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The Constitution and Conflict-of-Laws Treaties: Upgrading the International Comity

Ayelet Ben-Ezer* and Ariel L. Bendor**

Introduction

In the United States, like other federations, the Constitution's relationship to the conflict-of-laws in the internal state context has been debated intensively. On the other hand, to date, little attention has been paid to the constitutional conflicts arising from international conflict-of-laws. More specifically, there has been little discussion of the relationship between the Constitution and treaties governing international conflict-of-laws. This absence is striking since both international treaties and international conflict-of-laws have been discussed extensively over the last few years. The growing importance of international treaties and international conflict-of-laws is the result of globalization and the penetration of constitutional discourse into private law. Their role in legal discourse and foreign policy is expected to continue expanding. Generally cautious regarding international agreements, the United States has only entered into a few conflict-of-laws treaties. Nonetheless, the aforementioned trends suggest that it will consider joining further treaties. This essay will offer some preliminary insights into the relationship between international conflict-of-laws treaties and the Constitution.

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1 See EUGENE F. SCOL AS ET AL., CONFLICT OF LAWS 222 (3rd ed. 2000) [hereinafter SCOL AS ET AL].
2 See id.
Conflict-of-laws treaties are agreements between the United States and other countries dealing with one of the three areas relating to conflict-of-laws. The first is international jurisdiction over private disputes. In addition to the factual connection to the United States, private disputes affect other countries, regardless of whether or not those countries are partners to treaties. The second area is the international conflict-of-laws in the narrow sense, namely the determination of the law applicable to a private dispute factually linked to a number of countries. The third area is the recognition and enforcement of foreign judgments. It concerns the readiness of the courts and enforcement authorities of a particular country to recognize judgments of other countries as res judicata or to enforce such judgments.

The interaction between conflict-of-laws treaties and American constitutionalism gives rise to two main problems of apparent constitutional dissonance, which will be the focus of this discussion. The first problem is institutional, and the second substantive.

The first problem, on the institutional level, is the non-correlation between the conferral of constitutional powers regarding the conclusion of international treaties and the conferral of constitutional powers governing the regulation of private law. The consensual view is that, constitutionally speaking, the conclusion of treaties is a federal prerogative, whereas most realms of private law are regulated by competent state authorities. Furthermore, the conclusion of treaties is primarily

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4 See SCOLES ET AL., supra note 1, at 2.
5 Id.
6 Generally speaking, in England the term “Private International Law” refers to the entire realm, dealing with the three main subjects, one of which is “Choice of Laws” (or “Conflict-of-Laws”). In the United States, on the other hand, the expression “Conflict-of-Laws” describes both the entire realm, as well as one of its significant sub-topics – conflict-of-laws in the narrow sense. See DAVID MCCLEAN, THE CONFLICT OF LAWS 2-4 (5th ed. 2000); SCOLES ET AL., supra note 1, at 1-3; A.V. DICEY & J.H.C. MORRIS, THE CONFLICT OF LAWS 32 (Adrian Briggs et al. eds., 13th ed. 2000).
7 See SCOLES ET AL., supra note 1, at 1-3.
8 Id.
9 Id. at 1146.
an executive constitutional prerogative, while establishment of private law is a legislative function (and in areas governed by the common law – a judicial role). On the substantive level, there is potential for conflict between existing or future international U.S. commitments under conflict-of-laws treaties and other constitutional rules.

At both levels, a central role is played by the consideration of "international comity."\(^{12}\) Though generally important in the realm of conflict-of-laws,\(^{13}\) in our view, this consideration becomes seminally important when international treaties, which express explicit legal commitments between the United States and its contracting partners, produce comity. The conclusion of a treaty accommodates the optimal expression of comity. Thus, in an international treaty, comity has an upgraded function.

This essay is divided into two parts. In Part I, we describe the main constitutional rules regarding the power to conclude international treaties, including private law, of which conflict-of-laws is a part. We will discuss the constitutional non-correlation, facially at least, between some of these rules, and attempt to illuminate it from the perspective of the upgraded consideration of international comity. In Part II, we will discuss the potential discord in the field of conflict-of-laws between the treaty-based commitments of the United States and the parallel commitment to substantive constitutional rules. We will offer a few suggestions for dealing with these inconsistencies, based on the upgraded role of the international comity consideration in the rubric of international conflict-of-laws rules established in the treaties. Our discussion of the first problem will be essentially illuminative – an attempt to provide a justifying, though not necessarily historic, rationale for the accepted arrangement. Our discussion of the second problem will be essentially normative, indicating appropriate parameters for a solution.

I. Institutional Non-Correlation: A Suggested Illumination

A. International Conflict-of-Laws and the Constitution

Like other fields of law, international conflict-of-laws is


\(^{13}\) Id.
subject to the Constitution. First, the Constitution is the supreme source of power to establish rules governing the international conflict-of-laws. Second, the rules of international conflict-of-laws must substantively cohere with the Constitution. Concededly, the Constitution does not contain any provisions dealing explicitly with international conflict-of-laws, but there are numerous empowering and restrictive constitutional provisions that are applicable to the field.

Essentially, international conflict-of-laws is a branch of private law, and as such constitutional provisions which regulate the power to determine private law rules are equally applicable to the power to determine rules for international conflict-of-laws. Individual states are generally empowered to regulate private law. This power includes the authority to establish rules for international conflict-of-laws, whether by legislation or in state common law.

Douglas Laycock adopts a slightly different approach. Laycock writes: "How U.S. courts treat foreign law is a matter of comity and diplomacy, the voluntary choice of a sovereign power. [However], how Texas courts treat the law of a sister state is a matter of law, not comity, and the choice is no longer voluntary." In our opinion, this position is overly broad. International conflict-of-laws rules focus primarily upon the regulation of the legal rights of human persons and not of countries. Admittedly, importance attaches to considerations of foreign relations and international reciprocity, just as the rules of interstate conflict-of-

\[^{14}\] Id. at 124.
\[^{15}\] Id.
\[^{16}\] Id.
\[^{17}\] Id.
\[^{18}\] Id.
\[^{19}\] Id.
\[^{20}\] Although in the vast majority of the states no dispute exists regarding the validity of the common law, there is a certain uncertainty regarding the source of the Court's power to create law. See James M. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549-50 (1991); Davis v. United States, 417 U.S. 333, 359-61 (1974).
\[^{22}\] Id. at 259.
\[^{23}\] See McCLEAN, supra note 6.
laws impute importance to these considerations, albeit to a different degree.\textsuperscript{24} Nonetheless, the claim that substantively speaking it belongs \textit{in toto} to the realm of foreign relations and diplomacy would be more appropriate with respect to public international law, which deals with relationships between nations, and not the conflict-of-laws in private disputes (private international law).\textsuperscript{25} But notwithstanding their focus upon individual disputes, certain treaty-based arrangements in international conflict-of-laws rules establish legal rights for countries and not only for individuals. These arrangements are illuminated by the special status they confer to international comity. In the normative sense, there is room for special attention to be accorded to considerations of international comity in the application of the international conflict-of-laws rules established in treaties.\textsuperscript{26}

\textbf{B. Apparent Institutional Non-Correlation}

The international conflict-of-laws rules, especially in their narrow sense, are products of state law. In this sense, they resemble other branches of private law in the United States.\textsuperscript{27} An exception to state hegemony over these rules is their determination by the federal authorities, namely the President and the Senate, within the framework of international treaties. This exception is based upon the conjunction of three constitutional provisions: Article II, Section 2; Article VI, Section 2; and Article I, Section 10. Article II, Section 2 of the Constitution stipulates in its relevant part: "He [The President] shall have power, by and with the Advice and Consent of the Senate, to make Treaties, provided

\begin{itemize}
  \item \textsuperscript{25} See McClean, supra note 6.
  \item \textsuperscript{26} See infra, Part II.
\end{itemize}
two-thirds of the Senators present concur."  

