* nonetheless matters a great deal in other ways. It remains the case that the United States has ratified at least some human rights treaties, including the International Covenant on Civil and Political Rights[14] and the Convention Against Torture and Cruel, Inhuman or Degrading Treatment.[15] However much the Senate's reservations and understandings have limited such agreements, treaty supremacy unamended could still theoretically bar rights violations by the several states. Treaty supremacy would dictate this result, moreover, notwithstanding the Senate's typical addition of a declaration of "non-self-execution" (NSE), which posits that a treaty requires domestic incorporation by Congress. Beyond these practical considerations, Sloss's book posits a core theoretical inquiry. Constitutional amendment, even transformation, outside the bounds of Article V may at this point be old hat. But Sloss suggests that the change his book describes was "invisible," occurring without significant public discussion or institutional struggle. To that extent, his story "suggests that constitutional change outside the courts is not always consistent with principles of democratic legitimacy" (p. 13).

14. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171.

15. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987).

Sloss makes his historical case in the book's first three (of four) parts. Best known is his concise account of the Founding. Typically lawyers, judges, and scholars look in vain for a settled "original understanding" of constitutional issues that trigger modern controversies. Justice Jackson probably didn't realize how right he was when he famously declared, "Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh."[16] Treaty supremacy, however, is an exception. Sloss shows, briefly, yet in refreshing detail, that one of the critical problems leading to the Federal Convention was the national government's inability to ensure compliance with the treaties it made. That problem in turn resulted from Congress' lacking any power to compel individual states to abide by the nation's international obligations. Consequent violations threatened conflict with major European powers, not least the United Kingdom itself.

The Convention addressed this problem with the Supremacy Clause. So problematic were state treaty violations that the inclusion of treaties as the "supreme Law of the Land" "was crafted to ensure that valid, ratified treaties automatically repeal conflicting state laws" (p. 27). The state ratification debates confirm this understanding with a remarkably rare degree of consensus, notwithstanding disputes about other aspects of Federal treaties. To this, what should be familiar, account, the book usefully adds nuanced elaborations of the Founding understanding to 1800. At the time, whether a treaty was "self-executing" or not meant not whether it was judicial enforceable but rather whether it required an Act of Congress to bind Federal officers. A treaty calling for appropriations would; a treaty of alliance would not. Sloss, however, rightly stresses that these considerations operated wholly apart from the question of whether a treaty of its own force bound the states. The Supreme Court had no difficulty in answering yes in *Ware v. Hylton*, in which it invalidated a Virginia law that conflicted with the Treaty of Paris that ended the Revolution.[17] With regard to treaty supremacy, in short, consensus endured.

16. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring); *see also* Flaherty, *History "Lite," supra* note 5.

17. Ware v. Hylton, 3 U.S. 199 (1796).

The Death of Treaty Supremacy may be at its most rigorous in the next part, which shows how treaty supremacy flourished through World War II. Overall, Sloss's careful research describes an ongoing dichotomy between treaty supremacy and conceptions of self-execution. By far the more complicated story relates to self-execution. That story begins with an elegant recapture of Chief Justice Marshall's iconic treaty opinion in *Foster v. Neilson*.[18] *Foster* today usually stands for the proposition that treaty-makers can modify the separation of powers rules that would govern whether a treaty implementation requires congressional action, or even opt out of the treaty supremacy rule concerning the states, each a version of what Sloss labels a "one-step" approach (pp. 65-66). A close and masterful reading of the case in context, however, confirms that the case had nothing whatever to do with treaty supremacy over state law. Rather, at most Chief Justice Marshall meant to declare a rule that a treaty provision that required implementation by Congress could not be constitutionally enforced by the courts. In this particular instance, a treaty with Spain placed the United States under an obligation to protect the land titles of grantees from the Spanish King in an area disputed between the two nations. Under the property conceptions of the time, Marshall believed that congressional action was required to perfect land grants made by foreign authorities that lacked the clear authority to grant title. With if anything greater rigor, the book further considers how non-self-execution doctrine developed in the political branches and courts from 1800 to the end of World War II. Sloss refreshingly concedes that "readers who are not particularly interested in technical details of self-execution doctrine may wish to skip" this treatment (p. 66). Suffice it to say that the doctrine led to debate in the political branches, and figured almost not at all in the courts.

