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The Future of the Federal Common Law of Foreign Relations

INGRID WUERTH*

The federal common law of foreign relations has been in decline for decades. The field was built in part on the claim that customary international law is federal common law and in part on the claim that federal judges should displace state law when they conclude that it poses difficulties for U.S. foreign relations. Today, however, customary international law is generally applied based upon the implied intentions of Congress, rather than its free-standing status as federal common law, and judicial evaluation of foreign policy problems has largely been replaced by reliance upon presidential or congressional action, or by standard constitutional analysis.

*Two traditional areas of federal common law—immunity and the act of state doctrine—are alive and well doctrinally. Their status as federal common law is somewhat unsteady, however, because the Court has not provided a convincing account of why these two topics should be governed by federal common law, and because the traditional foundation for federal common law has eroded. Anthony Bellia Jr. and Bradford Clark have argued in *The Law of Nations and the United States Constitution* that the Constitution itself requires courts to apply customary international law in these two areas, but their argument fails to convince. A better approach is to justify federal common law as necessary to give effect to the very closely-related statutory framework governing foreign sovereign immunity, and because judicial lawmaking is also cabined by the content of customary international law and by some actions of the executive branch. The federal common law of foreign relations does have a future, but it depends neither upon the status of customary international law as federal common law nor upon judicial decision-making about the deleterious effect of state law upon U.S. foreign policy.*

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INTRODUCTION

What does the future hold for the federal common law of foreign relations? Foreign relations is often described as one of the best established and most legitimate enclaves of federal common law, but its overall scope and effect have been declining for decades. Issues that were once characterized as federal common law are increasingly resolved based on statutes, the Constitution, or actions by the President. The shrinking of common law in the area of foreign affairs forms part of some broader trends in foreign relations and constitutional law, including an increase in formalism, a growth in the difficulties in distinguishing foreign from domestic cases, and an overall normalization of the foreign relations field. These trends weaken arguments that foreign relations issues pose unique problems requiring special doctrinal treatment; those arguments have often been used to justify the federal common law of foreign relations. Federal common law does seem alive and relatively well in narrow areas of foreign relations, including cases involving the act of state doctrine and certain issues related to foreign sovereign immunity.

Yet the Supreme Court seems hesitant to refer to the act of state doctrine as federal common law, and it has not fully explained the basis for applying federal common law in immunity-related cases. Continuing in a long tradition of academic commentary critical of federal common law, an important new book by Professors Anthony J. Bellia Jr. and Bradford R. Clark, *The Law of Nations and the United States Constitution*, seeks to further shrink the field by arguing that the act of state and immunity doctrines should be treated as unusual forms of constitutionally mandated law, not judge-made federal common law.¹ The argument has implications for general common law, for foreign relations law as a field, and for formalist approaches to constitutional interpretation. But it is ultimately unconvincing. Courts should continue to apply judge-made federal common law in act of state and immunity related cases, although for different reasons than scholars and courts have sometimes given.

1. ANTHONY J. BELLIA JR. & BRADFORD R. CLARK, *THE LAW OF NATIONS AND THE UNITED STATES CONSTITUTION* (2017).

The Supreme Court's decision in *Erie Railroad Co. v. Tompkins* left unclear the constitutional basis for general common law,² but the Court continues to make federal law in special enclaves, including foreign relations. The enclaves as a group are sometimes defended as covering topics that are "federalized by force of the Constitution itself," thus resolving some doubts about their validity.³ Writing in that general tradition, but in some respects taking the argument farther, Bellia and Clark maintain that the Constitution itself requires courts to apply some, but not all, customary international law as federal common law.⁴ Bellia and Clark reconceptualize the act of state and immunity doctrines as constitutionally compelled applications of customary international law. Customary international law is not itself constitutional law, under this theory, but the Constitution grants to the federal political branches the exclusive power over some kinds of customary international law. Courts and states must apply that law unless and until the political branches elect to change it.

Bellia and Clark build their case on a fascinating historical analysis of the relationship between customary international law (or, to use the older term, the law of nations) and the U.S. Constitution. They argue that the Constitution relates in different ways to three historically distinct branches of customary international law: the law merchant, the law maritime, and the law of state-state relations.⁵ The historical categories have contemporary significance. The modern customary international law governing human rights has no historical counterpart, and thus is not federal law.⁶ The modern customary international law of state-state relations, on the other hand, not only may, according to Bellia and Clark, but must, be applied by courts as a matter of constitutional command, as a function of the recognition power.⁷ The act of state and immunity doctrines serve as their primary examples.⁸

The law governing acts of state and some forms of immunity is constitutionally compelled, Bellia and Clark argue, because the political branches have exclusive control over recognition under the Constitution.⁹ Once a foreign state is recognized, courts must apply the act of state and immunity doctrines. The argument explicitly constitutionalizes the two doctrines. Act of state and non-statutory immunity cases arise under federal law for jurisdictional purposes not because they apply judge-made federal common law, but instead because they arise under the

2. 304 U.S. 64, 78–80 (1938).

3. Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1031 (1967).

4. BELLIA & CLARK, *supra* note 1, at xii–vi, 149–50.

5. *Id.* at 1–2.

6. *Id.* at 189–211.

7. *Id.* at 189–91.

8. *Id.*

9. *Id.* at 170 ("Because the Constitution itself gives the political branches the power to recognize foreign nations, the exercise of that power requires state and federal courts alike to uphold the traditional sovereign rights of such nations as an incident of recognition.").

Constitution itself.¹⁰ The law applied by federal courts is supreme over state law because the Constitution itself is supreme.¹¹ State and federal courts do not make federal common law related to immunity and the act of state doctrine; instead, they are constitutionally obligated to apply customary international law to respect the sovereign rights of foreign countries recognized by the political branches.

Constitutionalizing the act of state and immunity doctrines would further shrink the scope of foreign relations common law and resolve formalist objections to the act of state and immunity doctrines as part of post-*Erie* common law, as described in Part I below. It would also have the effect of undermining the federal common law of foreign relations and even general federal common law by shrinking the scope of both.¹² Despite its formal attractions, the argument is ultimately unsuccessful as a modern approach to the federal common law of foreign relations.¹³ As described in Part II, the thesis relies too heavily on a recognition power that is hardly recognizable. Bellia and Clark argue that the recognition power is exclusive to the federal political branches, and that the recognition power includes respect for the rights and immunities of foreign nations. But the Court has recently held that the recognition power is exclusive to the President.¹⁴ That holding means that the rights and immunities of foreign nations which may follow from recognition—such as act of state and immunity—have a different constitutional source than recognition itself, contrary to Bellia and Clark’s argument. In effect, their argument is an unconvincing attempt to create an important, and previously unknown, constitutional power that gives the federal political branches exclusive power over the rights that follow from recognition.

The constitutional argument also relies upon an inaccurate description of how customary international law and related doctrines are actually interpreted and applied, as described in Part III. Courts do not merely implement a preexisting body of international legal rights that follow from the political act of recognition. Instead, they are making law that is informed—but not dictated—by customary international law. The upshot, as described in Part IV, is that with respect to immunity and the act of state doctrines, the current law as an enclave of preemptive, judge-made federal common law offers a better approach, one that is based on an

10. BELLIA & CLARK, *supra* note 1, at 176 (“[T]he Constitution sometimes requires courts to apply the law of state-state relations to uphold the rights of recognized foreign nations . . . the denial of such rights raises a question arising under the Constitution and supports federal question jurisdiction.”).