Article VI, Section 2 of the Constitution provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all treaties made or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.  

Finally, Article I, Section 10 of the Constitution, in its relevant part states that "No State shall enter into any Treaty, Alliance or Confederation."

The conjunction of these provisions indicates, first, that the conclusion of international treaties is an exclusive federal prerogative. Second, to the extent that the conflict-of-laws rules are based upon international treaties, they precede any state law. The federal authorities are competent to conclude treaties regarding all matters demanding federal attention. This applies to state matters as well. Hence, it is primarily state law, in which regulatory power is residual and embraces numerous aspects of private law, that governs many international conflict-of-laws issues. The power to conclude treaties regarding the very same matters is, however, a federal power. A treaty-based arrangement (of federal authorship) is considered as part of the state law and prevails over all laws adopted in the same state irrespective of the date of the treaty's adoption. In view of the

29 Id. art. VI, cl. 2.
30 Id. art. I, § 10.
31 See id.
32 See id. art. VI, cl. 2.
35 See U.S. CONST. art I, § 10; Id. art. II, § 2.
unequivocal constitutional prohibition on states to conclude treaties, any other approach would lead to an undesirable prohibition on the United States against contracting international treaties in state matters, including within the area of international conflict-of-laws.\textsuperscript{37}

The federal authorities, headed by the President, are charged with the initiation and negotiation of international treaties.\textsuperscript{38} The exceptional constitutional situation described above enables federal legislation in topics, when the basic conferral of power for their regulation was given to the states.

Another apparent irregularity derives from the dominant role accorded to the President – in his executive capacity – in the initiation and formulation of international treaties.\textsuperscript{39} The international conflict-of-laws rules are formulated as general non-definitive rules and common law, created by the legislature and the judiciary, respectively. Nonetheless, the President has a central role in the conclusion of international contracts, extending beyond his general legislative role (\textit{a fortiori} exceeding his role in the creation of common law), despite his residual authority to intervene in the federal legislative process.\textsuperscript{40} The centrality of his role regarding the conclusion of treaties is expressed by the fact that it is the President who initiates them, the President who conducts negotiations over their content, and the President who signs on behalf of the United States.\textsuperscript{41} The President is thus the final source of the United States’s international obligations, whereas the Senate’s role is restricted to the ratification of those obligations.\textsuperscript{42}

On the other hand, in legislative matters the process is focused upon the deliberations and the decisions of the legislators, and the President’s role is limited to his ability to initiate certain laws and to his veto power.\textsuperscript{43} Under the common interpretation, treaties

\textsuperscript{37} See U.S. CONST. art. I, § 10.

\textsuperscript{38} See U.S. CONST. art I, § 10; Id. art. II, § 2.

\textsuperscript{39} See United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319 (1936); TRIBE, supra note 33, at 643-46.


\textsuperscript{41} See Curtiss-Wright Exp. Corp., 299 U.S. at 319; TRIBE, supra note 33, at 643-46.

\textsuperscript{42} See TRIBE, supra note 33, at 643-46.

\textsuperscript{43} See Clinton, 524 U.S. at 438-39; Youngstown, 343 U.S. at 587.
may be formulated in a manner that makes them self-executing, so that upon Senate ratification and their international validation as tools for conducting U.S. foreign relations, they become automatically effective without the need for special complementary legislation. The process of Senate ratification is less complex than the passing of an Act. Furthermore, presidents may express the outcomes of their international negotiations in forms such as "executive agreements," though the limits of this power are not clear. The federal executive branch's power to conclude treaties, especially self-executing ones (or executive agreements which do not require Senate consent), also enables it to exercise powers that generally belong to the (state) executive and judiciary, including the determination of arrangements pertaining to conflict-of-laws.

This arrangement is characterized by an apparent non-correlation between the conferral of constitutional powers relating to the conclusion of international treaties and the conferral of constitutional powers in private law matters. There are two aspects of non-correlation. First, the power to conclude a treaty is an entirely federal power, whereas the states bear the primary responsibility for conflict-of-laws rules. Second, the power to conclude treaties rests primarily with the executive branch, i.e. the President, and this power also includes self-executing treaties, the conclusion of which is based both upon interpretation and


45 Compare U.S. CONST. art. II, § 2 (stating that a treaty is valid upon ratification by two-thirds of the Senators present), with U.S. CONST. art. I, § 7 (stating that for a bill to become law it must pass both Houses of Congress and then be signed by the President).

46 See TRIBE, supra note 33, at 648.

47 See id.

48 See U.S. CONST. art I, § 10; Id. art. II, § 2.

current practice. On the other hand, conflict-of-laws rules are for the most part determined by the legislative and judicial branches. This means that the constitutional conferral of power to regulate this realm of private law differs fundamentally from the conferral of laws in other areas of private law.

It must be mentioned that both aspects of this anomalous arrangement are relative and not absolute. Regarding the first aspect, the legislative branches are also functional in the conclusion of treaties, and the regulation of the private law is not the exclusive domain of the states, for there is also private federal law. However, there are still a number of substantive differences between the rules governing the adoption of private laws and those applicable to conclusion of treaties in the field of private law.

C. Illumination of the Apparent Non-Correlation by the International Comity Consideration

In our opinion, both aspects of this apparent non-correlation find their illumination in the international comity consideration. This suggested illumination might also explain the possibility of concluding self-executing treaties, the desirability if not the actual legality of which has been disputed.

As distinct from the historical explanation, this illumination does not necessarily rely upon the original intentions or reasoning of the constitutional framers or the judges charged with its interpretation, not all of which are harmonious or consistent. The illumination of an arrangement means the presentation of a substantive explanation, which is liable to present the best possible justification – presenting the arrangement in its best light – while at the same time providing an optimal solution for the apparent difficulties extant in the current arrangement. The absence of a necessary correlation between the historical explanations and the illumination dictates its rather general character. But it is sufficient if it coheres with the main elements of the arrangement, and provides a better justification for it than other competing explanations, historical or otherwise.

