

ARTICLE
“JUDICIAL ROLE” AND JUDICIAL DUTY IN FOREIGN
AFFAIRS

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INTRODUCTION

That the Constitution contemplates some meaningful role for federal courts in foreign affairs is clear from the text of Article III, which confers jurisdiction over not only cases arising under the Constitution and federal statutes, but also “Cases . . . arising under . . . Treaties made” under the authority of the United States, “Cases affecting Ambassadors, other public Ministers and Consuls,” “Cases

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of admiralty and maritime Jurisdiction,” and party-based jurisdiction over controversies involving, among others, “foreign States, Citizens, or Subjects.”¹ But the constitutional text stops well short of fully specifying the precise role that federal courts should play in the conduct of the nation’s foreign affairs or the precise relationship between the judiciary’s powers and those of the Legislative and Executive Departments. In this respect, the textual specification of the judiciary’s powers over foreign affairs, like those describing the powers of the President and Congress, conform to Professor Edward Corwin’s famous description of the Constitution as “an invitation to struggle for the privilege of directing American foreign policy.”²

But as Professor Martin Flaherty demonstrates in his impressive new book,³ the modern Supreme Court has shown relatively little interest in asserting itself in this struggle. Instead, the Court has taken a variety of steps that have limited its involvement in international affairs and largely acquiesced in an expansive conception of presidential power that limits the circumstances in which it must step in to police the boundary separating presidential power from congressional power.⁴ Drawing heavily on historical, structural, and functional arguments, Flaherty critiques this practice and urges the Court to adopt a more assertive role in foreign relations that he contends is more consistent with its Founding-era practices.⁵

There is a great deal to admire in Professor Flaherty’s carefully researched volume, including the impressive historical contextualization of a broad swath of doctrines touching on foreign affairs. As Professor Flaherty shows, courts in the early republic played a far more prominent and assertive role in foreign affairs controversies than does the modern judiciary actively enforcing international law and treaty commitments and enforcing meaningful limits distinguishing Congress’s foreign affairs powers

1. U.S. CONST. art. III, § 2.

2. EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787-1957* 171 (1957).

3. MARTIN S. FLAHERTY, *RESTORING THE GLOBAL JUDICIARY: WHY THE SUPREME COURT SHOULD RULE IN U.S. FOREIGN AFFAIRS* (2019).

4. *Id.* at 14-17.

5. *Id.* at 17-19.

from those of the President.⁶ If judged simply by reference to the practical significance of the judiciary's role in foreign affairs throughout the eighteenth, nineteenth, and early twentieth centuries, there seems little basis for doubting that modern cases suggest a substantially diminished role for the judiciary in this particular category of legal questions.⁷

But this focus on practical significance is not the only perspective from which the judiciary's proper "role" in the conduct of US foreign affairs might plausibly be assessed. Part I of this Essay sketches an alternative way of thinking about judicial "role" that connects the interpretive power and authority of the Article III federal courts to those courts' more fundamental duty to accurately apply the underlying substantive law to the particular cases and controversies that are brought within their jurisdiction. When assessed from this perspective, straightforward comparisons of judicial "role" at different points in US history of the type that feature prominently in Professor Flaherty's book become somewhat more complicated. Because the content of the underlying substantive rules of law may have changed over time, it is possible that the judiciary's proper functional "role" in foreign affairs controversies might be significantly less prominent today than it had been in the past even if the courts themselves faithfully adhere to a consistent understanding of their constitutional role and duty.

Part II of the Essay briefly considers three possible instances of legal change that might plausibly have influenced the judiciary's "role" in foreign affairs matters in the manner Part I suggests. In particular, Part II focuses upon: (1.) the practical demise of prize jurisdiction as a meaningful subject of international law in the late nineteenth and early twentieth centuries, (2.) the United States' enhanced engagement with multilateral human rights treaties and the corresponding increase in treaty reservations during the mid-twentieth century, and (3.) the shift in the conceptual underpinnings of the statutory presumption against extraterritoriality that occurred between the middle and later decades of the twentieth century.

6. *Id.* at 13-14.

7. *Cf. id.* at 174-75 (suggesting that modern jurisprudence has deviated from the framers' conception of the separation of powers, which "contemplate[d] an important role for the judiciary in foreign as in domestic affairs").

Part III flags three important caveats that limit and qualify the scope and strength of the claims being made in this Essay. First, the claims asserted in this essay are conceptual, rather than empirical in nature and thus should not be understood as staking out any strong claims about the content of existing law or the relationship between existing law and the law that predominated during any particular earlier period. Second, it may be the case that constitutional questions reflect additional interpretive challenges in assessing the judiciary's proper "role" and that such distinctive challenges are not fully accounted for by the present observations. Finally, the conception of "judicial role" that provides the central framing device for this Essay may not be appropriate for non-judicial actors in our constitutional system.

I. JUDICIAL POWER AND JUDICIAL DUTY

Any discussion of the judiciary's proper "role" in foreign affairs must start with a clear understanding of the judiciary's role in the broader constitutional framework and the nature of judicial power more generally. The foundational—or at least most widely quoted—articulation of the judiciary's constitutional role is, of course, found in *Marbury v. Madison*, and more specifically, Chief Justice Marshall's famous exhortation that "[i]t is emphatically the province and duty of the Judicial Department to say what the law is."⁸ Less often quoted are the two sentences that immediately follow Marshall's famous aphorism: "Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each."⁹ In other words, the foundation of judicial power—including the much vaunted power of "judicial review"—is characterized as derivative of, and contingent upon, the judiciary's more fundamental duty to apply existing law to the facts of the particular cases and controversies that are brought within the jurisdiction of the federal courts.¹⁰

8. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

9. *Id.*

10. *See id.* at 178 ("[I]f a law be in opposition to the Constitution ... so that the Court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty."); *see*

At least two important implications flow from this particular understanding of the judiciary's proper role in our constitutional framework. First, identifying the link between judicial power and judicial duty suggests that the constitutional foundations of the judiciary's much celebrated power "to say what the law is" may be much less distinctive than is often assumed. If the judiciary's power of law interpretation and exposition is simply an outgrowth or incident of its more fundamental constitutional duty to apply the law to the cases legitimately brought within its jurisdiction, then its power in this regard may not differ all that meaningfully from that of either Congress or the Executive Branch, each of which must also interpret the law to some extent in order to discharge their own respective constitutional duties.¹¹ Roughly a decade before the *Marbury* decision, Alexander Hamilton described the President's interpretive authority in remarkably similar terms to those Marshall would later use to explain the judiciary's power: "The President is the constitutional Executor of the laws . . . He who is to execute the laws must first judge for himself of their meaning."¹²

also, e.g., United States v. Windsor, 570 U.S. 744, 781 (Scalia, J., dissenting) ("[D]eclaring the compatibility of state or federal laws with the Constitution is not only not the 'primary role' of this Court, it is not a separate, free-standing role at all. We perform that role incidentally—by accident, as it were—when that is necessary to resolve the dispute before us."). For an extensive historical examination of the link between judicial power and judicial duty in early American political and legal thought, *see generally* PHILIP HAMBURGER, LAW AND JUDICIAL DUTY (2008).