11. *Id.* at xxi (“[T]he Constitution’s exclusive allocation of powers to the political branches to recognize foreign nations has been understood to require courts and U.S. states to uphold the rights of recognized foreign nations under the law of state-state relations”); *see also id.* at 43, 53, 57, 82, 103–04, 170, 174, 230.

12. In their book, Bellia and Clark do not spell out the implication of their arguments for federal common law generally or for the federal common law of foreign relations in particular. The authors discuss federal common law in their other works. *See, e.g.*, Anthony J. Bellia Jr. & Bradford R. Clark, *The Law of Nations as Constitutional Law*, 98 VA. L. REV. 729, 738–39, 830–31 (2012); Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1251, 1292–1306 (1996).

13. For an evaluation of the historical arguments see Michael D. Ramsey, *The Constitution’s Text and Customary International Law*, 106 GEO. L.J. 1747 (2018).

14. *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2089 (2015).

accurate description of the recognition power, of leading foreign relations cases, and of the actual process of resolving cases. It is also an approach which permits courts the flexibility to give effect to closely related statutory provisions.

If successful, Bellia and Clark's thesis would help demonstrate that formal methods of constitutional interpretation such as originalism and textualism do not require a wholesale rejection of modern doctrine and would preserve some federal common law while discarding what is not reconceived as a direct application of the Constitution. But formalists should not be convinced. Contorting the recognition power and modern case law to match the Bellia and Clark constitutionalism thesis is an unattractive option. As others have noted, formalist objections to federal common law generate pressure to twist the Constitution's meaning;¹⁵ that pressure also applies to precedent. It is better to conclude that state law should apply, or to argue that the constitutionalism thesis should be implemented despite its inconsistency with the Court's leading cases. Best of all, however, would be to accept the power of federal courts to make common law in act of state and immunity-related cases based upon precedent, the need to give effect to closely-related statutory regimes, and the limited range of judicial lawmaking involved.

I. THE FEDERAL COMMON LAW OF FOREIGN RELATIONS: A SHRINKING FIELD

After the Court's decision in *Erie Railroad Co. v. Tompkins*,¹⁶ federal common law has famously lacked a clear constitutional basis, although the Court continues to make federal law in special enclaves.¹⁷ Arguments against those enclaves persist. Federal common law, meaning here judge-made law that preempts state law and gives rise to federal question jurisdiction,¹⁸ is in tension, or outright conflict, with the Supremacy Clause, Article III, and separation of powers in the U.S. Constitution.¹⁹ Article III does not explicitly list federal common law as providing the basis for the jurisdiction of the federal courts, and the Supremacy Clause

15. See Caleb Nelson, *The Legitimacy of (Some) Federal Common Law*, 101 VA. L. REV. 1, 9 (2015) (noting that "[a]s a practical matter . . . reluctance to recognize federal common law creates pressure to interpret written federal laws in ways that depart from the tenets of textualism and originalism"); see also Stephen E. Sachs, *The "Unwritten Constitution" and Unwritten Law*, 2013 U. ILL. L. REV. 1797, 1845 ("If every issue of constitutional magnitude has to be settled by the text itself, then we'll end up 'interpreting' (some might say 'twisting') the text into expressing a great deal that it doesn't say.").

16. 304 U.S. 64 (1938).

17. See *Collins v. Virginia*, 138 S. Ct. 1663, 1680 (2018) (noting that the Court has applied "special enclaves of federal common law.").

18. This Article does not discuss federal common law doctrines that do not preempt state law, such as forum non conveniens or recognition of judgments. See *Am. Dredging Co. v. Miller*, 510 U.S. 443, 443 (1994) (forum non conveniens); *Comm'n Imp. Exp. S.A. v. Congo*, 757 F.3d 321, 322 (D.C. Cir. 2014) (recognition of judgments); see also Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 814–15 (2008).

19. See Michael D. Ramsey, *The Supremacy Clause, Original Meaning, and Modern Law*, 74 OHIO ST. L.J. 559, 568 (2013) (noting the conflict with the Supremacy Clause); Ingrid Wuerth, *Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department*, 51 VA. J. INT'L L. 915, 954–55 (2011) (surveying constitutional objections to the federal common law of foreign relations); Notes and Comments, *Federal Common Law and Article III: A Jurisdictional Approach to Erie*, 74 YALE L.J. 325, 331 (1964) (noting the conflict with Article III).

does not list federal common law as preempting state law; both instead use the phrase “the Laws of the United States.”²⁰ Furthermore, the separation of powers principle gives Congress, not the federal courts, the power to make law.²¹ Because of these problems, some formalist and originalist scholars maintain that the federal common law of foreign relations should be scrapped entirely in favor of state law,²² just as some argue that federal common law is illegitimate as a whole.²³ Others disagree, of course, on the extent to which the Constitution poses barriers to federal common law.²⁴

Foreign relations is sometimes viewed as the most defensible or legitimate area of federal common law, in part because applying state law appears to be an unattractive option in the areas related to foreign policy and relations with foreign states, and in part because the federal government is sometimes said to have especially broad constitutional power over foreign relations issues.²⁵ Federal courts have accordingly developed their own common law rules on topics including the act of state doctrine,²⁶ immunity,²⁷ the separate juridical status of foreign states and their agencies and instrumentalities,²⁸ customary international law,²⁹ the dormant Foreign Commerce Clause, and the preemption of state foreign relations activities through judicial decision making, also known as dormant foreign affairs preemption.³⁰ Although some other areas of federal common law are authorized by federal statute, the federal common law of foreign relations is based in part on structural implications of the Constitution and in part on the claim that foreign relations issues are, as whole, “uniquely federal in nature.”³¹

The distinction between constitutional law and some parts of federal common law is thin, especially in the areas of dormant foreign affairs judicial preemption

20. U.S. CONST. art. III, § 2, cl. 1; *id.* art. VI, cl. 2. Article VI adds “which shall be made in pursuance” of the Constitution, which arguably means that the phrase is narrower in the Article VI context than in the Article III context. *Id.*; see also *infra* notes 184–200 and accompanying text.

21. U.S. CONST. art. I, § 1; see Alfred Hill, *The Erie Doctrine and the Constitution*, 53 NW. U. L. REV. 427, 441 (1958); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 19–24 (1985); see also *infra* notes 219–22 and accompanying text.

22. See, e.g., Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1664–98 (1997).

23. See, e.g., Merrill, *supra* note 21.

24. See, e.g., Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 887–88 (1986) (suggesting that “judicial power to act is not limited to particular enclaves and that it is much broader than the usual references to judicial power would suggest”); Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 741 (2010) (“It is quite implausible to think that the Supremacy Clause addressed this body of law at all . . .”).

25. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 424 (1964); Hill, *supra* note 3, at 1042–61.