More to the point, this part of *The Death of Treaty Supremacy* demonstrates that even past the Second World War the doctrine remained alive, however much it had become weakened. During this period Sloss recounts sixty cases in which the Supreme Court considered a conflict between a treaty and state law. The competition broke exactly even. Treaties prevailed in twenty-six cases; state law prevailed on the grounds of no conflict in twenty-six others; and in eight instances the Court

18. Foster v. Neilson, 27 U.S. 253 (1829).

avoided the merits on other grounds. None of these cases mention the need for congressional implementation. More striking, as Sloss points out, "*none of them even mention the term 'self-executing' or 'non-self-executing'*!" (p. 87).

With the twentieth century, however, came "seeds of change." Some are familiar. First, "U.S. geopolitical power grew steadily from the Spanish-American War in 1898 until the end of World War II" (p. 153). Treaty violations were no longer as perilous to the nation as they were in its early, weak days. Second, a growing positivist conception of international law emphasized even further the Westphalian conception that keys on the horizontal relations between nation states. This development, too, would undermine the idea that treaties between nation states would automatically bind their provinces, or in U.S. parlance, the several states.

To these Sloss offers another typically rigorous analysis of three more specific developments. For one, influential articles in the *American Journal of International Law*[19] and the *Harvard Law Review*[20] introduced an "intent" approach to NSE treaties. In these pieces, Professor Edwin Dickinson sought to support the executive's seizure of foreign vessels outside U.S. international territorial limits pursuant to bilateral "Liquor Treaties" meant to facilitate Prohibition. Dickinson apparently was less than confident that the Constitution did not require congressional action to expand the territorial limits of U.S. criminal law. It probably did. He therefore argued that what mattered was not separation of powers limits, but rather the intent of the treaty makers to have the instrument apply domestically of its own force. This would prove crucial. Yet other developments would also be significant. So too would the rise of executive discretion in foreign affairs leading to World War II. The new intent-based NSE doctrine enabled the State Department and the executive generally to argue that, as the branch with special insight into the intent of the treaty-makers, treaties that enhanced executive power were self-executing and those that constrained it were NSE. Lastly, the Supreme Court itself began to conflate concepts of supremacy, an idea that suggested automatic superiority to

19. Edwin D. Dickinson, *Are the Liquor Treaties Self-Executing?*, 20 AM. J. INT'L. L. 444, 452 (1926).

20. Edwin D. Dickinson, *Jurisdiction at the Maritime Frontier*, 40 HARV. L. REV. 1 (1926).

state law, with preemption, a doctrine mainly developed for federal statutes, which to a significant extent turned on congressional intent. All these seeds would either blossom or germinate, depending on one's viewpoint, after 1945, when the NSE intent doctrine would be extended to treaty supremacy over state law.

The third part of the saga sets out the core of Sloss's thesis: the advent of modern international human rights law led to a parochial, nationalist—and frankly racist (my label, not Sloss's)—reaction that resulted in the extension of NSE doctrine to treaty supremacy over state law. The book's human rights account moves from the familiar to the still unappreciated. As any but the most idiosyncratic account holds, World War II and the Holocaust prompted the international community, led by the United States, to transform international law by addressing how nation states treated persons within their territory and jurisdiction. The U.N. Charter established the transformation, the Universal Declaration of Human Rights elaborated it as non-binding principles, and a series of Covenants and Conventions translated these principles into specific binding treaty obligations. Of all the freedoms enunciated, the one substantive right that the Charter mandated would remain central: enjoyment "without distinction as to race, sex, language, or religion."[21] Often overlooked today, domestic civil rights activists pounced on the new international human rights law featuring equality. Sloss recalls how the NAACP, the ACLU, and other groups filed amici briefs in numerous cases challenging racially discriminatory state laws as violating the U.N. Charter. The Supreme Court generally struck down such laws. When it did, however, it relied on constitutional grounds rather than the Charter.

That did not prevent a nationalist backlash that ultimately led to "the death of treaty supremacy." Two catalysts in particular triggered the reaction. U.S. accession to the Convention Against Genocide "threatened" to accord Congress the authority it otherwise would not have to pass an anti-lynching law under the logic of *Missouri v. Holland*.[22] Worse, in *Fujii v. California*,[23] a California appellate court relied on the U.N. Charter to invalidate a state law that prohibited (most) East Asians from owning land.