11. *See, e.g.,* Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 781-82 (2002) (observing that even proponents of judicial supremacy do not take the position that the Supreme Court should be the exclusive interpreter of the Constitution and that "government officials routinely, if often implicitly, render constitutional judgments in the absence of judicial deliberation on the issue.").

12. Alexander Hamilton, *Pacificus No 1* (June 29, 1793), in *THE PACIFICUS-HELVIDIUS DEBATES OF 1793-1794: TOWARD THE COMPLETION OF THE AMERICAN FOUNDING* 16 (Morton J. Frisch, ed. 2007). Hamilton's defense of presidential interpretive authority came in the context of the Neutrality Crisis of 1793 and President Washington's unilateral proclamation of American neutrality. *See* FLAHERTY, *supra* note 3, at 67-73 (discussing the Neutrality Controversy). Washington's proclamation followed an unsuccessful effort to obtain an advisory opinion from the Supreme Court regarding the nature of the United States' treaty obligations toward France, which the Justices famously refused to provide establishing an important early precedent regarding the limited scope of Supreme Court review. *Id.* at 71-72.

On this view of the judicial power “to say what the law is,” the absence of judicial oversight of certain questions affecting the other two Branches’ authority over foreign affairs is neither particularly aberrational nor particularly disturbing. Rather, the absence of judicial involvement may simply reflect the absence of a substantive entitlement conferring on aggrieved litigants an entitlement to judicial relief. Alternatively, such absence may simply reflect a decision by the affected parties not to bring whatever claims they might have before a federal tribunal.¹³

A second important implication of linking judicial role to judicial duty is that questions of “judicial role” are likely to hinge on the content of the underlying substantive law governing the United States’ relations with foreign nations and the nature of the particular cases and controversies that are brought before the courts. This means that a determination as to whether a particular level of judicial involvement in US foreign affairs is unduly passive (or unduly assertive) cannot meaningfully be made without some assessment of the content of the governing legal rules that define the rights and duties of the parties who choose to litigate in federal court. And because both the content of the governing law and the nature of the controversies brought before the courts may change over time, the appropriate level of judicial involvement may change as well for reasons other than a refusal by the courts to perform their assigned constitutional role.

This means, among other things, that simply looking to the practical significance of judicial decision-making to the conduct of US foreign affairs at one point in history (including the Founding era) may not provide a reliable guide to how significant a role the courts should play in modern foreign affairs controversies. Rather, the judiciary’s proper “role” in foreign affairs may have changed because the content of the relevant law and/or the nature of the cases brought before the courts have changed over time. Such a shift in background law or in the nature of cases brought within the scope of the federal courts’ jurisdiction could plausibly lead to the judiciary’s role being seen as less practically significant today than it may have been in earlier periods.

13. Cf. Ryan C. Williams, *Due Process, Class Action Opt Outs, and the Right Not to Sue*, 115 COLUM. L. REV. 599, 621-26 (2015) (noting that a party’s legal entitlement to sue typically carries with it a corresponding entitlement to choose not to have the claim asserted in litigation).

II. JUDICIAL DUTY AND CHANGES IN GOVERNING LAW

To assess the precise contours of judicial duty with respect to foreign affairs in our contemporary environment would require a carefully detailed assessment of what contemporary law requires with respect to each legal doctrine that might plausibly affect US relations with foreign nations. And to compare the judiciary's "proper role" in foreign affairs under this framework to its proper role at earlier periods of our nation's history would require an equally careful doctrine-by-doctrine assessment of what governing law required during those earlier periods. Such a review is well beyond the scope of the present inquiry. Instead, this Part will simply highlight three particularly prominent examples of legal change that have occurred over the course of our history that have shaped the development of judicial doctrine, each of which might plausibly be seen as having limited the practical significance of the judiciary's role in foreign affairs.

A. Changes in International Law and Practice: The Example of Prize Jurisdiction

One way in which changes in background law may affect the federal judiciary's proper role on the world stage involves changes in background principles of international law or patterns of international practice. A prominent example of this type of legal change is provided by the demise of prize jurisdiction as a meaningful source of adjudication during the late nineteenth and early twentieth centuries. Under the eighteenth-century international law of war, belligerent nations possessed the prerogative to seize property belonging to enemy nationals in order to deprive the enemy of the means of resistance.¹⁴ The law of prize had developed as a specialized branch of the law of war to formalize and regularize the legal rights, powers, and obligations of belligerent nations and neutrals with respect to the capture of seagoing vessels and their cargo.¹⁵ Courts played an integral role

14. EMER DE VATTEL, *THE LAW OF NATIONS*, bk. III, ch. IX, § 161 (Belá Kapossy & Richard Whitmore eds., Liberty Fund 2008).

15. David J. Bederman, *The Feigned Demise of Prize*, 9 *EMORY INT'L L. REV.* 31, 33 (1995) (reviewing J.H.W. VERZIJL, W.P. HEERE & J.P.S. OFFERHAUS, *INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE*, VOL. 11, PART IX-C: *THE LAW OF MARITIME PRIZE* (1992)) ("[C]ontrols

in the workability of this system because a judicial decree was necessary to give the claimants—both naval crewmen and privateers licensed by the belligerent state—clear legal title to captured property.¹⁶

Prize law hinged on an elaborate system of widely shared international law principles that had been carefully honed by courts and commentators over the course of centuries.¹⁷ Adherence to these principles by courts of all “civilized” nations allowed belligerents and neutrals whose property was caught up in prize proceedings to attain a measure of certainty regarding their rights and obligations¹⁸ and minimized the potential for naval captures to create or exacerbate international conflict.¹⁹ Conversely, the failure of a nation to adhere to the international law principles that governed prize cases could not only unsettle private commercial expectations but risked embroiling the nation in international conflict—up to and including war.²⁰ For this reason, attempting to regularize the administration of prize jurisdiction in state courts was an early focus of concern in the

on the seizure of an adversary’s ships and cargoes—as well as those of neutral powers—have preoccupied the minds of masters, merchants, and naval officers (along with their lawyers) since the early Middle Ages.”).

16. *See, e.g.*, 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1662 (1833) (describing the establishment and administration of prize courts as “not only a natural, but a necessary appendage to the power of war, and negotiation with foreign nations.”).

17. Bederman, *supra* note 15, at 33. On the background and development of the legal principles governing prize cases, *see generally* 1 PHILIP C. JESSUP & FRANCIS DEAK, NEUTRALITY: ITS HISTORY, ECONOMICS, AND LAW (1935).