26. E.g., *Sabbatino*, 376 U.S. at 424.

27. E.g., *Samantar v. Yousuf*, 560 U.S. 305, 1047 (2010).

28. E.g., *First Nat’l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 623 (1983).

29. E.g., *Filartiga v. Pena-Irala*, 630 F.2d 876, 885 (2d Cir. 1980).

30. See Goldsmith, *supra* note 22, at 1625–31 (describing dormant Foreign Commerce Clause and foreign affairs preemption as forms of federal common law).

31. *Sabbatino*, 376 U.S. at 424.

of state foreign relations activities and the dormant Foreign Commerce Clause, neither of which has been identified by the Supreme Court as involving federal common law. Writing in the late 1990s, Professor Jack Goldsmith argued that cases in these two categories involved reasoning comparable to the reasoning in cases in which the Court was more explicit about applying federal common law, such as the act of state doctrine.³² In all three areas, federal judges exercised broad power to displace state law based on their independent analysis of the foreign relations implications of applying state law.³³ In this sense, dormant foreign affairs preemption and dormant Foreign Commerce Clause preemption also constituted judge-made federal law drawn loosely from the constitutional structure. Goldsmith noted that the Court might be moving toward the elimination of the federal common law of foreign relations,³⁴ citing *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., International*,³⁵ which limited the act of state doctrine, and *Barclays Bank PLC v. Franchise Tax Board of California*,³⁶ which eschewed common law reasoning and refused to preempt state law under the dormant Foreign Commerce Clause.

That trend has continued. The Court has not applied the dormant Foreign Commerce Clause to strike down a state law since 1992,³⁷ and it has not applied dormant foreign affairs preemption to strike down a state law since 1968, despite opportunities to apply both. In the lower court decision in *Crosby v. National Foreign Trade Council*,³⁸ for example, the First Circuit applied both doctrines to invalidate a Massachusetts statute limiting trade with Burma by Massachusetts government agencies.³⁹ The Supreme Court affirmed, but on different grounds.⁴⁰ Instead of applying, or even discussing, federal common law doctrines, it relied on standard statutory preemption and concluded in somewhat strained analysis that a federal law sanctioning Burma preempted the Massachusetts statute.⁴¹ The Supreme Court has discussed dormant Foreign Commerce Clause preemption only once since the 2000 *Crosby* decision.⁴² Lower courts have applied it infrequently and usually with standard analysis from domestic interstate commerce cases, with little or no assessment of the impact of the state laws on U.S. foreign

32. See generally Goldsmith, *supra* note 22.

33. *Id.* at 1629–31, 1637.

34. *Id.* at 1624.

35. 493 U.S. 400 (1990).

36. 512 U.S. 298 (1994).

37. See *Kraft Gen. Foods v. Iowa Dept. of Rev.*, 505 U.S. 71 (1992).

38. 530 U.S. 363 (2000).

39. *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 45 (1st Cir. 1999).

40. *Crosby*, 530 U.S. at 388.

41. *Id.* at 372–88.

42. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003); see Leanne M. Wilson, *The Fate of the Dormant Foreign Commerce Clause After Garamendi and Crosby*, 107 COLUM. L. REV. 746, 748 (2007) (arguing that the dormant Foreign Commerce Clause has been “severely restricted” by *Garamendi* and *Crosby*). Courts are apparently hesitant to apply the Foreign Commerce Clause at all. See Scott Sullivan, *The Future of the Foreign Commerce Clause*, 83 FORDHAM L. REV. 1955, 1970 (2015).

relations.⁴³ Thus, much of the common law-like reasoning in dormant Foreign Commerce Clause cases has been replaced by statutory preemption and standard constitutional analysis.

The Supreme Court considered dormant foreign affairs preemption in its 2003 decision *American Insurance Ass'n v. Garamendi*,⁴⁴ with the four-Justice dissent explicitly distancing itself from *Zschernig*, the only Supreme Court case which has applied the doctrine.⁴⁵ The majority opinion in *Garamendi* also questioned *Zschernig*'s reasoning and did not rely on foreign affairs preemption in holding that the California state statute was preempted by the actions of the President—a clear step away from common law-like judicial preemption.⁴⁶ And several years later, the Court limited *Garamendi* itself to cases involving the settlement of foreign claims by the President.⁴⁷ Lower courts, especially in the Ninth Circuit, have continued to apply the foreign affairs preemption doctrine based in part on an independent assessment of the state law's impact on U.S. foreign policy,⁴⁸ although some cases also involve more analysis of the Constitution and the specific foreign affairs powers it confers on federal government.⁴⁹

The Supreme Court has provided a statutory basis for another important area of the federal common law of foreign relations: customary international law as applied

43. See, e.g., *Hartford Enters., Inc. v. Coty*, 529 F. Supp. 2d 95, 106 (D. Me. 2008) (applying *Younger* abstention to avoid resolving dormant Foreign Commerce Clause issue). A district court in Florida struck down a statute under the dormant Foreign Commerce Clause, but the Eleventh Circuit affirmed based on statutory preemption. *Odebrecht Const., Inc. v. Prasad*, 876 F. Supp. 2d 1305, 1318–19 (S.D. Fla. 2012), *aff'd sub nom.* *Odebrecht Const., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1287 (11th Cir. 2013). Courts have also struck down state statutes that impact foreign commerce using reasoning drawn from interstate commerce cases. See, e.g., *Piazza's Seafood World, LLC v. Odom*, 448 F.3d 744, 750 (5th Cir. 2006); *Nat'l Solid Wastes Mgmt. Ass'n v. Wayne*, 303 F. Supp. 2d 835, 848 (E.D. Mich. 2004); *cf.* *Antilles Cement Corp. v. Fortuño*, 670 F.3d 310, 328–29, 331 (1st Cir. 2012) (limiting the dormant Foreign Commerce Clause through a market-participant exception, but also striking down a Puerto Rican statute under the dormant Foreign Commerce Clause).

44. 539 U.S. 396, 439–40 (2002) (Ginsburg, J., dissenting) (“We have not relied on *Zschernig* since it was decided, and I would not resurrect that decision here.”).

45. *Zschernig v. Miller*, 389 U.S. 429 (1968).

46. *Garamendi*, 539 U.S. at 417–20 (majority opinion); see David H. Moore, *Beyond One Voice*, 98 MINN. L. REV. 953, 968 (2014) (noting that the Supreme Court has “cast doubt” on the current standing of dormant foreign affairs preemption).

47. *Medellín v. Texas*, 552 U.S. 491, 530–31 (2007).

48. See, e.g., *Gingery v. City of Glendale*, 831 F.3d 1222, 1230–31 (9th Cir. 2016) (upholding actions of a city because they lacked a demonstrable effect on foreign affairs); *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1076 (9th Cir. 2012) (striking down a California statute because it “has ‘more than some incidental or indirect effect’ on foreign affairs” by “express[ing] a distinct political point of view on a specific matter of foreign policy”) (citing *Zschernig*, 389 U.S. at 434); *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 965 (9th Cir. 2010) (striking down a state statute which was not enacted in an area of traditional state responsibility because “[b]y opening its doors as a forum to all Holocaust victims and their heirs to bring Holocaust claims in California against ‘any museum or gallery’ whether located in the state or not, California has expressed its dissatisfaction with the federal government’s resolution (or lack thereof) of restitution claims arising out of World War II”).