21. U.N. Charter, arts. 55 & 56.
22. 252 U.S. 416 (1920).
23. 217 P.2d 481, 488 (Cal. Ct. App. 1950).

At this point, the American Bar Association began in earnest to propose measures that would either limit the subject matter that treaties could address—meaning not human rights—or make the treaty supremacy rule subject to the doctrine of non-self-execution based on the intent of the treaty makers. These ideas were taken up in the Senate, most notably by Ohio's John Bricker. Bricker led a movement to amend the Constitution outright, an effort that has borne his name ever since. Sloss makes clear that the Bricker Amendment was actually a multi-headed beast. As he states:

> Proponents of the Bricker Amendment sought to accomplish four distinct goals: (1) to clarify that the Constitution takes precedence over a treaty in the event of a conflict, (2) to restrict the president's power to use executive agreements as a substitute for Article II treaties, (3) to overrule *Missouri v. Holland*, and (4) to abolish the treaty supremacy rule, or limit its scope so that most treaties affecting state law would not have any domestic legal effect unless Congress enacted implementing legislation (pp. 248-49).

As Sloss further points out, all but the second goal aimed at limiting human rights treaties that would have facilitated civil rights, which is to say racial equality, at home.

Bricker's forces lost, but exacted a price. The ultimate proposal that went before the Senate stated:

> A treaty or other international agreement shall become effective as internal law in the U.S. only through legislation by the Congress unless in advising and consent [sic] to a treaty the Senate . . . shall provide that such treaties may become effective as internal law without legislation by the Congress.[24]

This version, which created an NSE presumption which, critically, extended to treaty supremacy, went down to defeat by a close vote. A key factor in the result was the Eisenhower Administration, which opposed restrictions on the executive's ability to conclude international agreements. Yet Bricker and his supporters won a significant victory along the way. As Sloss notes, "[t]hroughout the Bricker Amendment debates, virtually all the

24. Telegram from the Acting Sec'y of State to the Sec'y of State, at Berlin (Feb. 4, 1964), *in* OFFICE OF THE HISTORIAN, 711.00/2–454, FOREIGN RELATIONS OF THE UNITED STATES, 1952–1954, GENERAL: ECONOMIC AND POLITICAL MATTERS, VOL. 1, PT. 2, DOCUMENT 360 (n.d.); *see also* DUANE TANANBAUM, THE BRICKER AMENDMENT CONTROVERSY: A TEST OF EISENHOWER'S POLITICAL LEADERSHIP, 152–153 (1988).

participants . . . framed their arguments in a way that viewed treaty supremacy as a subset of self-execution" (p. 253). In other words, the doctrines that had been distinct for over 150 years were effectively combined. It was now assumed treaty-makers could opt out of treaty supremacy over state law.

Why would human rights and civil rights advocates make such a concession? Complexity and confusion played a part. Sloss makes clear that constitutional law experts tended to understand NSE doctrine while international law experts specialized in treaty supremacy, which meant that generalists could easily conflate the doctrines. More substantively, some Bricker opponents made the pragmatic decision that permitting the President and Senate to opt out of treaty supremacy might make signing human rights treaties less objectionable and preserve the possibility of legislative incorporation. Finally, Sloss notes that the Supreme Court, not least in *Brown v. Board of Education*, and for that matter California's Supreme Court in *Fujii*, obviated human rights treaty arguments by relying on the Constitution's protections of civil rights, in particular Equal Protection. Placing its drafters under a microscope, Sloss makes the case that treaty supremacy's death certificate came in the form of the *Restatement (Second) of the Foreign Relations Law of the United States*. Among other things, the Restatement's position reflected the conflation of NSE and treaty supremacy doctrine during the Bricker controversy. It enabled the United States during the Cold War to avoid human rights violations if treaty provisions commanding racial equality automatically applied to the states. And it meant that the U.S. legal community would not have to squarely face the reality that international human rights law protected rights more extensively than did the Constitution. In the end, with virtually no public discussion, what Sloss calls the "de facto Bricker Amendment" become part of constitutional law. *Medellin*, the case with which Sloss begins *The Death of Treaty Supremacy*, shows how complete the passing is.

So, literally in a more comprehensive sense, does the book itself. *The Death of Treaty Supremacy* is as thorough, nuanced, and rich a work of legal scholarship as one may hope to find – an antidote to what I a while ago termed "history 'lite.'"[25] Throughout the volume, Sloss shows a firm command of the

25. Flaherty, *History "Lite," supra* note 5.

relevant scholarship, much often obscure, and the context that it creates. More striking, he plunges into the primary sources in a depth that would shame the most driven graduate student. That rigor, which ranges from eighteenth century essays to centuries of case law to draft Restatement provisions by the American Law Institute, permits Sloss to either fill in gaps or challenge conventional wisdom.