International comity means that the courts of each country

50 See Paust, supra note 44.
51 See U.S. CONST. art. II, § 2.
should exercise their judicial powers with consideration for the goals and interests of other countries, in order to promote cooperation, reciprocity, and international courtesy. Occasionally, international comity even may be at the expense of perfect individual justice between specific litigants. Behavior premised upon reciprocity will in the long term aggregately improve the positions of all countries participating in the "game."

This principle is not external to the rules of international conflict-of-laws, or an exception to them. It is rather one of the principal foundations of these rules, and reflects the unique character of international conflict-of-laws rules and their characteristic policy considerations. In this sense, the area of international conflict-of-laws differs from other fields of law, which are not required to consider foreign relations with other states. Even so, the consideration of comity is not an absolute one. In essence, it is a criterion for the exercise of judicial discretion (and in the broad sense — legislative and executive action), but it is not conclusive. The reason for this conclusion is that any governmental branch — the court or other — may exercise its discretion in a manner displaying total indifference, and certainly not giving due consideration to the interests of other countries, if so dictated by the interests of the United States, its values, or universal values.

The apparent inconsistency of the constitutional arrangement for concluding treaties in the field of international conflict-of-laws — both aspects thereof — can be illuminated from the perspective of

53 See Clermont, supra note 12, at 98.
55 See Lea Brilmayer, Conflict of Laws: Foundations and Future Directions 155-61 (1991); Larry Kramer, Rethinking Choice of Law, 90 COLUM. L. REV. 277, 339-44 (1990); see also Kirk A. Carter, Balancing Factors in the Spirit of International Comity, 10 SUFFOLK TRANSNAT'L L. REV. 545, 549-50 (1986) (discussing the dangers that may ensue if seamen or their estates are permitted to bring personal injury or wrongful death suits against their employers when the interests of other nations are stronger). But see, Louise Weinberg, Against Comity, 80 GEO. L.J. 53, 57-59 (1991).
56 See Laycock, supra note 21, at 259.
57 See generally Carter, supra note 55 (discussing the factors that must be balanced when seamen or their estates bring personal injury or wrongful death suits against their employers when the interests of other nations are stronger).
international comity. As stated, the inconsistency is expressed by the federal arrogation of state powers in certain fields of private law, otherwise governed by state authored rules under state jurisdiction. This arrogation is necessitated by the pan-national nature of the consideration of international comity. Indeed, on the international level, central importance attaches to this consideration, based upon the wider national interests operative in foreign policy.\textsuperscript{58}

Constitutionally, the management, supervision and review of foreign relations are federal functions \textit{par excellence}.\textsuperscript{59} In this context, the Constitution determines \textit{inter alia} that the President is the supreme commander of the army,\textsuperscript{60} and that after consultation and Senate approval, the President can enter into a treaty and appoint ambassadors and other public ministers and consuls.\textsuperscript{61} Moreover, the Constitution also determines that the President "shall receive Ambassadors and other public Ministers,"\textsuperscript{62} that Congress shall have the Power to "provide for the common Defense,"\textsuperscript{63} shall "define and punish Piracies and Offences against the Law of Nations,"\textsuperscript{64} regulate foreign commerce,\textsuperscript{65} "declare war,"\textsuperscript{66} and make the rules of war.\textsuperscript{67} Additionally, federal judicial power given to the Supreme Court "extends to all cases affecting Ambassadors, other public Ministers and... Treaties... under Consuls."\textsuperscript{68} The Constitution further provides that "[i]n all cases affecting Ambassadors, other public Ministers, and Consuls, the

\textsuperscript{58} See id.


\textsuperscript{60} U.S. CONST. art. II, § 2.

\textsuperscript{61} Id.

\textsuperscript{62} Id. art. I, § 3.

\textsuperscript{63} Id. art. I, § 8, cl. 1.

\textsuperscript{64} Id. art. I, § 8, cl. 10.

\textsuperscript{65} Id. art. I, § 8, cl. 3.

\textsuperscript{66} Id. art. I, § 8, cl. 11.

\textsuperscript{67} Id.

\textsuperscript{68} Id. art. III, § 2, cl. 1.
Supreme Court has original jurisdiction.”\textsuperscript{69} Concisely, the constitution explicitly provides that “No state shall enter into any Treaty, Alliance, or Confederation . . .”\textsuperscript{70}

Necessarily, private law arrangements, which significantly implicate foreign policy, should be determined and implemented with regard for international comity as a foreign policy consideration. Accordingly, and under the aforementioned constitutional legislation, the federal authorities are the natural legislators and executors of these arrangements, and none of the individual states is permitted either to determine or implement its own foreign policy using that avenue.\textsuperscript{71}

Admittedly, international conflict-of-laws rules not originating in international treaties are state regulated, based upon the legislatures and common law of the states, and implemented by state courts. To this extent, the state courts are authorized to have consideration for international comity. However, it would seem that this arrangement itself, as opposed to the constitutional one regarding treaties, is irregular and requires explanation. Conceivably, the rules of international conflict-of-laws and interstate conflict-of-laws are identical. Practically speaking, most litigation occurs within interstate contexts and not international ones. Accordingly, the rules are based on national, as opposed to pan-national considerations. State consideration for international comity at the legislative and judiciary levels is therefore a secondary consideration, a derivative of its discursive focus – the state and interstate levels.\textsuperscript{72}

Despite the congressional role (the scope of which is disputed)\textsuperscript{73} in the determination of foreign policy, and the judicial role,\textsuperscript{74} which is limited due to the political question doctrine,\textsuperscript{75} it is

\textsuperscript{69} Id. art. III, § 2, cl. 2.
\textsuperscript{70} Id. art. 1, § 10, cl. 1.
\textsuperscript{72} See id.
\textsuperscript{75} See Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 106 (1948); People’s Mojahedin Org. of Iran v. U.S. Dep’t of State, 182 F.3d 17, 23-24 (D.C. Cir. 1999); John Yoo, Federal Courts as Weapons of Foreign Policy: The Case of the Helms-
the President as the federal executive branch who is the primary actor in U.S. foreign policy.\textsuperscript{76} Here, Congress's role is essentially advisory, in addition to providing approval and inspection and enlisting public support.\textsuperscript{77} Though the President may have difficulty pursuing a foreign policy in defiance of congressional opposition, foreign policy is established and led by the President and not Congress.\textsuperscript{78} This is the background for the illumination of the presidential conferral, as opposed to congressional, with the lion's share of the power to negotiate international treaties and subsequently engage in them with the Senate consultation and approval.\textsuperscript{79}

Accordingly, we can also understand the current interpretation and practice by which the President, with Senate approval, can conclude a self-executing treaty, the implementation of which does not require legislation.\textsuperscript{80} Admittedly, whether this interpretation and practice is consistent with the Framers' original intention is moot\textsuperscript{81} but illuminated, given the President's role as the leader of foreign policy of the United States and its international representative.\textsuperscript{82} Even if the Framers intended that international treaties should not become operational absent appropriate supplementary legislation, international comity considerations provide an explanation for the existing situation.\textsuperscript{83} An international commitment of the United States to other partner countries in a convention clearly creates comity and such a commitment is contingent upon the United States having entered the convention with Senate approval, expressed by a majority of two-thirds.\textsuperscript{84} Deferral of the treaty's implementation until, and pending, the adoption of the complementary law, would cause


\textsuperscript{77} See Yoo, supra note 71, at 1964.