49. See, e.g., *Deutsch v. Turner Corp.*, 324 F.3d 692, 712 (9th Cir. 2003) (holding a California statute unconstitutional “because it intrudes on the federal government’s exclusive power to make and resolve war, including the procedure for resolving war claims”).

in Alien Tort Statute (ATS) cases. The ATS is a jurisdictional statute that allows aliens to sue in federal district court for torts in violation of the law of nations.⁵⁰ The ATS does not create a cause of action.⁵¹ ATS cases brought against aliens do not satisfy the constitutional requirements for diversity jurisdiction because the Supreme Court has construed Article III as authorizing diversity suits only between a citizen of a state and an alien.⁵² Lower courts concluded that customary international law is itself federal common law and that ATS cases thus arise under federal law.⁵³ In *Sosa v. Alvarez-Machain*, however, the Court reasoned that with the ATS, Congress authorized the courts to recognize “a claim under the law of nations as an element of common law.”⁵⁴ Although courts still apply federal common law in ATS cases, including the creation of a federal common law cause of action, they do so not because customary international law has freestanding status as federal common law, but instead because Congress has delegated lawmaking power to the courts.⁵⁵ In this way, the ATS is like the Labor Management Relations Act, which also delegates lawmaking authority through a grant of jurisdiction.⁵⁶ Although the creation of a federal common law cause of action in ATS cases is now based on a statutory grant of power, the Court has still read the statutory grant narrowly, consistent with its general skepticism about some forms of federal common law.⁵⁷

The trend away from common law reasoning in foreign relations cases is related to broader developments in the field. In general, the Court has normalized its approach to foreign relations law over the past several decades, meaning that it does not treat all foreign relations cases as presenting an exceptional need for federal control,⁵⁸ a principle at the heart of the traditional federal common law of foreign relations.⁵⁹ Relatedly, the Court has increasingly relied upon formalist

50. 28 U.S.C. § 1350 (2012).

51. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004).

52. *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12, 14 (1800).

53. *See, e.g., Filartiga v. Pena-Irala*, 630 F.2d 876, 885 (2d Cir. 1980).

54. 542 U.S. at 725.

55. Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869, 894–96 (2007).

56. *See Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 451 (1957).

57. *See, e.g., Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1402 (2018) (holding that the ATS does not extend liability over foreign corporations and noting “this Court’s general reluctance to extend judicially created private rights of action”); *id.* at 1413 (Gorsuch, J., concurring in part and concurring in the judgment) (“Adopting new causes of action may have been a ‘proper function for common-law courts,’ but it is not appropriate ‘for federal tribunals’ mindful of the limits of their constitutional authority.” (citation omitted)); *see also* Paul B. Stephan, *Inferences of Judicial Lawmaking Power and the Law of Nations*, 106 GEO. L. J. 1793, 1816 (“Of significance is the *Sosa* Court’s recognition that, although it invoked a prescriptive inference for the first time in fifty years to justify its holding, such inferences are problematic.”).

58. Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1910–11, 1942–46 (2015).

59. *See, e.g., Zschernig v. Miller*, 389 U.S. 429, 441 (1968); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 424 (1964); Goldsmith, *supra* note 22, at 1621.

reasoning in foreign relations cases,⁶⁰ an approach that highlights the textual problems associated with common law in general and with the common law of foreign relations in particular.

The scope of the federal common law of foreign relations has contracted in most areas over the past few decades, but immunity-related issues are an exception. The immunity of foreign sovereigns is governed in part by the Foreign Sovereign Immunities Act (FSIA).⁶¹ Most lower courts had held that the FSIA also applied to cases against individual foreign officials acting on behalf of their governments (although not to heads of state),⁶² but in 2010, the Supreme Court held that the FSIA does not apply to any individual defendants and that their immunity is governed instead by “common law.”⁶³ The Court thus expanded the scope of federal common law governing immunity.⁶⁴ A series of lower court decisions have applied the common law of immunity and dismissed cases against sitting or former government officials based on either their status-based or conduct-based immunity.⁶⁵

Closely related to immunity, courts also apply federal common law to determine whether foreign states should be liable for the actions of state-owned agencies and instrumentalities, and vice-versa. The 1983 Supreme Court case on this topic, *First National City Bank v. Banco Para el Comercio Exterior de Cuba (Bancec)*, held that foreign governments and their separately constituted agencies and instrumentalities enjoy a presumption that they are legally distinct for the purposes of liability.⁶⁶ The Court applied federal common law—not Cuban law or state law—and noted the principles it applied are part of both common law and public international law.⁶⁷ Although the Court was not entirely clear about whether it was applying federal common law or international law, there is no

60. Harlan Grant Cohen, *Formalism and Distrust: Foreign Affairs Law in the Roberts Court*, 83 GEO. WASH. L. REV. 380, 385–86 (2015). See generally Ingrid Wuerth, *Medellín: The New, New Formalism?*, 13 LEWIS & CLARK L. REV. 1 (2009).

61. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1332, 1391(f), 1441(d), 1602–1611 (2012).

62. See, e.g., *Ye v. Zemin*, 383 F.3d 620, 625 (7th Cir. 2004); *Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 815 (6th Cir. 2002), *abrogated by Samantar v. Yousuf*, 560 U.S. 305, 1047 (2010); *United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997); *Lafontant v. Aristide*, 844 F. Supp. 128, 131–37 (E.D.N.Y. 1994).

63. *Samantar*, 560 U.S. at 325–26.

64. The *Samantar* Court said “common law,” but courts and commentators have interpreted that to mean federal, not state, common law. *Id.*; see Wuerth, *supra* note 19, at 962.

65. See, e.g., *Lewis v. Mutond*, 258 F. Supp. 3d 168, 170 (D.D.C. 2017) (holding officials of the Democratic Republic of Congo “immune under the common law foreign official immunity doctrine”); *Moriah v. Bank of China Ltd.*, 107 F. Supp. 3d 272, 274 (S.D.N.Y. 2015) (common law foreign sovereign immunity precluded the deposition of a former Israeli official); *Rishikof v. Mortada*, 70 F. Supp. 3d 8, 10 (D.D.C. 2014) (conferring common law immunity on an employee of Switzerland who was acting within the scope of his employment).

66. *First Nat’l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 620–21 (1983) (*Bancec*).