18. *See, e.g.*, David A. Faber, *Justice Bushrod Washington and the Age of Discovery in American Law*, 102 W. VA. L. REV. 735, 782 (2000) (“The benefits of [prize law] to commerce ... are obvious. Merchants have one set of rules and get one opportunity in prize cases; they do not have to deal with inconsistent rules of law and decisions by competing courts. Once a prize court acts, the decision is final for all.”).

19. *See* 3 STORY, *supra* note 16 (warning that, in the absence of a uniform system of prize jurisdiction “the peace of the whole nation might be put at hazard at any time by” the actions of a single state court because the federal government “could neither restore upon an illegal capture; nor in many cases afford any adequate redress for the wrong; nor punish the aggressor.”); *cf.* Ryan C. Williams, *The “Guarantee” Clause*, 132 HARV. L. REV. 602, 616 (2018) (observing that “[t]he eighteenth-century law of nations permitted one nation who believed itself wronged by another’s violation of its international obligations to wage offensive war, both to obtain redress for its injuries and to punish the offender”).

20. *See, e.g.*, David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 1003-04 (2010).

Revolutionary-era Confederation Congress.²¹ And concern over administration of prize cases provided a significant impetus for the Philadelphia Convention's decision to confer jurisdiction over admiralty and maritime cases on the Article III judiciary.²²

During the Founding era and for close to a century thereafter, prize jurisdiction constituted one of the most significant sources of litigation implicating US foreign affairs.²³ Some of the most significant early foreign affairs precedents from the first century of our nation's existence, including *Murray v. The Schooner Charming Betsy*,²⁴ *The Schooner Exchange v. McFaddon*,²⁵ and, of course, *The "Prize Cases,"*²⁶ arose out of this branch of the federal courts' jurisdiction. Because prize law was an integral component of the international law of war, and because the law of nations typically supplied the rule of decision governing the parties' legal rights in prize cases,²⁷ the federal courts' prize jurisdiction gave those

21. Wythe Holt, "To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts, 1989 DUKE L.J. 1421, 1427-30 (discussing controversies surrounding state administration of prize proceedings in the Early Republic).

22. See, e.g., Golove & Hulsebosch, *supra* note 20, at 1004 ("[T]he grant of admiralty jurisdiction to the federal courts—with their constitutionally guaranteed independence from the legislative and executive branches—was an important signal to European powers of the willingness and capacity of the new nation to uphold its legal obligations."); William R. Casto, *The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers, and Pirates*, 37 AM. J. LEGAL HIST. 117, 118 (1993) (identifying prize cases, along with cases involving enforcement of U.S. revenue laws and criminal prosecutions arising out of offenses on the high seas as among the most significant factors driving the Framers' decision to confer admiralty jurisdiction on the federal courts).

23. Golove & Hulsebosch, *supra* note 20, at 1003 (identifying prize cases as "among the most numerous and important types of cases raising questions under the law of nations" in the early Republic); Ariel N. Lavinbuk, Note, *Rethinking Early Judicial Involvement in Foreign Affairs: An Empirical Study of the Supreme Court's Docket*, 114 YALE L.J. 855, 882-83 (2005).

24. *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (articulating a rule of statutory construction providing that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.").

25. *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 134-35 (1812) (holding the ships of national sovereigns exempt from the jurisdiction of the federal courts).

26. *The Prize Cases*, 67 U.S. (2 Black) 635, 668-71 (1862) (concluding that President Lincoln possessed the constitutional authority to order a blockade of the rebellious Southern states at the outbreak of the U.S. Civil War without obtaining prior Congressional authorization).

27. See Golove & Hulsebosch, *supra* note 20, at 1001-02.

courts a particularly prominent voice in the young nation's conduct of foreign affairs.

In the mid-nineteenth century, however, the significance of prize cases in the framework of international law began to recede. The 1856 Paris Declaration Respecting Maritime Law reflected a commitment by most of the great powers of Europe to abandon the practice of privateering, thereby eliminating a significant portion of the economic incentive that had motivated prize cases in earlier years.²⁸ And though the United States was initially a holdout from the Paris Declaration, the political branches eventually acquiesced in the international trend away from privateering as a permissible method of warfare.²⁹

This shift in international practice left open a possible continuing role for prize law as a mechanism for adjudicating captures by naval officers and crew.³⁰ And federal courts continued to hand down a few significant prize decisions through the conclusion of the nineteenth century.³¹ Indeed, prize cases remain a formal subject of federal district courts' statutorily conferred jurisdiction to this day.³² But legal reforms of the early twentieth century removed most of the persisting financial incentives for naval personnel to initiate prize proceedings, and prize cases essentially vanished as a meaningful component of the

28. Bederman, *supra* note 15, at 43.

29. See Proclamation No. 8, 30 Stat. 1770, 1771 (Apr. 26, 1898) (“[T]he policy of this Government will be not to resort to privateering, but to adhere to the rules of the Declaration of Paris”); see also Bederman, *supra* note 15, at 43 n.54 (discussing possible reasons for the United States' initial reluctance to join in the Paris Declaration).

30. Bederman, *supra* note 15, at 43-44 (acknowledging the continued ability of naval personnel to bring prize actions).

31. Perhaps most famous was the United States Supreme Court's 1900 decision in *The Paquete Habana*, 175 U.S. 677 (1900)—a prize decision growing out of the capture of Spanish fishing vessels during the Spanish-American War. The decision acquired an outsized degree of retrospective significance due to later citations of Justice Horace Gray's declaration that “[i]nternational law is part of our law[.]” *Id.* at 700. See also, e.g., FLAHERTY, *supra* note 3, at 88-89 (discussing the influence of *The Paquete Habana*); Bederman, *supra* note 15, at 66-67 (same).

32. 28 U.S.C. § 1333(2) (2018) (conferring on federal district courts jurisdiction over “[a]ny prize brought into the United States and all proceedings for the condemnation of property taken as prize.”).

judiciary's caseload by the middle portion of the twentieth century.³³

Prize law's demise has obvious implications for assessing the judiciary's proper "role" on the international stage under a conception of judicial role that prioritizes the judicial duty to decide actual cases between adverse litigants. For one thing, the collapse of prize jurisdiction eliminated a significant category of litigants who, under virtually any plausible doctrinal test, could establish the existence of a genuine "case or controversy" sufficient to confer standing on the federal courts.³⁴ And because prize law *required* the judiciary to make determinations regarding the nation's rights and responsibilities regarding the conduct of war as a necessary incident of deciding such cases,³⁵ this particular head of jurisdiction allowed—indeed, required—the judiciary to play a significant role in the determination of foreign affairs controversies. But with prize jurisdiction's collapse, the courts may have fewer occasions to opine on such matters because no litigant possesses the type of standing necessary to confer jurisdiction on the federal courts.³⁶

The disappearance of prize law as a meaningful category of Article III adjudication has also affected the substance of the law that the federal courts are called upon to apply. Prize law reflected a system of carefully refined and reasonably clear legal rules that

33. See Bederman, *supra* note 15, at 38 ("[S]ince 1948, there was not a single true prize decision reported in the United States."); see also Nicholas Parrillo, *The De-Privatization of American Warfare: How the U.S. Government Used, Regulated, and Ultimately Abandoned Privateering in the Nineteenth Century*, 19 YALE J.L. & HUMAN. 1, 90-95 (2007) (discussing late nineteenth century legislative reforms that eliminated financial incentives for naval personnel to bring prize actions).