\textsuperscript{78} Id. at 1963.

\textsuperscript{79} Id.

\textsuperscript{80} See Bowles & Kromos, supra note 73, at 815.

\textsuperscript{81} See Yoo, supra note 71, at 1981-82.

\textsuperscript{82} See Bowles & Kromos, supra note 73, at 815.

\textsuperscript{83} See Yoo, supra note 71, at 1978-80.

\textsuperscript{84} U.S. Const. art. III, § 2, cl. 2.
uncertainty regarding the actual approval and whether the conditions of approval are actually consistent with U.S. treaty obligations.\(^5\) Such a deferral would be inimical to international comity.\(^6\) It must be remembered that under existing theory, the United States is under no obligation to restrict its engagements to self-executing treaties.\(^7\) Both the President and the Senate may decide, in accordance with their assessment of the U.S. interests, to conclude treaties that are not self-executing.\(^8\) However, conferring power, where necessary to conclude a self-executing treaty, accommodates appropriate consideration of international comity when required and to the degree deemed appropriate by the competent authorities.\(^9\)

Furthermore, there are grounds for claiming that self-executing treaties are necessary, having consideration for national government’s inability to enforce state compliance with treaties and to make law applicable to individuals.\(^10\) The international comity of the United States may also demand that national undertakings not be thwarted by the states.\(^11\) To this end, formulating a treaty to be self-executing may be beneficial and the possibility of doing so should not be precluded.\(^12\)

The option of self-executing treaties, together with their potential contribution to the international comity of the United States, does not significantly undermine the American system of checks and balances.\(^13\) The requirement of Senate approval by a two-thirds majority together with compulsory consultation ensures that a proper mechanism exists for parliamentary supervision.\(^14\)

\(^{85}\) See Yoo, supra note 71, at 1980.


\(^{87}\) See Yoo, supra note 71, at 1978.

\(^{88}\) See id. at 1959.


\(^{90}\) Id. at 1083.

\(^{91}\) See generally U.S. CONST. art. I., § 10, cl. 1, 3; Missouri v. Holland, 252 U.S. 416 (1920); Paul, supra note 86, at 1 (exploring the role of states in international comity).

\(^{92}\) See Damrosch, supra note 44, at 516.

\(^{93}\) See Yoo, supra note 71, at 1977; see also Damrosch, supra note 44, at 527.

\(^{94}\) See Yoo, supra note 71, at 2092.
This is lacking in most other countries. For countries in which the conclusion of an international treaty is the executive prerogative, a treaty can only be implemented by a law, which expresses the approval and the support of the legislative branch. The constitutional arrangement in the United States guarantees such approval and support, with a special majority, at the early stage of the actual engagement in the treaty. Thus, as a matter of principle, nothing need prevent the Senate from considering the waiver of additional congressional involvement by way of supplementary legislation.

It would, therefore, seem that the international comity consideration, which as stated is one of the basic rules of international conflict-of-laws, is particularly enlightening regarding the apparent discord between conferral of constitutional power for the conclusion of conflict-of-laws conventions and conferral of constitutional powers for the determination of other private law arrangements.

II. Substantive Non-Correlations: Suggested Normative Adjustments

A. International Comity and Conflict-of-Laws Treaties

The international comity of the United States under the conflict-of-laws treaties can clash, at least as far as an American citizen is involved, with other substantive constitutional rules (e.g. in the realm of human rights and civil liberties). The problem is relevant primarily in the context of conflict-of-laws. Accordingly, when applying regular international conflict-of-laws rules, an American court may find itself adjudicating a dispute under a foreign law which conflicts with the American

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95 See generally Paul, supra note 86, at 1 (comparing international comity in the United States and other nations).
96 Id.
97 U.S. CONST. art. II, § 2, cl. 2.
98 Id.
99 See Clermont, supra note 12, at 126.
Constitution. Alternatively, under the same rules, an American court may be forced to recognize foreign judgments as res judicata or enforce foreign judgments, the contents of which conflict with substantive arrangements determined in the Constitution. Like the problem discussed in the previous section, this problem too has become increasingly relevant in the age of globalization, in which there are ever more multi-jurisdictional claims. It reflects an inherent tension between the procedural sovereignty of the United States and its substantive sovereignty. In other words, while U.S. constitutional power to conclude international treaties broadens the range of procedures for expressing its sovereignty, the actual exercise of that sovereignty may abridge its freedom to realize, in appropriate cases, other substantive constitutional values.

Obviously, international comity supports the application of foreign laws, which the United States has undertaken to apply pursuant to its treaty commitments. In our opinion, its power in this context increases by comparison with its power in regular cases, which do not involve a legal commitment, whether pursuant to a treaty or another legally binding source of international law. In such regular cases, the comity inducing the courts to apply a foreign law or enforce a foreign judgment reflects a foreign policy interest in the promotion of proper relations with other countries, premised upon appropriate reciprocal consideration of accepted moral norms. But comity in this sense is an exclusively political consideration. It does not entitle the other country to consideration of its interest, neither under international law nor

101 See id.
102 See id.
103 See id. at 418.
104 See id. at 432.
105 See id.
107 See Hudleston, supra note 100, at 422.
108 See von Mehren & Trautman, supra note 106, at 1603-04.
109 See Pink v. A.A.A. Highway Exp., 314 U.S. 201, 209 (1941) (asserting that recognition of foreign law under the doctrine of comity is not a matter of right, and that such recognition of the foreign law is purely voluntary on part of the nation in whose courts the question may arise).
under any other source. On the other hand, application of the foreign law originating in a treaty to which the United States and the other country are parties creates international comity. International comity exceeds the boundaries of political interest; it is based upon legal commitment of a contractual nature. The most jarring infringement of international comity originates in the breach of a legal commitment; the gravity of such a breach exceeds the gravity of a comity breach occasioned by failure to consider the interests of a foreign country not legally entitled to such consideration.