67. *Id.* at 623 (“[T]he principles governing this case are common to both international law and federal common law, which in these circumstances is necessarily informed both by international law principles and by articulated congressional policies.”).

plausible basis upon which to apply international law other than its arguable status as some form of federal common law. The Court did say, however, that it refused to apply state or Cuban law because it wanted to avoid situations in which states could use their own corporate law to shield themselves from liability to third parties for violations of international law.⁶⁸ Lower courts routinely apply the *Bancec* test,⁶⁹ and have expanded it beyond federal common law governing corporate attribution for state-owned entities to also apply to the issues of immunity that are governed by the FSIA and to constitutional issues.⁷⁰ *Bancec* is, however, rarely cited in academic discussions of federal common law.⁷¹

The common law act of state doctrine is also alive and well in the lower courts. Unlike immunity, which is a jurisdictional defense acting to prevent adjudication of the case, the act of state doctrine is (like most applications of the *Bancec* test) a rule of decision, pursuant to which courts will not hold invalid the official act of a foreign sovereign in its own territory.⁷² Although the doctrine was narrowed in 1990, and now applies only if deciding the case requires holding the government's action invalid,⁷³ lower courts continue to apply it, and the Supreme Court recently mentioned it in the context of the recognition of foreign sovereigns.⁷⁴

Courts apply federal common law doctrines governing acts of state, attribution of liability among state-owned enterprises, and immunity, but their basis for doing so is somewhat unsteady. The Supreme Court has not provided a reason for applying federal common law in individual immunity cases, although it has suggested that its reasons for doing so are historical.⁷⁵ Lower courts have occasionally struggled to explain their power to apply federal common law under *Bancec*, sometimes analyzing various sources of law to avoid holding that federal common law applies.⁷⁶ The act of state doctrine as part of federal common law dates

68. *Id.* at 622–23.

69. *See, e.g.*, *EM Ltd. v. Banco Cent. de La República Arg.*, 800 F.3d 78 (2d Cir. 2015); *Alejandro v. Telefonica Larga Distancia de P.R., Inc.*, 183 F.3d 1277 (11th Cir. 1999).

70. *See, e.g.*, *Arch Trading Corp. v. Republic of Ecuador*, 839 F.3d 193 (2d Cir. 2016) (immunity); *Doe v. Holy See*, 557 F.3d 1066, 1078 (9th Cir. 2009); *GSS Group Ltd. v. Nat'l Port Auth.*, 680 F.3d 805 (D.C. Cir. 2012) (due process).

71. *But see* Gary Born, *Customary International Law in United States Courts*, 92 WASH. L. REV. 1641, 1706 (2017) (noting that *Bancec* applied federal common law rules derived from international law even though no statute required the application of federal common law and both state and foreign law addressed the issue).

72. *W.S. Kirkpatrick & Co. v. Evtl. Tectonics Corp., Int'l*, 493 U.S. 400, 405 (1990).

73. *Id.*; *see, e.g.*, *Hourani v. Mirtchev*, 796 F.3d 1, 15 (D.C. Cir. 2015) (“The Act of State doctrine accordingly did not apply [in *Kirkpatrick*] because the case could be decided without directly adjudicating the lawfulness of the Nigerian government’s conduct. Not so here.”); *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1165 (D.C. Cir. 2002) (“Because the relief sought here would require us to question the ‘legality’ of Kazakhstan’s denial of the export license by ruling that denial a breach of contract, the act of state doctrine applies.”).

74. *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2084 (2015).

75. *See Samantar v. Yousuf*, 560 U.S. 305, 321–22 (2010).

76. *See Compagnie Noga D'Importation et D'Exportation S.A. v. The Russian Federation*, 361 F.3d 676, 684–90 (2d Cir. 2004) (analyzing Russian law, federal common law, and international law); *id.* at 691–92 (Jacobs, C.J., concurring) (arguing for the application of federal common law and noting that “it is a more natural development of the analysis to identify the proper source of law and apply it”); *cf.*

back to the 1964 *Sabbatino* case in which the Court reasoned that the doctrine had “constitutional underpinnings” and involved issues that “must be treated exclusively as an aspect of federal law.”⁷⁷ It is unclear whether all Justices on the Supreme Court would agree with that reasoning today, especially Justices who are skeptical of federal common law or who emphasize the formal process for lawmaking under the Constitution.⁷⁸ In its most recent reference to the act of state doctrine, the Court mentioned neither *Sabbatino* nor federal common law, but instead described the doctrine in terms of the deference courts afford the acts of foreign sovereigns committed within their own territory, perhaps reflecting uncertainty about its basis in federal common law.⁷⁹

Enter *Bellia* and *Clark*. They provide a different basis for applying both the individual immunity and the act of state doctrines. If correct, their argument would constitutionalize both doctrines as part of the federal government’s power over recognition. Doing so would resolve formalist objections to the doctrines in their traditional common law form, but without concluding that state law must therefore apply, an approach with potentially broad appeal. *Bellia* and *Clark*’s position is not persuasive, however. It involves creating an entirely new and important recognition-related constitutional power, one with no basis in the text of the Constitution and in tension with many of the Court’s leading decisions. It also mischaracterizes the task of applying and interpreting customary international law in immunity and act of state cases.

II. AN UNRECOGNIZABLE RECOGNITION POWER

The recognition power is a fundamental building block of *Bellia* and *Clark*’s effort to constitutionalize some parts of the federal common law of foreign relations. Key to their argument is this much-repeated claim: “[T]he Constitution’s

Bettis v. Islamic Republic of Iran, 315 F.3d 325, 330, 332–33 (D.C. Cir. 2003) (avoiding the term “federal common law” to describe the body of law applicable if a federal-question cause of action is implied from the Foreign Sovereign Immunities Act); *EM Ltd. v. Banco Cent. de La República Arg.*, 800 F.3d 78, 90 (2d Cir. 2015) (referring to *Bancec* as recognizing a “statutory presumption”).

77. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423–25 (1964).

78. *See Medellín v. Texas*, 552 U.S. 491, 530–32 (2008) (discussing and ultimately declining to extend *Garamendi*); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 739 (2004) (Scalia, J., concurring in part and concurring in the judgment) (“Although I agree with much in Part IV, I cannot join it because the judicial lawmaking role it invites would commit the Federal Judiciary to a task it is neither authorized nor suited to perform.”); *Boyle v. United Techs. Corp.*, 487 U.S. 500, 514 (1988) (Brennan, J., dissenting) (“The Court—unelected and unaccountable to the people—has unabashedly stepped into the breach to legislate a rule denying Lt. Boyle’s family the compensation that state law assures them. This time the injustice is of this Court’s own making.”).

79. *See Zivotofsky*, 135 S. Ct. at 2084 (“The actions of a recognized sovereign committed within its own territory also receive deference in domestic courts under the act of state doctrine.”); *see also* *W.S. Kirkpatrick & Co. v. Env’tl. Tectonics Corp., Int’l*, 493 U.S. 400, 404–05 (1990) (describing act of state doctrine in detail without mentioning common law). Even the majority opinion in *Sosa* evinces a certain discomfort with the act of state doctrine as federal common law, reasoning that: “And although we have even assumed competence to make judicial rules of decision of particular importance to foreign relations, such as the act of state doctrine the general practice has been to look for legislative guidance before exercising innovative authority over substantive law.” *Sosa*, 542 U.S. at 726 (citation omitted); *see also* *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1402 (2018).

exclusive allocation of the recognition power to the political branches required courts and states to uphold the traditional rights of recognized foreign nations under the law of state-state relations.”⁸⁰ Their recognition power is exclusive to the political branches—meaning that it excludes both courts and the states from recognizing foreign states and also that it requires courts and states “to respect the rights that accompanied that status.”⁸¹ Denial by courts or states of those “rights” that accompany the status as a recognized state would “contradict” and “usurp” the political branches’ exercise of the recognition power.⁸² The “rights” that are traditionally part of the exclusive recognition power include immunity and territorial integrity; the latter gives rise to the act of state doctrine.⁸³