34. Cf. *Summers v. Earth Island Institute*, 555 U.S. 488, 493 (2009) (articulating a doctrinal test for standing that requires the showing of an actual injury that is concrete and particularized, fairly traceable to the defendant's action, and redressable by the courts).

35. See, e.g., *The Prize Cases*, 67 U.S. (2 Black) 635, 667-71 (1862) (considering the lawfulness of a federal blockade initiated without a formal declaration of war by Congress); *The Nereide*, 13 U.S. (9 Cranch) 388, 425-27 (1815) (considering whether neutral property carried on belligerent ships could lawfully be claimed as prize).

36. See, e.g., *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973) (concluding that member of Congress lacked standing to challenge President's conduct of military operations allegedly unauthorized by Congress); *Smith v. Obama*, 217 F. Supp. 3d 283 (D.D.C. 2016) (rejecting service member's claim of standing to challenge President's deployment of military forces).

had been developed by jurists and commentators over the course of centuries.³⁷ There was no question as to the power and duty of federal courts to look to international law as the governing rule of decision in this category of cases because the universal practice of American and European courts was to apply such law to prize cases.³⁸ Modern cases in which federal courts are urged to apply international law may be quite different, both because the content and status of the asserted international law rules may be far less certain and precise than the rules that governed prize cases³⁹ and because the availability of such international law rules as a rule of decision governing the parties' rights and responsibilities may be far more open to contestation.⁴⁰

B. Changes in Domestic Law: The Example of Multilateral Treaty Reservations

A second way in which changes in underlying legal rules might change the duties of courts (and the judiciary's consequent "role" in foreign affairs) involves changes in domestic law. Changes in US treaty practice provide a possible illustration of this second phenomenon. Though treaties reflect international law commitments between the United States and foreign nations, they also constitute a source of domestic law that is, at least potentially, enforceable by appropriate parties in federal courts.⁴¹ But not

37. See Bederman, *supra* note 15, at 33 ("The law of naval prize has an extraordinarily rich history, longer and deeper than perhaps any other discrete subject matter in the law of nations.").

38. See, e.g., Golove & Hulsebosch, *supra* note 20, at 1001 (observing that both English and American courts had applied the law of nations in prize cases since long before the Constitution's adoption); Bederman, *supra* note 15, at 51 ("[F]rom time immemorial, when a national court adjudicated a case of a maritime capture it was obliged to follow international law.").

39. See, e.g., J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 469-75 (2000) (discussing methodological challenges of identifying modern norms of customary international law).

40. Compare, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 827 (1997) (contesting the view that federal courts possess a general power to apply customary international law as a rule of decision in modern cases), with, e.g., Harold Hongju Koh, *Is International Law State Law?*, 111 HARV. L. REV. 1824, 1824-27 (1998) (contending that customary international law is federal law enforceable by federal courts).

41. See U.S. CONST. art. VI (defining treaties "made ... under the Authority of the United States," along with the Constitution and federal laws, as the "supreme Law of the Land");

every treaty commitment pledged by the United States necessarily establishes the type of legal right that is enforceable by courts. Consider, for example, the 1783 Treaty of Paris, which formalized the end of hostilities with Great Britain and brought the American Revolution to a close.⁴² Certain commitments in that document undoubtedly pledged direct commitments of the type that were administrable by courts. For example, the treaty's fourth article, which pledged that "[c]reditors on either [s]ide shall meet with no [l]awful [i]mpediment to the [r]ecovery of the full [v]alue . . . of all bona fide [d]ebts heretofore contracted,"⁴³ was famously enforced by the Supreme Court notwithstanding a conflicting Virginia statute in its landmark 1796 decision in *Ware v. Hylton*.⁴⁴ But the very next article in that treaty conferred no directly enforceable individual right, but rather merely pledged that Congress would "earnestly recommend it to the Legislatures of the respective States" that loyalist property confiscated during the Revolution be restored.⁴⁵ Because this commitment could be discharged by Congress through a mere recommendation to the state legislatures, it created no judicially enforceable entitlement that could be asserted by disappointed loyalists seeking restoration of their confiscated property.⁴⁶

Chief Justice Marshall's 1829 decision in *Foster v. Neilson*, recognized a similar distinction between what that decision characterized as commitments "address[ed] . . . to the political"

id. art. III, § 2 (providing that the judicial power of the United States "shall extend" to, among other cases, those "arising under ... Treaties made" under the authority of the United States).

42. FLAHERTY, *supra* note 3, at 50.

43. Definitive Treaty of Peace, U.S.-Gr. Brit., art. 4, Sept. 3, 1783, 8 Stat. 80.

44. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 242-45 (1796); *see also* FLAHERTY, *supra* note 3, at 73 (identifying as "the first judicial review case insofar as ... the Court invalidated the act of a legislature in the name of higher law").

45. Definitive Treaty of Peace, *supra* note 43, at art. 5; *see also* Michael D. Ramsey, *A Textual Approach to Treaty Non-Self-Execution*, 2015 BYU L. REV. 1639, 1650 (2015) (identifying Article 5 of the Treaty of Paris as an illustration of "treaty provisions that do not contain a rule of decision for courts").

46. *See, e.g.*, *Cornwall v. Hoyt*, 7 Conn. 420, 428 (1829) (recognizing the fifth Article of the Treaty of Paris as merely recommending the states voluntarily adopt a remedy that Congress "had no power to enforce" itself); *Read v. Read*, 9 Va. (5 Call.) 160, 209-10 (1804) (recognizing that Article 5 was recommendatory to the states only and did not create a directly enforceable right).

departments and those addressed to the judiciary.⁴⁷ As elaborated by later cases, the distinction Marshall drew came to stand for the principle that some treaty commitments are “self-executing,” in that they “automatically have effect as domestic law.”⁴⁸ Other commitments, though constituting valid international law commitments, do not “by themselves function as binding federal law” and are thus considered “non-self-executing.”⁴⁹

Throughout the nineteenth and early twentieth centuries, the task of distinguishing self-executing treaty provisions from non-self-executing provisions involved primarily parsing the relevant treaty language along with whatever evidence of extrinsic intent of the treaty’s framers was deemed admissible.⁵⁰ This task was facilitated to a significant extent by the predominance of bilateral treaties as the near-exclusive paradigm of US treaty-making during the early nineteenth century.⁵¹ Though hardly free from difficulties,⁵² the discernment of presumed intent from a document produced through bilateral negotiations between contracting state parties involved fewer interpretive challenges than those that typically attend the multilateral paradigm that had come to predominate US treaty-making by the middle decades of the twentieth century.⁵³ Because such treaties result from multilateral

47. *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829).