B. Constitutional versus International Obligations

Despite our comments above, the rejection of the constitutionality requirement in certain cases is impossible and undesirable. The Constitution is not a state law subject to federal treaties. A court adjudicating a claim functions as a governmental branch of the United States (or one of the states) and, as such, is bound by the Constitution. It is not permitted to make decisions or issue orders that breach constitutional provisions directed at branches of the U.S. government or at one of the states. In Shelley v. Kraemer, Chief Justice Vinson wrote in this context regarding the Fourteenth Amendment:

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110 See id.
111 See Clermont, supra note 12, at 189.
112 Together with the consideration of international comity, the consideration of legal coherency and non-application of contrived laws also supports the respecting of the treaty. The reason is that the inherent result of applying a substantive foreign law combined with the constitution of the forum country is the application of an artificial law, which is not the real law that applies to the country dictated by the international conflict-of-laws rules. This is obvious in those cases in which the application of the local constitution leads to a final conclusion different than that which would have been dictated by application of the law referred to by the international conflict-of-laws rules. The application of the local constitution in these cases amounts to a breach of the international conflict-of-laws rules and means the application of artificial rules, which are not the laws of any country, thus impairing legal coherency. The consideration of legal coherency, however, is beyond the scope of this article.
114 See id. at 434.
115 See Shelley v. Kraemer, 334 U.S. 1, 14 (1948) (holding that while a private discriminatory covenant did not violate the Fourteenth Amendment, a state court's enforcement of the discriminatory covenant would).
116 See id.
[That] [t]he action of state courts and judicial officers in their official capacities is to be regarded as action of the state within the meaning of the Fourteenth Amendment, is a proposition which has long been established . . . state action in violation of the Amendment’s provisions is equally repugnant to the constitutional commands whether directed by state statute or taken by a judicial official in the absence of statute.117

Concededly, Shelley v. Kraemer has been distinguished and limited over the years, to prevent the penetration of constitutional provisions into unintended areas.118 But, in exercising its powers, the judiciary is still subject to constitutional limitations that are not necessarily grounded in the substantive law that it applies.119 For our purpose, this means that the Constitution may prevent judicial “cooperation” in a governmental capacity with the foreign laws applicable under the rules of international conflict-of-laws or with foreign judgments that are candidates for recognition or enforcement.120 In our opinion, this rule applies with even greater force when a claim is based upon an international treaty binding the United States. A treaty to which the United States is a party is not a regular contract, the parties to which are private persons. The actual engagement of an American governmental authority in a convention that substantively contradicts the American Constitution is unconstitutional, above and beyond the unconstitutionality of its enforcement by an American court.121

Furthermore, even when the Constitution does not impose direct duties upon the courts, it expresses the fundamental political, social, and moral principles of the United States.122

117 Id. at 13.
118 See, e.g., Evans v. Abney, 396 U.S. 435, 445 (1970) (upholding a Georgia city’s reversion of a public park back to the heirs of the testator, rather than comply with an integration order where the racially discriminatory covenant originated in a private party, the testator, not in the state or its agents).
120 But see Borchers, supra note 119, at 1173.
121 But see Hudleston, supra note 100, at 425.
Some of these principles embody what American society considers to be absolute moral principles, universally valid and justified\textsuperscript{123} (as opposed to absolute universal application in positive law, which presumably is rare). In order to identify such universal constitutional principles, one can \textit{inter alia} examine whether the principle under discussion is grounded in public international law. Application of foreign laws or the recognition and enforcement of foreign judgments in conflict with the Constitution may be regarded by the United States as a violation of both its own fundamental principles and of basic universal principles.\textsuperscript{124} Judicial application of these principles expresses the United States's sovereignty over foreign laws, and their waiver could be regarded as unreasonable.\textsuperscript{125}

Admittedly, application of foreign laws and the recognition and enforcement of foreign judgments expresses a country's readiness to partially cede its sovereignty, \textit{inter alia}, for reasons of international courtesy.\textsuperscript{126} But in our opinion, though international courtesy may warrant judicial restraint based on consideration for the United States's treaty commitments, it does not obligate the courts to waive basic constitutional principles.\textsuperscript{127} This is especially true when sub-constitutional foreign laws confront the Constitution of the United States.\textsuperscript{128} It is inconceivable that the Constitution, which precedes and annuls sub-constitutional state laws, should be stripped of that power when confronted by unconstitutional foreign laws.\textsuperscript{129}

For similar reasons, traditional international conflict-of-laws

\textsuperscript{123} See Paolo Torzilli, \textit{Reconciling the Sanctity of Human Life, the Declaration of Independence, and the Constitution}, 40 CATH. LAW. 197, 202-03 (2000).

\textsuperscript{124} See Reid v. Covert, 354 U.S. 1, 5-6 (1957) ("[T]he shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.").


\textsuperscript{126} See von Mehren & Trautman, \textit{supra} note 106, at 1603-04.

\textsuperscript{127} See Hudleston, \textit{supra} note 100, at 422 ("A treaty is still subordinate to the Constitution, and its rules must conform to this inferior position, but Supreme Court case law establishes that when an international interest is at stake, claims of unconstitutionality will not be easily recognized.").

\textsuperscript{128} See \textit{id}.

\textsuperscript{129} See \textit{id}. at 432.
rules make application of foreign laws and the recognition and enforcement of foreign judgments subject to the external public policy of the United States and its mandatory rules (and occasionally even the mandatory rules of a third, foreign country). These two classic doctrines—the external public policy doctrine and the doctrine of mandatory rules—prevent application of foreign laws and the recognition and enforcement of foreign judgments when the foreign laws or judgments conflict with principles of the United States (or a third country). They reflect basic values and interests that American society is unwilling to relinquish when confronted by conflicting values or interests expressed in foreign laws or judgments. This is certainly the case with respect to interests of public policy and non-constitutional, mandatory rules and it applies a fortiori in the context of the constitutional principles of the forum country. These doctrines also apply when the self-executing treaty or the law dictates the application of a foreign law.

C. Applying the Constitution When a Conflict-of-Laws Treaty Refers to a Foreign Law

The application of the United States Constitution in cases where the conflict-of-laws rules refer to a foreign law or in cases where a court is requested to recognize or enforce a foreign judgment, does not mean that the Constitution will be applied in the same manner in which it would have been applied if the applicable law was the state law in its entirety.

130 See Loucks v. Standard Oil Co. of N.Y., 120 N.E. 198 (1918) (holding that while a foreign statute is not law in New York, it rises to an obligation that this court will enforce unless some sound reason of public policy makes it unwise); Scoles et al., supra note 1, at 50, 663, 979-82.


132 Leflar, et al., supra note 131, § 44.

133 See id.

134 Id.


Consequently, where constitutional provisions are applicable to courts in their governmental capacity, their applicability must further be examined with respect to cases in which a treaty refers to a foreign law or in proceedings of recognition or enforcement of foreign judgments. The reason is that some of the constitutional provisions imposing duties upon the judiciary are of a local character, in that they bind the judiciary in its application of the local law and not a foreign law. For example, in *Estate of Thornton v. Caldo, Inc.*,\(^{137}\) the Supreme Court invalidated under the First Amendment a Connecticut statute that required private employers to honor every employee’s desire to refuse to work on “his Sabbath.” Presumably, this ruling would not dictate the avoidance of laws of foreign countries or refusal to enforce or recognize judgments of such countries, by reason of the First Amendment proscription of establishment of religion.\(^{138}\) The distinction lies in the non-universal character of the proscription, geared toward the particular character and special needs of American society.\(^{139}\)

As a result, it would seem that an employment agreement adjudicated under a foreign law mandating respect for the employee’s day of rest, and for which the place of performance was the foreign country, would be adjudicated under that foreign law in its entirety. An American court would not invalidate the foreign law, nor would it refrain from enforcing a foreign judgment for severance pay given under that law (despite the recognition given by an American court thereby to an unconstitutional law).\(^{140}\) The constitutional prohibition of establishment of religion only applies to “its establishment” in the United States, and does not prevent an American court from recognizing, in appropriate cases, the establishment of religion by another country within its own borders.\(^{141}\)

Furthermore, the entrenchment of a rule in the Constitution indicates its substantive status, as expressing basic principles of

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\(^{137}\) 472 U.S. 703 (1985).