Recognition is at the core of their argument, but the authors do not provide a comprehensive analysis of its constitutional basis nor of its relationship to the “rights” that purportedly accompany it, such as immunity and the act of state doctrine.⁸⁴ Recognition, as the Supreme Court recently explained, is a “‘formal acknowledgement’ that a particular ‘entity possesses the qualifications for statehood’ or ‘that a particular regime is the effective government of a state.’”⁸⁵ As a matter of the Constitution’s text, the argument that a broad and exclusive recognition power—one that includes rights that follow from recognition—is vested in the political branches is not especially convincing.⁸⁶ It involves a series of inferences. Recognition itself is not an explicit constitutional power at all; instead, it is a power implied in part from the President’s power to receive ambassadors.⁸⁷ From the implied power to recognize a foreign state, Bellia and Clark infer that recognition includes a set of additional powers, those which relate to sovereign rights and which may follow from the act of recognition, such as the act of state doctrine and immunity.⁸⁸ And by further implication, neither the states nor courts (state or federal) may interfere with the rights which follow from recognition.⁸⁹

The second and third steps of the argument are unconvincing. In effect, they create a new constitutional category: the rights that sometimes follow from recognition. The legal rights which may follow from recognition—immunity and act of state—are not part of the recognition power itself, contrary to Bellia and Clark’s position. The Supreme Court recently noted that “[l]egal consequences follow formal recognition,” including the rights of recognized sovereigns to sue in United States courts, sovereign immunity, and “deference in domestic courts

80. BELLIA & CLARK, *supra* note 1, at 41; *see id.* at 15–16, 43, 269–71.

81. *Id.* at 53.

82. *Id.* at 43, 53, 57, 170–71, 269–70.

83. *Id.* at 99–100.

84. *See id.* at 15–16, 51–56.

85. *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2084 (2015) (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 203 cmt. a (AM. LAW INST. 1986)).

86. *See Ramsey*, *supra* note 13, at 1790–91.

87. U.S. CONST. art. II, § 3; *Zivotofsky*, 135 S. Ct. at 2085; *see BELLIA & CLARK, supra* note 1, at 15; Robert J. Reinstein, *Recognition: A Case Study on the Original Understanding of Executive Power*, 45 U. RICH. L. REV. 801, 812–16 (2011).

88. *See BELLIA & CLARK, supra* note 1, at 90, 98, 175.

89. *Id.* at 56.

under the act of state doctrine,” but the Court never suggested that these consequences were part of recognition itself as a constitutional matter.⁹⁰ Indeed, those doctrines have a distinct constitutional basis, one that is not exclusive to the federal political branches, as demonstrated both by recent cases discussed in Part A and by mid-twentieth century cases related to the recognition of the Soviet Union discussed in Part B.

A. RECOGNITION AND *ZIVOTOFKSY V. KERRY*

Contemporary case law does not support a broad recognition power exclusive to the political branches. The Supreme Court’s recent blockbuster case on recognition, *Zivotofsky v. Kerry*, held that recognition is exclusive to the President.⁹¹ The case is mentioned only occasionally by Bellia and Clark, who downplay *Zivotofsky*’s significance by saying that whether the recognition power is exclusive to the President “is not of central importance here.”⁹² The important point, rather, is that the Constitution gave exclusive power to the federal government, not the courts or the states, meaning that “both courts and states” are precluded from “taking it upon themselves to exercise or countermand the recognition power of the federal government.”⁹³

The *Zivotofsky* case is problematic for Bellia and Clark’s thesis, however. It drives a wedge between the recognition power and the “rights” which flow from recognition. Bellia and Clark argue that those rights are themselves an aspect of the constitutional power over recognition. Over and over, Bellia and Clark describe the obligation of courts and states to respect foreign nations as following directly from recognition itself, which is constitutionally vested in the “political branches.”⁹⁴ The point is central to their claim that courts and states are required to respect those rights, to their claim that cases about those rights arise under the Constitution itself, and to their claim that federal courts applying law related to those rights do not violate the Supremacy Clause.

But *Zivotofsky* holds that recognition is vested in the President alone.⁹⁵ As a result, the legal effects of recognition are not an aspect of recognition *itself* because those rights are *not* exclusive to the President. Unlike recognition itself, power over the legal effects of recognition (for example, act of state and immunity) is shared between Congress and the President.⁹⁶ Congress has, for example, controlled the rights of recognized states by enacting legislation that directly

90. See *Zivotofsky*, 135 S. Ct. at 2084.

91. *Id.* at 2094.

92. BELLIA & CLARK, *supra* note 1, at 56.

93. *Id.*

94. See, e.g., *id.* at xxvi–vii, 83–89, 104, 112, 169–71, 218–19, 225, 253–55, 268, 269–70.

95. 135 S. Ct. at 2094.

96. As Bellia and Clark point out, their argument “does not rest on the general observation that the Constitution assigns various foreign relations powers to the federal government”; instead, it “derives from the precise language employed by Articles I and II to grant specific powers to the political branches.” BELLIA & CLARK, *supra* note 1, at 16.

regulates immunity and the act of state doctrine.⁹⁷

The Supreme Court examined the source of federal congressional power over foreign sovereign immunity in *Verlinden B.V. v. Central Bank of Nigeria* without even mentioning recognition,⁹⁸ reasoning instead that the power is based on Congress's authority "over foreign commerce and foreign relations."⁹⁹ Congressional power over the act of state doctrine is apparently not based on the recognition power either, but instead from the power over foreign commerce.¹⁰⁰ Not only is constitutional power over the act of state and immunity doctrines not the same as the recognition power, it is also not exclusive to the federal political branches. The power over the act of state and immunity doctrines comes at least in part from the authority to regulate commerce with foreign nations, which is not exclusive to the political branches or even to the federal government. The Foreign Commerce Clause permits Congress to displace state law on matters affecting interstate commerce, but it is not exclusive. States are free to legislate on issues related to foreign commerce unless Congress chooses to act to preempt state law.¹⁰¹ If recognition is exclusive to the President as *Zivotofsky* held, and if the act of state doctrine and immunity are part and parcel of the recognition power as Bellia and Clark maintain, then it follows that presidential power over those doctrines is also exclusive, and the federal statutes regulating the act of state doctrine and foreign state immunity are therefore all unconstitutional.

The wedge between recognition and the legal rights of sovereigns that follow in part from recognition is fatal to Bellia and Clark's argument about exclusivity, at least as they present it. The Court reasoned in *Zivotofsky* that, "As Justice Jackson wrote in *Youngstown*, when a Presidential power is 'exclusive,' it 'disabl[es] the Congress from acting upon the subject.'"¹⁰² Bellia and Clark have a

97. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602–1611 (2012) (regulating foreign immunity); Second Hickenlooper Amendment, 22 U.S.C. § 2370 (1964) (regulating the act of state doctrine).