48. *Medellín v. Texas*, 552 U.S. 491, 504-05 (2008).

49. *Id.*

50. *Compare, e.g., Cameron Septic Tank Co. v. City of Knoxville*, 227 U.S. 39, 43-49 (1913) (concluding that a treaty addressing patent lengths should be construed as non-self-executing notwithstanding putatively clear treaty language where drafting history and subsequent Congressional action suggested a more limited understanding), *with, e.g., United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 195-98 (1876) (concluding that a treaty between the United States and an Indian tribe restricting sale of alcohol was self-executing based on language and purpose of the agreement).

51. A 1968 compilation prepared by the Assistant Legal Advisor to the Department of State identified only two multilateral agreements entered into by the United States prior to the Civil War—one of which concerned construction of a cemetery by European and American consular officials with the other focused on commerce, consular rights, and shipping in Samoa. 1 CHARLES I. BEVANS, *TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA, 1776-1949*, iii-ix, 1-6 (1968).

52. The Marshall Court famously revised its interpretation of the treaty with Spain that had been the subject of the dispute in *Foster* in a later case after reviewing the Spanish-language version of the treaty, which lent additional credence to the self-execution interpretation. *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 88-89 (1833).

53. *See, e.g., Kevin C. Kennedy, Conditional Approval of Treaties by the U.S. Senate*, 19 *LOY. L.A. INT’L & COMP. L. Rev.* 89, 97-98 (1996) (discussing statistics showing that

negotiations among nations that may have significantly different internal mechanisms for ensuring treaty compliance, such treaties rarely speak with clarity to the precise modes in which nations should go about carrying into execution their treaty commitments.⁵⁴

The mid-twentieth-century ascendance of multilateral treaties also introduced a further complication arising from the growing tolerance under international law of treaty reservations, which allowed state parties to join multilateral agreements subject to reservations that did not require the mutual assent of all other contracting parties.⁵⁵ The growing acceptance of treaty reservations on the international plane in the mid-twentieth century coincided with a movement by political forces in the United States—led by Ohio Senator Joseph Bricker—to limit the domestic legal effect of multilateral human rights treaties.⁵⁶ Though Bricker and his allies initially mobilized behind a proposed constitutional amendment that would limit treaties' self-executing effect as a general matter, the energies associated with their movement were eventually channeled toward efforts to limit the domestic legal effect of multilateral human rights treaties through treaty reservations.⁵⁷ Throughout the later portion of the twentieth century, the Senate conditioned its "advice and consent" to multiple multilateral human rights treaties on "reservations," "understandings," or "declarations" purporting to limit those treaties' domestic legal effect.⁵⁸

multilateral treaty-making nearly doubled during the period from 1946 to 1990, as compared to the period from 1896 to 1945, while the overall number of bilateral treaties declined).

54. *Medellín v. Texas*, 552 U.S. 491, 552 (Breyer, J., dissenting).

55. See, e.g., Ryan Goodman, *Human Rights Treaties, Invalid Reservations, and State Consent*, 96 AM. J. INT'L L. 531, 533–34 (2002) (discussing the mid-twentieth century shift away from the "unanimity rule" in state practice, which allowed only those state reservations to multilateral treaties that were "accepted by all the other parties," and toward a framework that was more permissive of unilateral reservations).

56. See FLAHERTY, *supra* note 3, at 224–25 (discussing the background and political context of the proposed Bricker Amendment).

57. See *id.* at 225–26 (discussing the failure of the proposed Bricker Amendment and its subsequent influence on U.S. treaty-making practice).

58. *Id.* at 226–27; see also, e.g., Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 346–48 (1995) (identifying multiple multilateral human rights treaties, which the United States joined subject to such reservations).

Courts that have considered the question of whether the Constitution empowers the Senate to condition its assent to treaties in this manner—and thereby limit their domestic status as judicially enforceable “supreme Law”—have generally held such reservations permissible.⁵⁹ But the question is hardly free from controversy.⁶⁰ And even apart from such express reservations, questions may frequently arise regarding the proper interpretation of multilateral treaty commitments that might plausibly be read to incorporate either a direct commitment enforceable by the judiciary or a more abstract goal or objective that is more properly directed to implementation by the political branches.⁶¹

The significant changes in treaty practice that occurred in the twentieth century—both at the international level and in the practices of the US political branches—may render the judiciary’s late eighteenth and early nineteenth century treaty jurisprudence a potentially inapposite guide for modern treaty interpretation. Professor Flaherty demonstrates a robust commitment among jurists in the early republic to enforcing treaties as domestic law on the same plane as federal statutes.⁶² But even that early jurisprudence reflected a recognition that some treaty commitments might be directed to institutions other than courts.⁶³ To the extent modern treaty-makers have chosen to rely more extensively on such non-judicially enforceable commitments—whether through explicit treaty language, express treaty reservations, or the choice of vague and aspirational pledges rather

59. See, e.g., Ramsey, *supra* note 45, at 1659; see also *Igartúa-de la Rosa v. United States*, 417 F.3d 145, 150 (1st Cir. 2005) (en banc); but see *Power Auth. of N.Y. v. Fed. Power Comm’n*, 247 F.2d 538, 543-44 (D.C. Cir. 1957) (holding a Senate reservation did not limit the domestic effect of a federal treaty), *vacated sub nom.* *Am. Pub. Power Ass’n v. Power Auth. of N.Y.*, 355 U.S. 64 (1957).

60. Compare, e.g., Henkin, *supra* note 58, at 346 (arguing that unilateral declarations of non-self-execution are contrary to the Supremacy), with, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 446-51 (2000) (defending constitutionality of declarations of non-self-execution).

61. See Ramsey, *supra* note 45, at 1654-58 (contending that vague, ambiguous, or aspirational language in treaty provisions may be more properly interpreted as reflecting non-self-executing political commitments).

62. See FLAHERTY, *supra* note 3, at 73-75, 83, 222-24.

63. See *Ware supra* note 47 and accompanying text.

than concrete commitments⁶⁴—the refusal of courts to attempt to craft legal doctrines from such commitments would hardly reflect an abdication of judicial duty. To the contrary, such a refusal may merely reflect adherence to the design choice of the constitutionally authorized lawmaking authorities (*i.e.*, the President, by and with the advice and consent of two-thirds of the Senate).⁶⁵ This would be precisely what judicial duty commands.