\(^{138}\) Devgun, *supra* note 136, at 202-04 (arguing that provisions of the First Amendment regarding freedom of speech should not apply outside the borders of the United States).

\(^{139}\) *Id.*

\(^{140}\) *Id.*

\(^{141}\) *Id.*
the United States that in many cases are binding upon all branches of its government including the courts, and that are often perceived by American society as expressing universal values, which should also be applied in disputes substantively governed by foreign law. The international conflict-of-laws rules are ultimately based upon a default option by which the Court applies the specific national law dictated by the international conflict-of-laws, which is not necessarily the relevant American law, whether federal or state. The conception of the Constitution as a "regular" American law is liable to annul its special status as the supreme legal norm, expressing the fundamental principles of the system, which is a status that may justify deviation from the default option.

D. Which Law Should Be Applied Instead of an Unconstitutional Foreign Law

Invalidation of a foreign law, otherwise applicable under a treaty due to its contradiction of the applicable provision in the United States Constitution, raises the question of which law should replace the invalidated law. The invalidation of the foreign law does not release the court from its obligation to rule on the dispute before it. In fact, it is the United States's (or another state's) striving to realize its universal Constitutional provisions that conduces the Court to adjudicate the dispute itself. Where an American law (or law of another state) dictates the invalidation of a foreign law otherwise applicable by reason of international conflict-of-laws rules, there are two default options: the foreign law can be applied as if the invalid provision was not included therein, or the invalidated provision can be replaced with a parallel provision stipulated in the forum law.

142 It would seem that the parallel question does not arise regarding procedures of recognition or enforcement of foreign judgments. A foreign judgment that contravenes a provision of the local constitution will neither be enforced nor recognized by the land of the constitution, which will reject the claim. In such a case, there is obviously no question regarding which judgment will be recognized or enforced instead of the judgment, which was invalidated.

143 See, e.g., Pearson v. N.E. Airlines, Inc., 309 F.2d 553 (2d Cir. 1962) (holding that a New York Court may find a defendant liable based on Massachusetts's wrongful death statute and refusing to impose Massachusetts's limitation on damages when New York does not have such a limitation).

144 Yet, it seems that in courts which apply modern approaches to conflict-of-laws that are based on policy considerations, there is no prospect that foreign law contradicts
In our opinion, both of these options are problematic. The first option entails the application of artificial laws, not based upon any of the rationales behind international conflict-of-laws rules and not promoting any coherent policy. The second leads to a broad breach of the American duty under the treaty and serious damage to its international comity.

Against this background, it seems that where a foreign law is voidable due to its conflict with the Constitution, there should be an initial examination of whether the avoidable provision can be separated substantively from the other provisions of the applicable law. For example, the case of an employer's claim against an employee based on two separate grounds: first – contractual (due to breach of employment contract), and second - tortuous or property (due to the violation of trade secret) by reason of the employee having worked for one of the plaintiff's competitors. In the United States, the tortuous head can be avoided, for it violates the freedom of occupation. The contractual head, on the other hand, complies with American constitutionalism, since, under American law, in order for a contractual clause restricting employment to be upheld, it is sufficient that it be reasonable and in the absence of a contractual condition, an inevitable misappropriation of trade secrets must exist. The reasonableness requirement is more lenient, substantively and evidentially, than the requirement of inevitable misappropriation of trade secrets. A clear distinction can be made between the tortuous-property ground and the contract ground, allowing judgment to be given on the basis of contract. Consequently, the invalidation of the first grounds does not diminish the coherency of the foreign law to be the public policy of the Forum. See LEFLAR, ET AL., supra note 131, § 93.

145 See supra note 112 and accompanying text.
147 See, e.g., PepsiCo, Inc. v. Redmond, 54 F.3d 1262 (7th Cir. 1995).
148 See AMP, Inc. v. Fleischhacker, 823 F.2d 1199, 1202 (7th Cir. 1987).
149 See id. at 1206 ("An employer is always free to protect its interests through a reasonable restrictive covenant not to compete.").
applied, and does not lead to application of artificial foreign law that the parties could never have expected, and which does not promote any rational policy.\textsuperscript{152}

However, in other cases, this examination may demonstrate that it is totally unreasonable to separate the avoidable, unconstitutional legal provisions from the other legal, constitutional provisions; for example, a defamation action involving foreign law provisions that determine the scope of substantive liability by imposing restrictions upon freedom of expression. Under the First Amendment, such provisions may be invalidated. Nonetheless, invalidation of the offensive provisions, while retaining intact all the defenses provided by the foreign law could lead to warped results, thereby making the separation unreasonable. As a rule, the scope of substantive liability for defamation is connected to the scope of the defenses. Limitation of substantive liability is likely to be accompanied by a parallel limitation of defenses, for broad defenses are not required when substantive liability is limited. On the other hand, broad substantive liability may necessitate broad defenses as a proportionate balance to the broadened substantive liability for defamation. For our purposes, this means that replacing the broad liability specified in the foreign law with the narrower liability under the forum law, while retaining the limited defense of the foreign law, leads to a warped, unbalanced result. The result would be that the overall scope of liability (after applying the defenses) for defamation is narrower not only than that of the applicable law, but also than that of the forum. This result is unreasonable and does not reflect any coherent policy.

It seems, therefore, that when a particular provision of the applicable law is unconstitutional, an analogy should be drawn from the severance (divisibility) rule.\textsuperscript{153} Accordingly, statutory provisions found to be illegal will lead to the avoidance of the entire law as unconstitutional if the invalidation of the particular provision will undermine the underlying legislative purpose.\textsuperscript{154} On

\textsuperscript{152} See LEFLAR ET AL., supra note 131, § 93.


\textsuperscript{154} See Ala. Airlines, Inc. v. Brock, 480 U.S. 678, 685 (1987) ("The . . . relevant
the other hand, if the constitutionally valid statutory provisions are retainable after avoidance of the unconstitutional provision, without undermining the legislative policy, only the unconstitutional provision will be invalidated. In this context, consideration may also be given to the severance provisions occasionally determined by the law itself. However, the absence of such provisions does not preclude separation in terms of the purpose of the law under discussion. Conceivably, in these contexts it is appropriate to apply the special care rule. This rule is generally applied to the invalidation of American laws (federal and to a large extent state), and not to foreign laws made applicable pursuant to a treaty. Its application would give expression to the status of a treaty as constituting a legal obligation and the highest level of international comity.

E. Constitutionality Versus Public Policy

The doctrine of external public policy prohibits the application of a foreign law (or judgment), which is inconsistent with the basic principles of the United States or relevant state. It is enforceable with respect to foreign laws, which would otherwise apply under the conflict-of-laws rules in the narrow sense, or by virtue of the recognition or enforcement of foreign judgments. It grants the court relatively broad discretion, for these "basic principles" lack precise definition. They exist rather in the form of "examples," according to the classic common law style, as cases in which laws or foreign judgments retreat before the principles of the United

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155 Id.