98. 461 U.S. 480 (1983).

99. *Id.* at 493. The Court went on to note that when enacting the FSIA, Congress relied on:

its powers to prescribe the jurisdiction of federal courts, Art. I, § 8, cl. 9; to define offenses against the 'Law of Nations,' Art. I, § 8, cl. 10; to regulate commerce with foreign nations, Art. I, § 8, cl. 3; and to make all laws necessary and proper to execute the Government's powers, Art. I, § 8, cl. 18.

Id. at 493 n.19.

100. See *Banco Nacional de Cuba v. Farr*, 243 F. Supp. 957, 972 (S.D.N.Y. 1965), *aff'd*, 383 F.2d 166 (2d Cir. 1967).

101. See Ryan Baasch & Saikrishna Bangalore Prakash, *Congress and the Reconstruction of Foreign Affairs Federalism*, 115 MICH. L. REV. 47, 65 (2016) ("[T]he grant of commerce authority to Congress does not necessarily bar state regulation of the same commerce."). See generally MICHAEL J. GLENNON & ROBERT D. SLOANE, *FOREIGN AFFAIRS FEDERALISM: THE MYTH OF NATIONAL EXCLUSIVITY* 147–83 (2016) (describing the dormant Foreign Commerce Clause). *But cf.* *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 451–54 (1979) (holding that a California ad valorem tax violated the dormant Foreign Commerce Clause if the tax was applied to Japanese cargo containers registered in Japan and used exclusively in foreign commerce).

102. *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2095 (2015) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring)).

broader conception of exclusivity. They argue that the “political branches” have exclusive power over rights that flow from recognition, which disables both states and federal courts from acting on those rights.¹⁰³ As we have seen, however, the rights that flow from recognition do not follow directly from recognition, nor are they exclusive to the federal government. Bellia and Clark base key parts of their argument on federal exclusivity, including the claim that states are constitutionally required to respect the rights of recognized nations and that courts can apply those rights as preemptive federal law without violating the Supremacy Clause because the Constitution itself is doing the preempting of state law.¹⁰⁴

B. RECOGNITION OF THE SOVIET UNION

The primary cases upon which Bellia and Clark rely also do not support a broad and exclusive rights-related-to-recognition power vested in the political branches.¹⁰⁵ In *United States v. Pink*, the Court considered the effect of Soviet decrees that nationalized Russian insurance companies and their property, wherever located.¹⁰⁶ The United States subsequently concluded an executive agreement with the Soviet government and simultaneously recognized it as the government of Russia.¹⁰⁷ The agreement included an assignment (the Litvinov Assignment) that gave to the United States the claims of the Soviet government against American nationals.¹⁰⁸ The United States brought an action to recover the property of a Russian insurance company which was still in the possession of the New York Superintendent of Insurance.¹⁰⁹ New York law did not give extraterritorial effect to the 1918 decree, and the New York courts held for the defendant.¹¹⁰ The Supreme Court reversed, holding that New York law was preempted, despite the lack of a federal statute or Article II treaty.¹¹¹ What was doing the preempting? The opinion gives two possible responses: the executive agreement between the United States and the Soviet Union, or the President’s recognition of the Soviet Union.¹¹² Subsequent cases and commentators have relied upon the first,¹¹³ while Bellia and Clark focus on the second.

103. BELLIA & CLARK, *supra* note 1, at 269.

104. *See id.* at xxi (stating that “the Constitution’s exclusive allocation of powers to the political branches to recognize foreign nations . . . require[s] courts and U.S. states to uphold the rights of recognized foreign nations under the law of state-state relations”); *see also id.* at xxvi–xxvii, 50, 71, 166, 171–73, 197–98, 230, 250–55.

105. *See id.* at 98–101, 104, 173–75, 180. These cases are *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), *United States v. Pink*, 315 U.S. 203 (1942), and *United States v. Belmont*, 301 U.S. 324 (1937).

106. 315 U.S. at 210–11.

107. *Id.* at 211.

108. *Id.* at 211–13 (quoting the Litvinov Assignment).

109. *Id.* at 213.

110. *Id.* at 215, 217.

111. *Id.* at 233–34 (holding that the property right had previously vested in the Soviet Government and passed to the the United States under the Litvinov Assignment).

112. 315 U.S. at 231–32.

113. *See infra* notes 127–29 and accompanying text.

Some language in *Pink* and a similar case, *United States v. Belmont*,¹¹⁴ appears on its face to support a broad, preemptive recognition power.¹¹⁵ The Court reasoned in *Pink*, for example, that the President's authority "is not limited to a determination of the government to be recognized. It includes the power to determine the policy which is to govern the question of recognition."¹¹⁶ But commentators immediately recognized that *Pink*'s language about recognition proved too much. They noted that the courts of no other country would give a confiscating government such as the Soviet Union title to property in the forum state, even after recognition, without regard to whether not doing so violated domestic policy or international law,¹¹⁷ and that giving recognition the legal effect suggested by some of the language in *Pink* would require that "the United States undertake a one-sided commitment, without regard for possible unfair treatment of the parties, to effectuate the most diverse legislation of foreign nations."¹¹⁸ In other words, as in the immunity cases discussed in the next section, the legal rule applied in *Pink* that preempted state law did not follow directly from recognition. Other countries did not give nationalization decrees of recognized governments' extraterritorial effect,¹¹⁹ nor did courts in the United States in the years before or after *Pink*.¹²⁰ It was the sole executive agreement that gave effect to decree, not recognition itself.

Bellia and Clark suggest in passing that the confiscation of New York property in *Belmont* was not extraterritorial because the corporation that owned the property was Russian.¹²¹ State courts were thus obligated to honor the Russian nationalization decrees under the act of state doctrine after the United States

114. 301 U.S. 324 (1937).

115. See BELLIA & CLARK, *supra* note 1, at 98–101.

116. 315 U.S. at 229; see *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2088 (2015) (quoting *Pink*, 315 U.S. at 229).

117. See Note, *Effect of Soviet Recognition upon Russian Confiscatory Decrees*, 51 YALE L.J. 848, 851 (1942); see also John R. Stevenson, *Effect of Recognition on the Application of Private International Law Norms*, 51 COLUM. L. REV. 710, 720 (1951) ("Hitherto the efficacy of a recognized foreign government's acts intended to affect persons or property within the United States had been considered open to challenge in American courts. There had been scarcely a hint in the cases, and none whatsoever by the commentators, of the converse doctrine that mere recognition, without more, might impose on the courts an affirmative duty to give extraterritorial effect to the legislative acts of the recognized government even where violative of international law or repugnant to the public policy of the forum.").

118. Stevenson, *supra* note 117, at 721.

119. See F.A. Mann, Case Note, *Extraterritorial Effect of Confiscatory Legislation*, 5 MOD. L. REV. 161, 262 (1942) ("It is probably no exaggeration to say that the principle that confiscatory legislation is denied any effect upon property situate[d] outside the boundaries of the confiscating state, has hitherto been regarded as one of the most securely established and most commonly accepted maxims of international law . . .").