C. Accommodating Legal Change: The Law of Interpretation

A third category of legal change that might plausibly affect the judiciary's proper "role" in foreign affairs controversies involves the body of legal rules, principles, presumptions, and guidelines through which the judiciary identifies the linguistic content of legal instruments and translates that language into authoritative legal commands—what William Baude and Stephen Sachs have termed the "law of interpretation."⁶⁶ Though ubiquitous in our legal practices, the precise legal and jurisprudential status of such interpretive rules and principles has long been ambiguous and contestable.⁶⁷ But it is difficult to deny that such interpretive principles have played a significant role in shaping the judiciary's engagement with foreign affairs controversies.⁶⁸

The ambiguity surrounding the precise legal status and legitimacy of the judiciary's interpretive rules is matched by a similar ambiguity surrounding the mechanisms through which

64. *Cf.* Ramsey, *supra* note 45, at 1657–58 (suggesting that aspirational nature of treaty commitments may be an *indicia* of their status as pledges to be implemented by the political branches rather than the judiciary).

65. U.S. Const. art. II, § 2.

66. William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079 (2017).

67. *Id.* at 1085 (observing that recent debates have overlooked the role of legal principles by assuming "that legal interpretation is just regular interpretation, applied to legal texts"); *but cf.* Ethan J. Leib & Michael Serota, *The Costs of Consensus in Statutory Construction*, 120 YALE L.J. ONLINE 47, 58–62 (2010) (arguing against according stare decisis effect to interpretive methodology in the statutory interpretation context).

68. *See* FLAHERTY, *supra* note 3, at 75–77, 245–49 (discussing the "Charming Betsy" presumption that federal laws be read in a manner consistent with international law to the extent possible); *id.* at 84–85 (discussing the "last-in-time" rule for addressing conflicts between the requirements between federal statutes and federal treaties); *id.* at 128–29, 194–98 (discussing presumption of deference to Executive interpretation of federal treaties).

such interpretive rules and maxims may permissibly change. Some scholars take the position that the interpretation of legal texts should always be guided by the interpretive rules and maxims that were widely accepted at the time a particular legal instrument was enacted.⁶⁹ Others take the position that interpretive rules and practices may permissibly change over time in ways that diverge from those that might have been anticipated by the initial enactors.⁷⁰ But even under the more restrictive view that would limit interpretive principles to those that were in place at the time of enactment, changes in background conditions or assumptions may force officials to adapt the applicable interpretive rules to address the new state of affairs.⁷¹

The presumption against extraterritorial application of federal statutes supplies a possible example of this latter phenomenon. The presumption against extraterritorial application of federal statutory law emerged at an early period of our nation's history.⁷² But as originally formulated, the presumption reflected a mere corollary of the assumedly limited scope of prescriptive jurisdiction under international law. As Justice Joseph Story explained in his 1824 decision in *The Apollon*—a canonical early citation for the presumption against extraterritoriality—“[t]he laws of no nation can justly extend beyond its own territories except so far as regards its own citizens.”⁷³ Thus, “however general and comprehensive the phrases used in our municipal laws may be,” Story wrote, they must always be “restricted in construction to

69. See, e.g., Baude & Sachs, *supra* note 66, at 1132–36 (arguing that interpretive rules that “determine the legal content of a written instrument upon its adoption” should be held stable over time).

70. See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 68–69 (1994) (contending that the Supreme Court possesses and exercises the authority to adapt “interpretive regimes” to reflect judicial preferences).

71. Cf. Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 589–90 (2003) (observing that “the criteria for the proper application of some of the Constitution’s words and phrases” were likely “not fully specified at the time of the founding” and that “changed circumstances ... have the potential to expose” latent ambiguities in the constitutional text).

72. *The Apollon*, 22 U.S. (9 Wheat.) 362, 370–72 (1824).

73. *Id.* at 370.

places and persons, upon whom the legislature has authority and jurisdiction."⁷⁴

As the foremost American expert on international law principles governing the conflict of multiple sovereigns' laws, and the author of the treatise that established conflict of laws as a distinctive field of legal studies,⁷⁵ Story was decidedly well positioned to opine on this issue. In view of the strongly territorial conception of sovereign jurisdiction that predominated in late eighteenth and early nineteenth-century international law,⁷⁶ the presumption against extraterritoriality could be seen as little more than a specific instantiation of the equally venerable *Charming Betsy* canon—*i.e.*, the principle that a statute should not be construed to violate an established norm of international law if an alternative interpretation were available.⁷⁷ Like all rules of international law, the operative judicial presumption was that Congress could override this directive through a sufficiently clear expression of statutory intent.⁷⁸ And throughout the nineteenth century, the predominant question surrounding the extraterritorial effect of federal law was whether Congress had

74. *Id.*

75. See generally JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS (Hilliard, Gray 1834); see also Caleb Nelson, *State and Federal Models of the Interaction Between Statutes and Unwritten Law*, 80 U. CHI. L. REV. 657, 671 (2013) (observing that early efforts by American jurists to systemize thinking around the problem of conflicts of law "did not really take root until" the 1834 publication of Story's "acclaimed" treatise).

76. See, e.g., J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463, 492 (2007) ("It is undoubtedly true that eighteenth- and nineteenth-century legal thought was heavily territorial. Broadly speaking, a nation's law was viewed as territorially limited, meaning that neither its proscriptive power nor its protections were thought to operate extraterritorially.").

77. See, e.g., William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 114 (1998) (describing the nineteenth century presumption against extraterritoriality as the product of combining "an international law rule that the laws of a nation cannot extend beyond its own territory with a presumption that Congress does not intend to violate international law").

78. Cf. *Brown v. United States*, 12 U.S. (8 Cranch) 110, 128–29 (1814) (characterizing international practice as "a guide which the sovereign follows or abandons at his will" and suggesting that it is for Congress, rather than the President or the courts to determine whether customary international law should be followed).

expressed its intent to deviate from international law limitations with sufficient clarity.⁷⁹

Beginning in the early twentieth century, however, the international law framework undergirding the presumption against extraterritoriality began to shift significantly. At the international level, the assumption of exclusively territorial national jurisdiction began to yield to a much more expansive conception of state authority.⁸⁰ At around the same time, the predominant assumption of territoriality as the governing framework for determining the scope of sovereign lawmaking authority within the United States came under withering attack by “Legal Realist” critics.⁸¹ By the later portion of the twentieth century, the strictly territorial conception of sovereign authority that had motivated the initial adoption of the presumption against extraterritoriality had all but disappeared on the international stage and had ceded its position as the once-dominant paradigm for thinking about conflicts of law within US courts.⁸²

With the original conceptual foundations of the presumption against extraterritoriality thus eroded, the judiciary faced a choice

79. See, e.g., *Patterson v. Bark Eudora*, 190 U.S. 169, 172–74 (1903) (determining that Congress had expressed its intent to regulate the wages paid to seamen on foreign vessels with sufficient clarity).

80. A seminal development in this regard was the 1927 decision of the Permanent Court of International Justice in the famed *S.S. Lotus* decision, which explicitly recognized that international law did not lay down “a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory,” but rather, subject to specific exceptions, left each state free “to adopt the principle which it regards as best and most suitable.” *The Case of the S.S. Lotus (Fr. v. Turk.)*, Judgment, 1927 P.C.I.J. (ser. A) 10, at 19 (Sept 7); see also, e.g., Dodge, *supra* note 77, at 114 (pointing to the *Lotus* decision as support for the proposition that “[i]nternational law provides no basis for the presumption against extraterritoriality today”).