156 See, e.g., id. at 697 (finding the legislative-veto provision of the Airline Deregulation Act unconstitutional and severable from the remainder of the Act); Ala. Airlines, Inc., 480 U.S. at 680; Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919, 959 (1983).


158 See Hilton v. Guyot, 159 U.S. 113, 164-56 (1895); JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC § 38, at 35 (8th ed. 1883); Scoles et al., supra note 1, at 50.

159 See STORY, supra note 158, § 38 at 35.

States and cases in which there is no such retreat.\textsuperscript{161}

External public policy as applied in the field of international conflict-of-laws, is not identical to internal public policy as applied in domestic private law. For instance, contracts law is generally of a narrower scope than that covered by internal public policy.\textsuperscript{162} The variation in their scope stems from their diverse respective goals. When applied internally, public policy imposes restrictions on private legal norms, mainly contractual provisions, whereas, when applied externally it imposes restrictions upon government norms, mainly in the form of laws and judgments. But, as opposed to internal governmental norms, foreign governmental norms are subject to the judicial review of the forum on the grounds of public policy. Even so, considerations of international comity and international tolerance dictate special restraint in the exercise of judicial review of the legal norms of foreign countries.\textsuperscript{163}

Furthermore, the actual existence of a foreign element dilutes its effect on the interests of the United States or the state and weakens the interest in intervening with the results dictated by the substantive law that is supposed to apply.\textsuperscript{164} These considerations do not exist to the same extent in the context of private legal norms, regardless of whether the applicable law is American or foreign (in which case the public policy muster is double, in accordance with the internal public policy of the country whose law applies and the external public policy accepted in the United States or other country).\textsuperscript{165}

For purposes of this essay, the question arises regarding the

\textsuperscript{161} Id.


\textsuperscript{163} See supra note 55 and accompanying text.

\textsuperscript{164} See supra note 55 and accompanying text.

\textsuperscript{165} See supra note 55 and accompanying text.
relationship between the external public policy of the United States and the Constitution. As stated, both sources serve in the review of foreign norms, whether laws or judgments. Indeed, there are cases in which both categories of review will produce identical results. For example, discrimination contravenes the U.S. Constitution and it may be reasonably presumed that at least in certain cases, given its universality, it would lead to the invalidation of foreign laws or judgments (and not only of American judgments). In the same way, a discriminatory foreign law or judgment could be declared as contradicting external public policy and consequently be avoided. The question, therefore, is whether there are two separate categories or whether they are coterminous (and, if the latter, what is the specific context for the application of each one of them). For example, there were two cases in which American courts (a Federal court and a State court) refused to enforce British judgments that contravened the First Amendment, because their enforcement would contravene public policy, to the extent that it breached a mandatory provision.

Indeed, there is a facial similarity between the application of constitutional provisions, which are liable to lead to the avoidance or non-enforcement of foreign legal norms, and external public policy considerations whose application would also lead to similar results. But in our opinion they are nonetheless two separate categories and the distinction between them ought to be maintained.

We will begin with the connection between the two categories. The connection between the application of constitutional provisions, which may lead to avoidance or refusal to enforce foreign legal norms and external public policy, is based upon the fact that not all constitutional provisions are automatically

\[166 \text{ See Michael L. Novicoff, } Blocking and Clawing Back in the Name of Public Policy: The United Kingdom's Protection of Private Economic Interest Against Adverse Foreign Adjudication, 7 NW. J. INT'L. L. & BUS. 12, 23-24 (1985).}\]

\[167 \text{ Id.}\]

\[168 \text{ See Matusевич v. Telnikoff, 888 F. Supp. 1 (D.D.C. 1995); Buchanan v. India Abroad Publ., Inc., 585 N.Y.S.2d 661 (Supp. Ct. 1992). For discussion of these cases, see Hudleston, supra note 100, at 411-15; Foster, supra note 125, at 389-90; Devgun, supra note 136, at 202-06 (discussing the Buchanan case).}\]
applicable, directly or indirectly, to foreign legal norms. Their application is discrentional, and the Constitutional provisions applied to foreign legal norms are the same provisions that restrict the power of an American Court, or provisions reflecting universal values applicable in all places, including outside the United States. External public policy, as distinct from internal public policy, also reflects values, which the United States or state regard as universally valid, and which from their perspective are also applicable in cases not subject to their legal system.

In view of the above, it could be claimed that the Constitutional provisions applied in foreign contexts are no more than specific examples of external public policy. But in our view, this claim is fundamentally untrue, and specifically, it is inaccurate in the context of the conflict-of-laws rules determined in a treaty. This position derives from a few considerations.

Firstly, the Constitution is the supreme law of the United States, established by its founders, and can only be changed through a particularly complex process. External public policy is generally part of the common law. As such, not only does it lack any extra-legal status, but it can also be deviated from, or amended by law. By extension, it cannot be said that constitutional provisions are part of the common law, which may be sub-constitutional or even sub-legal. Constitutional provisions and other laws also may influence the contents of the external public policy or even change it, but they are not an integral part of the rules of the common law, subsumed under the title of "external public policy."

Secondly, the Constitution is a written, formal, rigid document, not easily given to amendment. External public policy, as part of the common law, is characterized by its flexibility; it is characteristically not grounded in any formal document with defined content. Practically speaking, its content is a matter of

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169 See sources cited supra note 162.
170 See sources cited supra note 162.
171 See sources cited supra note 162.
173 Id.
174 Id.
judicial discretion.\textsuperscript{175} Granted, according to at least some interpretative views, the Court also has reasonably broad latitude in its constitutional interpretation.\textsuperscript{176} Its discretion is applied in both the interpretation it gives to substantive constitutional provisions and in its interpretation regarding their applicability to foreign legal norms (including their application to the Court itself, in a manner that allows it to avoid enforcing norms that contravene the Constitution).\textsuperscript{177} Even so, the interpretation of the Constitution by the courts is ultimately subject to the constitutional text, which is not absolutely fluid.\textsuperscript{178} The Court is not authorized to "interpret" the constitution in a manner that is inconsistent with its wording.\textsuperscript{179} Thus, external public policy is considerably more malleable and subject to development than are the constitutional provisions that apply to foreign laws or judgments.\textsuperscript{180}

Thirdly, it is precisely the constitutional entrenchment of certain requirements that can engender their application to foreign legal norms, whereas it is doubtful whether the same requirements would have been determined as part of the external public policy.\textsuperscript{181} For example, the provision of the Fourteenth Amendment that "nor shall any State deprive any person of life liberty or property" occasions various procedural rights, and is similarly likely to apply in the context of international conflict-of-laws.\textsuperscript{182} However, it is doubtful if these rights in their entirety would have been classified as belonging to external public policy of the United States, if not for their prior classification as