Out of this effort comes a double irony. The major one is that Sloss is so sensitive to history's complexity that his work will evade the legal audiences who could benefit from it most. As the issues that the post-9/11 world raised have shown, foreign relations law can be daunting and unfamiliar even to specialists. The two hundred years of treaty doctrines that Sloss details are complex by any measure. As he himself stresses, one reason that at least one version of NSE doctrine and treaty supremacy could be combined is that experts in either constitutional or international law did not always find it easy to keep them conceptually apart. Sloss does his best to keep matters clear, with numerous "roadmap" paragraphs and even user-friendly doctrinal graphs. His account nonetheless remains challenging to follow, in contrast to "history 'lite'" accounts that offer simple and striking stories that overlook sheaves of contrary evidence. That said, curiously, one area in which the book might have benefited from more detail relates to its key claim about opponents of the actual Bricker Amendment(s), whether cold warriors in the Eisenhower Administration or pragmatic human rights internationalists outside, accepting the death of treaty supremacy as the lesser of two evils. Here, more quotations, statements, and reports would have made Sloss's case compelling rather than simply clear. Of course, part of Sloss's point is that much of this compromise was "invisible," taking place outside of general public discourse. Even so, more overt reliance on the offstage materials would have made a strong argument even stronger.

The point, however, remains plenty strong, these ironies notwithstanding. Shorn of complexity, *The Death of Treaty Supremacy* establishes several points that deserve to be widely known among constitutional lawyers and scholars. The Founding clearly established the doctrine that treaties were supreme over state law, whether they required further congressional legislation or not. That doctrine prevailed for over a century and a half. As with many doctrines, it came to be transformed and, in this

instance, all but repealed. Unlike other doctrines, however, the change came about—if not quite invisibly—with little public discourse, prolonged institutional conflict, landmark elections, or judicial deliberation. So little noted or appreciated was the change that it took *The Death of Treaty Supremacy* to restore it to our constitutional consciousness.

TRANSFORMATION OR TRANSGRESSION?

All of which raises the question: was the death of treaty supremacy legitimate or is it an ongong constitutional violation? Moving from the descriptive to the normative, the final part of the book briefly answers "yes." Sloss first argues that treaty supremacy's effective repeal has since aquired a measure of validity through constitutional custom. Decades of legislative and executive practice have legitimized a rule in which the President and the Senate can employ a version of NSE doctrine to "opt out" of treaty supremacy over state law, though not out of the requirement that judges have a duty to adjudicate treaty claims. By contrast, he clearly has issues with how treaty supremacy was killed off in the first place. His review of several leading theories concerning popular constitutional change outside of Article V, at least as applied to "the invisible change" he has described, all come up wanting. The book therefore ends with less of a conclusion than a challenge. There should be further research into the other invisible constitutional changes, as well as their implications for modern constitutional theory.

Yet the death of treaty supremacy may be more troubling than even Sloss allows. Constitutional custom almost certainly affords the best defense for the doctrine's continuing eclipse. In this instance, however, the custom at issue appears insufficient, especially as it is made possible by the constitutional anomaly of a minority veto in the Senate, itself a democratic anomaly. More importantly, the bar for a constitutional change through institutional custom would seem higher when the original constitutional position is thoroughly entrenched through specific text, discernible original understanding, and centuries of custom confirming the initial commitment. Conversely, Sloss is on firmer ground doubting that theories of popular constitutionalism can account for the *de facto* amendment he recounts. As he suggests, all of the leading approaches in this case come up wanting based on democratic considerations alone. As he could have suggested

more forcefully, the change he describes fails even more strikingly based on considerations of justice. The death of treaty supremacy was unconstitutional not just because it did not engage the public for the purposes of democratic deliberation. It was also illegitimate insofar as it was designed to protect America's version of apartheid from international human rights treaties. It follows that the most principled response to the death of treaty supremacy may be simply . . . to resurrect the doctrine of treaty supremacy.