81. See Kermit Roosevelt, III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2458–61 (1999) (discussing the Legal Realist critique of the predominant territorialist conception of conflicts); cf. Dodge, *supra* note 77, at 114–15 (discussing the inability of modern domestic conflicts theory to justify the presumption against extraterritoriality).

82. See, e.g., Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501, 2512 (2005) (observing that “geographic borders . . . coincide quite imperfectly with the reach of national laws” and that “[a]n increasingly interdependent and globalized world has rendered strict territorial limits on jurisdiction increasingly unworkable”); Nelson, *supra* note 75, at 679–93 (discussing the “Conflicts Revolution” of the 1960’s and 1970’s during which the majority of U.S. jurisdictions moved away from strict territoriality as an organizing principle of conflicts jurisprudence).

regarding how to respond to this change. One conceptually available response may have been to abandon the presumption and instead interpret federal statutes to reach the full extent of the nation's permissible jurisdiction under international law.⁸³ But this was not the only option available to the courts. One that the Supreme Court actively embraced,⁸⁴ was that the presumption against extraterritoriality should be adhered to as part of the federal law of interpretation unless and until that presumption was displaced by Congress.

The choice of this latter option was hardly unreasonable. After all, the presumption against extraterritoriality had been part of the interpretive practices of federal courts for more than a century.⁸⁵ Replacing that presumption with an alternative presumption threatened to unsettle the expectations underlying numerous earlier-adopted federal statutes.⁸⁶ Nor was it obvious that a different rule of construction should apply to statutes adopted after the shift in understanding regarding the territorial limits of national legislation. Given the longstanding adherence to the presumption against extraterritoriality, both Congress and those subject to its enactments might reasonably assume that the presumption would continue to apply in the manner it had unless

83. See, e.g., John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT'L L. 351 (2010) (urging a presumption that federal statutes be read to extend to the permissible scope of U.S. jurisdiction under international law); cf. Zachary R. Clopton, *Replacing the Presumption Against Extraterritoriality*, 94 B.U. L. REV. 1, 24–35 (2014) (arguing that international law should define the presumptive scope of civil, but not criminal, federal statutes).

84. See *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 248 (1991) (citing *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)) (“[L]egislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.”).

85. See *The Appollon*, 22 U.S. (9 Wheat.) 362, 370-72 (1824).

86. Similar interpretive challenges attend other circumstances in which courts are called upon to determine the jurisdictional reach of statutes that were adopted against background legal assumptions that have changed over time. Compare, e.g., *Archer Daniels Midland Co. v. Seven Up Bottling Co.*, 746 So. 2d 966 (1999) (interpreting a state antitrust statute adopted in the late nineteenth century to exclude transactions in interstate commerce that would have been deemed outside the scope of state regulatory authority under restrictive judicial interpretations of the Commerce Clause that predominated at the time of the statute's enactment), with, e.g., *Freeman Indus., LLC v. Eastman Chem. Co.*, 172 S.W.3d 512 (2005) (interpreting a state antitrust statute enacted during the same era as reaching all transactions within the scope of statutory language that state could permissibly regulate under modern Commerce Clause jurisprudence).

and until Congress chose to override the presumption—either through the inclusion of explicit overriding language in a particular statute or through a more general interpretive directive similar to those found in the so-called “Dictionary Act.”⁸⁷

In short, the twentieth-century shift in thinking regarding the centrality of territory to a nation’s lawmaking authority revealed a latent ambiguity regarding the status of the presumption against extraterritoriality. On one understanding, it could be seen as a mechanism for limiting Congressional enactments to the presumed limited scope of the federal government’s jurisdictional authority under international law. As so understood, the presumption might reasonably be seen as flexible and adaptable such that the presumption itself should adapt to mirror any corresponding changes in background principles of international law. Alternatively, the presumption could be seen as a mechanism for discerning the actual intent of Congress by placing the interpretive burden on proponents of extraterritorial application to express their goal through sufficiently clear statutory language.

Alternative paths to addressing this ambiguity were certainly available to the judiciary. But it is far from clear that *either* these alternative paths or the path that the Supreme Court eventually settled on—*i.e.*, adhering to a reasonably strong presumption against statutory extraterritoriality—were affirmatively compelled by a proper understanding of “judicial duty.” Rather, it may be the case that the judiciary sometimes possesses a degree of discretion in choosing from *among* various equally permissible mechanisms of discharging its judicial duty “to say what the law is.”⁸⁸ And while the Supreme Court might reasonably be criticized for having chosen the “wrong” option from the perspective of

87. See 1 U.S.C. § 1 (setting forth a limited set of interpretive prescriptions relating to federal statutory language addressing “numbers, gender, and so forth”); *see also, e.g.*, Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2145–56 (2002) (urging Congress to enact a broader range of such interpretive rules).

88. Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed From Above*, 22 SYRACUSE L. REV. 635, 637 (1971). (identifying one conception of judicial “discretion” with the idea that, in some cases, a court may be “free to render the decision it chooses” because “legally speaking, ... there is no officially right or wrong answer.”).

desirable public policy,⁸⁹ such policy-based critiques differ in meaningful respects from a charge that the courts have failed in or abdicated their duty to follow applicable law. In circumstances like those that confronted the judiciary during the transition of the extraterritoriality presumption from a corollary of international law into a more conventional "substantive" canon of statutory interpretation,⁹⁰ it is far from clear that *any* controlling legal authority provided a clear legal answer to the questions the courts were called upon to resolve.

III. CAVEATS

Before concluding, it is important to emphasize a few significant caveats that should clarify and circumscribe the claims being made in this Essay. The primary thrust of this Essay is conceptual rather than empirical. This Essay does not stake out any strong claim regarding the content of the overall corpus of background legal rules relevant to the judiciary's authority in the realm of foreign affairs at any particular point in American history or how those rules relate to those in existence today.

The three specific historical examples discussed in Part II are intended principally to concretize the intuition animating this Essay and to render somewhat more plausible the claim that the judiciary's shifting role in foreign affairs controversies over time might be at least partially attributable to changes in background law. But even with respect to these specific examples, it is possible that more detailed examination might reveal that the actual changes in background law that have taken place over time may have different implications for the judiciary's power and duty than those gestured at in the foregoing discussion.

In considering the potential significance of intervening legal change on the judiciary's proper role, this Essay has focused on

89. Cf. FLAHERTY, *supra* note 3, at 185–87 (arguing that the presumption against extraterritoriality, in conjunction with various other doctrines, tends to limit the power of courts and Congress on international stage and thus threatens disruption to a functionalist conception of the separation of powers).