\textsuperscript{175} Id.
\textsuperscript{177} See, e.g., Miller, 530 U.S. at 355-56; Agostini, 521 U.S. at 235.
\textsuperscript{178} See sources cited supra note 177.
\textsuperscript{182} See Morrisey, 408 U.S. at 481; Eldridge, 424 U.S. at 333; McGown, 366 U.S. at 425-26.
Constitutional rights.\textsuperscript{183}

Fourthly, in certain contexts, there are grounds for claiming that it is precisely the Constitution that protects the public policy exception when realizing the principles of federalism and protection of state sovereignty under the Tenth Amendment.\textsuperscript{184} Even so, it does not follow that the contents of public policy are fixed in the Constitution, but rather that a state’s right to avoid recognition of foreign laws that contradict public policy is a constitutional right constituting the basis of American federalism.\textsuperscript{185}

These four proposed distinctions between constitutional provisions and external public policy are relevant both for cases in which the international conflict-of-laws rules are treaty-based, or when they are based on common law. There is, however, a fifth distinction, which applies only to conflict-of-laws rules established in a self-executing treaty or in a federal law executing the same.\textsuperscript{186} There are two aspects to this distinction. The first is that the contravention of external state policy (similar to a contravention of any other internal state law) does not empower a state court to invalidate a provision of a treaty legally concluded by the United States.\textsuperscript{187} Under the Constitution, a treaty is part of “the Supreme Law of the Land”\textsuperscript{188} and, as such, is normatively subordinate to the Constitution.\textsuperscript{189} It is certainly not subject to conceptions of “public policy” external to the Constitution.\textsuperscript{190} This is not the case when the avoidance is based upon the U.S. Constitution.\textsuperscript{191}

The second, more general aspect is that a court implementing

\textsuperscript{183} See Morrisey, 408 U.S. at 481; Eldridge, 424 U.S. at 333; McGown, 366 U.S. at 425-26.


\textsuperscript{185} See id.

\textsuperscript{186} Missouri v. Holland, 252 U.S. 416, 434 (1920).

\textsuperscript{187} This was fixed in the Supreme Court ruling of Missouri v. Holland, 252 U.S. at 434.

\textsuperscript{188} U.S. CONST. art. VI, § 2.

\textsuperscript{189} See supra notes 27, 33-34 and accompanying text.

\textsuperscript{190} See supra notes 27, 33-34 and accompanying text.

\textsuperscript{191} See Reid, Superintendent, D.C. Jail v. Covert, 354 U.S. 1, 5-6 (1957); De Geofroy v. Rigs, 133 U.S. 258, 267 (1890).
conflict-of-laws rules (in the narrow sense) or rules for recognition and enforcement of foreign judgments determined in a treaty, should use its discretion to avoid foreign laws. This should be done on the basis of public policy with a higher degree of restraint, dictated by the particularly high level of international comity created by the treaty. Furthermore, the Court may consider only factors affecting universal public policy, or at least federal public policy, but not public policy grounded in state considerations. These restrictions clearly would not apply to the constitutionally based avoidance, which is the supreme law of the land, also binding upon treaties.

F. Recognition or Enforcement of Foreign Judgments under a Treaty

A special problem may arise when a court is asked to recognize or enforce a foreign judgment by virtue of a multilateral or bilateral treaty (and not exclusively by virtue of international comity, which is not based upon a binding treaty). To date, the United States has not joined treaties of this kind, but may do so in the future, and the problem is whether the enforcement or recognition of a foreign judgment can be opposed on the basis of its contravening the U.S. Constitution.

A similar problem has been dealt with on an internal level, which is regulated by the collateral bar rule and its exceptions. The collateral bar rule prevents a person who has breached a judicial injunction or administrative order from challenging the

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192 See supra notes 27, 33-34 and accompanying text.
193 See supra notes 27, 33-34 and accompanying text.
194 See supra notes 27, 33-34 and accompanying text.
195 In 1977, the United States initiated a Treaty for Mutual Recognition and Enforcement of Judgments with England, however, the treaty was never ratified due to English reservations. See Scoles et al., supra note 1, at 1152.
196 See generally id. at 1152.
constitutionality of the breached order during proceedings, including civil contempt proceedings, instituted against him because of the breach. The very breach of such an injunction or order is prohibited, regardless of the fact that the order in question may have been unconstitutional. The only defenses that the person in breach may raise are that: (1) the court or administrative authority that made the decision lacked the substantive or formal competence; or (2) the law under which the court granted the restraint was facially unconstitutional.

The collateral bar rule does not apply to procedures of recognition or enforcement of foreign judgments. In other words, a litigant who lost a case conducted abroad, including in a trial which was governed by American law under the conflict-of-laws rules of the country in which it was given, and thereafter failed to execute the judgment, is not estopped from claiming in the framework of enforcement or recognition of a foreign judgment, that the order was unconstitutional. In our opinion, however, even if the collateral bar rule does not apply to such proceedings, and it certainly is not of automatic applicability, considerations of justice between the parties, especially the consideration of international comity, may in certain cases justify the restraint of an American court in exercising “judicial review of the foreign judgment” by way of analogy; provided, however, that the party in breach had been given a full right of claim abroad or appropriate right of claim, and the substantive law applied is the American law or the law of another country, which in terms of its contents is similar to the relevant American constitutional law.

III. Conclusion

The rules of international conflict-of-laws are basically part of private law because they deal with the establishment of rights and

198 See sources cited supra note 197.
199 See sources cited supra note 197.
200 See Walker v. Birmingham, 388 U.S. 307, 315 (1967) (suggesting that an injunction that was “transparently invalid” or that had been issued by a court lacking jurisdiction would not be covered by the collateral bar rule).
201 See sources cited supra note 197.
202 See sources cited supra note 197.
203 See generally SCOLES ET AL., supra note 1, at 1152.
debts between individuals.\textsuperscript{204} Even so, the international and multinational aspects of dispute resolution, in cases affecting a large number of states, give rise to the consideration of international comity as an integral, though not dominant, consideration in this field.\textsuperscript{205} The rules of international conflict-of-laws in treaties change, and, in fact, substantively upgrade the status of the consideration. Such changes express not only international courtesy, but also a legal international commitment of a contractual nature, which is anchored in the United States as the "Supreme Law of the Land."\textsuperscript{206}

As detailed at the beginning of this article, this substantive difference provides a rationale for the apparent non-correlation between the constitutional arrangements in the institutional realm for regulating private law in general and such arrangements as they affect the regulation by way of international conflict-of-laws treaties.\textsuperscript{207} This difference also requires conferring special significance on international comity in dealing with cases in which there is an apparent non-correlation between the international constitutional commitment of the United States under conflict-of-laws treaties and its commitment to the supremacy of the Constitution.\textsuperscript{208}

\begin{itemize}
\item \textsuperscript{205} See sources cited supra note 197.
\item \textsuperscript{206} See sources cited supra note 197.
\item \textsuperscript{207} See generally sources cited supra note 162.
\item \textsuperscript{208} See generally SCOLES ET AL., supra note 1, at 1152.
\end{itemize}