Of course this conclusion need not follow if the repeal of the rule, however illegitimate initially, gained the status of a new constitutional standard in light of subsquent custom. Here Sloss adopts the approach attributed to Justice Frankfurter in *Youngstown*. Justice Frankfurter's famous concurrence set out the idea that unbroken, systematic executive action, combined with congressional acquiescence, can help confirm the constitutionality of that practice.[26] Sloss, as noted, argues that executive branch lawyers during the Bricker Amendment controversy put forward the view that the President and Senate could sidestep the treaty supremacy rule, among other ways, by stipulating that a treaty was NSE, a move that would then enable the United States to sign human rights treaties but avoid the dire consquence of having international legal standards upend Jim Crow. Again, with typically rigorous research, Sloss recounts numerous treaties which the Senate approved subject to an NSE declaration. These instances, he argues, show an ongoing custom that assumes such a declaration suffices as an opt-out of treaty supremacy.[27]

Sloss's concession apparently strives for a moderate position, but in the end is made too readily. Accepting the idea that the President and Senate can now opt out of treaty supremacy through NSE doctrine serves as a kind of strategic retreat that enables Sloss to defend other positions that remain protective of human rights, for example, that the political branches cannot decide to maintain an NSE treaty as the supreme law of the land, yet render it unenforceable in the courts. Whether this back-up position is worth defending is an open question. The more

26. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 593–614 (Frankfurter, J., concurring).

27. He further notes that there is no similarly clear custom that assumes an NSE declaration can mean something else: that a treaty is federal law but cannot be enforced by the courts (what he calls "no judicial enforcement" or NJE doctrine) (pp. 298, 303–06).

fundamental problem, however, is the claim that custom justifies the death of treaty supremacy in the first place. Even on its own terms, the practice that the book cites is limited and recent. By its count, the Senate has employed NSE declarations that among other effects deny treaty supremacy in only about two dozen instances. This custom, moreover, as a consistent matter, dates back only to the 1990s. Further worth noting is the idiosyncratic mechanism through which this particular custom occurs. Presumably, one justification for reliance on political branch practice is the democratic basis on which the President and Congress act. Any custom that both consistently establish ostensibly reflects more general approval by the American electorate. Now consider the treaty context. Under the Treaty Clause, only one-third plus one of a quorum of the Senate, already a seriously flawed body from a democratic perspective, suffices to insist on an NSE declaration for a given treaty. A limited, recent custom based on such an extreme minority veto falls short as a basis to amend the Constitution.

More importantly, Sloss sets the theoretical bar too low. Justice Frankfurter, and in a roundabout way Justice Jackson as well, discussed constitutional practice at most as a gap-filler in areas in which conventional methods of constitutional interpretation left significant space for the political branches to work out pragmatic understandings. A classic instance in this regard is or should be congressional limits on the President's removal power.[28] That is not the case with treaty supremacy. The most natural reading of the the Supremacy Clause makes the rule mandatory: "*all* Treaties made, or which shall be made, under the Authority of the United States, *shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding*."[29] The original understanding, for once, confirms that the consensus view of this provision was for treaties to check violations of U.S. treaty obligations without implementing legislation by Congress. This very book, moreover, makes abundantly clear that over a century and a half of consistent practice took this understanding for granted. A theory of customary constitutional change might allow for so entrenched a doctrine to be amended by later practice. But if so, it would seem

28. *See* Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996).
29. U.S. CONST. art. VI, cl. 2 (emphases added).

to follow that such a theory would require a consistent, repeated, longstanding, and open practice that is compelling.

The book ends on firmer ground in questioning whether other theories of constitutional change can account for the transformation it describes. Here Sloss is more interested in raising the concern than resolving it. The approaches he considers he loosely terms "popular" constitutionalism. By this, he alludes to a school of thought that seeks to justify constitutional change outside the formal mechanisms of Article V that nonetheless rests on some discernible form of popular consent. Though he doesn't develop the distinction, the theories he has in mind differ from custom in an important respect. Whereas custom represents incremental legitimation through consistent institutional practice, "popular" constitutional approaches emphasize change that is more discrete, dramatic, and deliberative—something closer to securing an actual amendment, however informally. So defined, any approach along these lines runs into trouble legitimating the death of treaty supremacy, and for the same reason. Popular forms of constitutionalism, almost by definition, depend on public consideration of a proposed change. On Sloss's account, treaty supremacy died almost unnoticed, save for a small group of lawyers in the executive branch, elite bar associations, and the academy.