90. Cf. Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 127–28 (2010) (observing that judicial use of substantive canons has a "long pedigree [that] makes it difficult to dismiss their use as fundamentally inconsistent with the limits that the Constitution imposes upon the exercise of judicial power.").

non-constitutional sources of law. Determining what judicial duty requires with respect to claims arising under the Constitution itself introduces a host of additional challenges due to the diversity of modern views regarding the appropriate target and methodology of constitutional interpretation.⁹¹ For those who view the Constitution as a set of fixed directives that may only be legitimately altered through the Article V amendment process,⁹² the passage of time may be much less significant for comparing the appropriate role of the judiciary at different points in our history because there have been only a small number of formal amendments, virtually none of which touch in a meaningful way on the allocation of foreign affairs powers.⁹³ But for those whose preferred theory of constitutional interpretation acknowledges the permissibility of some forms of legitimate, extratextual constitutional change,⁹⁴ the passage of time may open up interpretive challenges similar to those considered in this Essay because the governing rules of constitutional law might be seen as meaningfully different at different points in our history.⁹⁵

Finally, though this Essay has focused on assessing the judiciary's proper "role" from the perspective of judicial duty, this is hardly the only perspective from which the question might usefully be assessed. A starting assumption of this Essay has been

91. See, e.g., Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CAL. L. REV. 535, 537 (1999) ("Anyone who cares about constitutional law confronts a large and proliferating number of constitutional theories, by which I mean theories about the nature of the United States Constitution and how judges should interpret and apply it.").

92. See, e.g., Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 865-67 (2015) (characterizing originalism as a theory that requires each constitutional rule to be supported by a pedigree tracing back to either the original Constitution of 1787 or a validly enacted amendment).

93. Even theories that assume a fixed and unchanging constitutional meaning may face challenges in determining how that meaning applies to new facts or interacts with changes in non-constitutional legal rules. See Nelson, *supra* note 71, at 589-98 (discussing such challenges).

94. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) ("It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them").

95. Cf. Curtis A. Bradley & Neil S. Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, 2014 SUP. CT. REV. 1, 51-65 (considering an "adverse possession" analogy for constitutional meaning under which certain forms of long-settled constitutional practice might permissibly supersede an inconsistent rule derived from constitutional text).

that *courts* themselves should view their proper "role" in foreign affairs as a function of their more fundamental duty to interpret and apply the governing law in cases properly brought within their jurisdiction.⁹⁶ But such a constrained view of judicial role may not necessarily be appropriate for all actors in our constitutional system.

To the extent that the particular attributes that characterize the Article III judiciary—including legal expertise, independence, insulation from political pressures, and adversarial presentation of evidence and arguments—render the courts particularly appropriate or desirable forums for addressing questions touching on foreign relations,⁹⁷ calls for a more significant practical role for the courts might plausibly be addressed to not only the courts themselves but to other institutions, such as the President and Congress. These other institutional actors, unlike the courts, are not limited to interpreting and applying the preexisting law in cases properly brought within their jurisdiction. Rather, these other institutions have an explicit and acknowledged policymaking role in the constitutional framework and are thus much less inhibited in their ability to explicitly weigh and act on purely functionalist considerations.⁹⁸

And the President and Congress, in the exercise of their respective constitutional powers,⁹⁹ have a significant degree of control over the substantive legal entitlements that might be brought before the courts, thereby shaping to a meaningful extent the practical significance of the judiciary's role in foreign affairs.

96. See *supra* notes 8-13 and accompanying text.

97. See, e.g., Aziz Z. Huq, *Structural Constitutionalism as Counterterrorism*, 100 CALIF. L. REV. 887, 948-49 (2012) (identifying features of Article III courts, such as the adversarial process and political insulation, that might make them valuable participants in making and reviewing decisions concerning counterterrorism policy).

98. Cf. *Hollingsworth v. Perry*, 570 U.S. 693, 700 (2013) (explaining that an important function of the case or controversy limitation is to "ensure[] that we act as judges, and do not engage in policymaking properly left to elected representatives.") (emphasis omitted).

99. See U.S. Const. art. I, § 8 (empowering Congress to legislate with respect to a variety of enumerated subjects and to make laws "necessary and proper for carrying into execution" its own powers as well as "all other powers vested . . . in the Government of the United States, or in any Department or Officer thereof"); U.S. Const., art. II, § 2 (empowering the President, by and with the advice and consent of the Senate, to make Treaties); U.S. Const., art. VI (declaring federal statutes and treaties, along with the Constitution, to be the "supreme Law of the Land").

Thus, for example, if the political branches are dissatisfied with the practical operation of the presumption against extraterritoriality (and the consequent failure of courts to enforce statutory rights abroad), Congress can override the presumption—either globally or within the context of specific statutes.¹⁰⁰ Likewise, if Congress and the President grow dissatisfied with the judiciary's present inability to enforce the nation's commitments under multilateral treaties, they have the capacity to alter this state of affairs by either renegotiating the underlying treaties to remove obstacles to self-execution or (more likely) by adopting implementing legislation conferring explicit rights under domestic law that match the nation's international treaty commitments.¹⁰¹

And while it seems deeply improbable that policymakers would have either the incentive or capacity to restore prize jurisdiction to its once central role in the transnational legal system, the success of prize courts in providing a relatively stable system of international governance implemented through national courts might plausibly provide a model for future directions in international law.¹⁰² Efforts along these lines may already be emerging at the international level.¹⁰³ To the extent the political branches are interested in integrating the federal judiciary into this emerging framework of international governance, they may have a significant capacity to empower the courts in this way.

CONCLUSION

We are all, of course, familiar with Chief Justice Marshall's famous declaration that "[i]t is emphatically the province and duty of the judicial department to say what the law is."¹⁰⁴ Less often

100. *See supra* note 87.

101. *See, e.g.*, Torture Victim Protection Act of 1991 (TVPA), Pub. L. No. 102-256, 106 Stat. 73 (March 12, 1992) (establishing a private right of action for victims of torture or extrajudicial killing in order "to carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights").

102. *See* Bederman, *supra* note 15, at 64 ("The enduring significance of prize law lies not so much in informing our opinions of admiralty or constitutional doctrine (which it surely does), but, rather, as a paradigm for the incremental development of customary international law.").

103. *See, e.g.*, FLAHERTY, *supra* note 3, at 147-48 (discussing the emergence in recent years of a global legal system composed of "formal and informal transnational judicial networks").

104. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

appreciated is that the practical significance of this duty will often depend on what that "law" actually is. A consequence of this way of thinking about the judiciary's proper "role" in foreign affairs is that the judiciary's role might plausibly change over time due to changes in background principles of governing law. It is at least conceivable that the content of the underlying law has, in fact, changed in ways that render the judiciary's role in modern foreign affairs controversies less significant than it may have been in earlier eras. But even accepting this possibility, there is every reason to expect that background legal principles will continue to change and evolve in new ways. And some of those changes may have the tendency to magnify, rather than diminish, the judiciary's role in foreign affairs. Professor Flaherty has given us a great deal to think about as we look back over the changes that have already taken place, and ahead at the changes that are yet to come.