This relative invisibility undermines reliance on two theories Sloss mentions, and one that he curiously does not. The missing approach traces to Bruce Ackerman, who in many ways pioneered modern notions of popular constitutional amendment beyond Article V.[30] Treaty supremacy's demise can find no justification in an Ackermanian account for several reasons. As a hidden change, it produced no sustained inter-branch struggle, no critical elections, no sustained popular discourse. If anything, this particular change appears in tension with the popular internationalism that Ackerman and David Golove maintain characterized the final element of constitutional change under Franklin Roosevelt, a chapter that among other things resulted in ratification of the U.N. Charter and the legitimation of

30. *See* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998); 3 BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION (2014).

congressional-executive agreements.[31] Nor, as Sloss does point out, does the repeal of treaty supremacy find ready justification in Larry Kramer's more open-ended conception of popular constitutional change. Kramer's approach emphasizes popular movements as channeled through Congress and the President.[32] A barely noted "amendment" championed by a small group of executive branch lawyers falls well short of Kramer's target. Finally, Sloss considers Jack Balkin's important work seeking to reconcile the demands of originalism with the more open-ended change of a "living constitution."[33] For this approach, there would appear to be trouble enough that what becomes [a] subject of living change was a clear textual rule that commanded something close to an original consensus. Sloss, for his part, notes Balkin's argument that not all specific changes need meet general requirements of legitimacy so long as the system of constitutional change as a whole does. Yet, even here, Sloss rightly cautions that invisible constitutional change may fall short of a requirement for some sustained public consideration even under Balkin's approach.

All told, the fate of treaties as the supreme law of the land, notwithstanding anything in the constitution or laws of any state to the contrary, finds scant justification under any theory of constitutional change that presupposes some degree of public awareness, much less deliberation, custom included. But that is not the worst part.

Yet unmentioned are theories of constitutional legitimacy that emphasize, not democratic pedigree, but conceptions of justice. Theorists who arguably fall into this camp include Larry Sager,[34] Steve Macedo,[35] James Fleming,[36] and, still towering over all, Ronald Dworkin.[37] The differences and nuances

31. *See* BRUCE ACKERMAN & DAVID GOLOVE, IS NAFTA CONSTITUTIONAL? (1995).

32. *See* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004).

33. *See* JACK M. BALKIN, LIVING ORIGINALISM (2014).

34. *See* LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE (2004).

35. *See* STEPHEN MACEDO, LIBERAL VIRTUES: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM (1990).

36. *See* JAMES E. FLEMING, FIDELITY TO OUR IMPERFECT CONSTITUTION: FOR MORAL READINGS AND AGAINST ORIGINALISMS (2015).

37. *See* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996).

distinguishing these and associated scholars one from another are many. Suffice it to say that they reflect an approach to constitutional theory that posits a constitutional regime's commitment to justice, however defined, as a component of its validity. From this perspective, the transformation that Sloss recounts is a transgression. As noted, his book leaves no doubt that the newfound resistance to treaty supremacy post-World War II was a direct response to newly minted human rights treaties that posed a direct threat to old-fashioned domestic racial discrimination. Sloss characterizes this factor as vividly yet somewhat charitably a need to believe in American exceptionalism:

> [Then and now] we cling to our faith in the superiority of the U.S. constitutional system, but domestic protection for human rights falls short of international standards. International human rights law provides a mirror that tells us who is "the fairest of them all." Like the queen in Snow White, we do not like the answer, so we refuse to look in the mirror (pp. 4-5).

Sloss is right in noting that the death of treaty supremacy "helps us avert our gaze from the unflattering answer the mirror provides" (p. 5). Yet its consequences go beyond that. At the time, the invisible constitutional change specifically protected Jim Crow, lynching, and racial discrimination generally. Today, it allows a superminority in the Senate to block international law further addressing the rights of torture victims,[38] women,[39] the disabled,[40] and children,[41] to name a few. In normative terms, the repeal of the Founding treaty rule ironically has more in common with Founding's embrace of racial inequity than it does with any modern theory of justice.

In this light, the better course is not to attempt legitimating a constitutional transformation with no obvious justifiction. Rather, it is to recognize an unconstitutional transgression and restore the commitment that existed previously—to press for a day when that commitment comes back. Either way, *The Death of Treaty*

38. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987).

39. Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sep. 3, 1981).

40. Convention on the Rights of Persons with Disabilities, *adopted* Dec. 13, 2006, 2515 U.N.T.S. 3 (entered into force May 3, 2008).

41. Convention on the Rights of the Child, *adopted* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sep. 2, 1990).

Supremacy magnificently uncovers a timely challenge that should no longer remain invisible.