120. See, e.g., *Vladikavkazsky Ry. Co. v. N.Y. Tr. Co.*, 189 N.E. 456, 461 (N.Y. 1934); Stevenson, *supra* note 117, at 723 ("[C]ourts have deemed themselves free to deny effect within New York to foreign decrees regarded as repugnant to the public policy of the state, even where such decrees emanate from recognized foreign governments.").

121. BELLIA & CLARK, *supra* note 1, at 99, 100 n.91, 173; see also Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573, 1643 (2007) ("[T]he Court seemed to apply the doctrine based on the situs of the Russian corporation (Russia).").

recognized the Soviet government.¹²² But the Supreme Court did not take a position on the situs of the confiscation in *Belmont*.¹²³ Although the decision does discuss several act of state cases—all of which however involved confiscation of property located in the territory of the confiscating foreign state—it does so in support of its conclusion that “no state policy can prevail against the international compact here,” meaning the executive agreement assigning the claims.¹²⁴ The Court explains that the act of state doctrine preempts state law, and so, too, do the international agreements concluded by the President as part of the decision to recognize the Soviet Union.¹²⁵ The *Pink* case, too, does not conclude that the situs of the confiscations was Russia.¹²⁶

Subsequent Supreme Court cases have not interpreted *Belmont* and *Pink* as *Bellia* and *Clark* do. The Court has reasoned instead that the constitutional basis for those decisions is the sole executive agreement concluded between the United States and the Soviet Union, not recognition. In particular, the Supreme Court’s decision in *Dames & Moore v. Regan* gave preemptive force to a sole executive agreement not concluded in connection with recognition, relying in part on the precedent established in *Pink*.¹²⁷ The Court similarly relied extensively on *Belmont* and *Pink* in *American Insurance Ass’n v. Garamendi*, which gave preemptive effect to the President’s policy related to the settlement of claims by executive agreement.¹²⁸ As the Court has described it, these cases appear to establish a narrow presidential power to settle claims with foreign sovereigns through non-treaty agreements.¹²⁹ The *Belmont* and *Pink* cases fit

122. BELLIA & CLARK, *supra* note 1, at 99. They say, for example, that in *Belmont*: “The Supreme Court found it ‘irrelevant’ that the Russian corporation’s property was located in New York at the time of confiscation because the confiscation of the corporation took place in Russia.” *Id.* at 173. But they misstate how the opinion uses the word “irrelevant.” The opinion says instead that “when judicial authority is invoked” in aid of the federal government’s consummation of its authority over “international negotiations and compacts, and in respect of our foreign relations generally,” then “state constitutions, state laws, and state policies are irrelevant to the inquiry and decision.” *United States v. Belmont*, 301 U.S. 324, 331–32 (1937). The book makes a similar mistake in this sentence describing *Belmont*: “In the Court’s view, no state power ‘can be interposed as an obstacle to the effective operation of a federal constitutional power’—in this case, the recognition power.” BELLIA & CLARK, *supra* note 1, at 99–100 (citing *Belmont*, 301 U.S. at 332). But the case was not referring to the recognition power. Instead, the Court cites to cases about the *treaty* power because the “federal constitutional power” under discussion in the language quoted by *Bellia* and *Clark* is not the recognition power but instead the power over “foreign relations generally” and over “all international negotiations and compacts.” *Belmont*, 301 U.S. at 331–32.

123. New York courts held that New York was the situs of expropriation. *Belmont*, 301 U.S. at 327.

124. *Id.*

125. *Id.* at 328–30.

126. *United States v. Pink*, 315 U.S. 203, 221, 234 (1942); see also *Animal Sci. Prod., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 1864 (2018) (The disposition of [*United States v. Pink*] turned on the extraterritorial effect of the nationalization decree—specifically, whether the decree reached assets of the Russian insurance company located in the United States, or was instead limited to property in Russia”).

127. 453 U.S. 654, 682–83 (1981).

128. 539 U.S. 396, 415–17 (2003).

129. See *Medellín v. Texas*, 552 U.S. 491, 530–31 (2007) (“The claims-settlement cases [including *Belmont*] involve a narrow set of circumstances: the making of executive agreements to settle civil claims between American citizens and foreign governments or foreign nationals.”).

comfortably within such a power,¹³⁰ but that reading of the cases is inconsistent with how they are described by Bellia and Clark.

The sole-executive agreement rationale of *Belmont* and *Pink*, and the cases that rely upon and expand that rationale, are unsatisfactory in their own ways. In those cases, the President is able to make law which controls the outcome of cases in federal courts, and which preempts inconsistent state law, in tension with, or directly contrary to, the Supremacy Clause and basic separation of powers principles.¹³¹ Bellia and Clark avoid these difficulties by grounding these decisions in the recognition power, rather than in the President's power to make preemptive non-treaty agreements. In that sense their theory is attractive. But they do so by distorting and expanding the recognition power. Recognition lacks the self-executing effects that Bellia and Clark attribute to it. In *Belmont* and *Pink*, the act of recognizing the Soviet Union did not have the obvious or direct consequence of giving legal effect to nationalization decrees which acted extraterritorially upon property in the United States. Indeed, as noted above, other countries did not give recognition such a broad effect, and neither apparently did the U.S. government in other situations.¹³² The legal effect of the nationalization decrees did not follow from recognition itself, as Bellia and Clark argue, but instead involved an intermediate act, which itself had legal effect: the sole-executive agreement. The same problem arises in the context of sovereign immunity. Immunity does not follow directly from recognition, both as a matter of the scope of the recognition power, as described above,¹³³ and as a matter of how immunity decisions are actually made, as described in the next section.

The failure to distinguish between recognition and the legal effects of recognition is a significant problem for Bellia and Clark's thesis. It is also a distinction highlighted in a Supreme Court decision that they do not discuss: *Guaranty Trust Co. v. United States*.¹³⁴ In that case, too, the United States sought to recover assets granted to it under the Litvinov Assignment.¹³⁵ The defendant argued that the claim was barred by the statute of limitations. The United States argued that the limitations period was tolled during the period that the United States did not recognize the Soviet Union.¹³⁶ Although the United States had recognized the Provisional Government of Russia (which could have sued, meaning that the limitations period should not have tolled), the subsequent recognition of the Soviet

130. *See id.*

131. *See* Brannon P. Denning & Michael D. Ramsey, *American Insurance Association v. Garamendi and Executive Preemption in Foreign Affairs*, 46 WM. & MARY L. REV. 825, 913 (2004) (arguing that the "inclusion of treaties in the Supremacy Clause" "stands squarely against the idea of executive lawmaking in foreign affairs"); Ingrid Brunk Wuerth, *The Dangers of Deference: International Claim Settlement by the President*, 44 HARV. INT'L L.J. 1, 11 (2003) ("Termination of domestic litigation by the courts in deference to a sole executive agreement stands in significant tension with the Supremacy and Treaty Clauses of the Constitution.").

132. *See* Stevenson, *supra* note 117, at 725.

133. *See supra* notes 91–104 and accompanying text.

134. 304 U.S. 126 (1938).

135. *Id.* at 130.

136. *Id.* at 130–31.

government “operates to set at naught all the legal consequences of the prior recognition by the United States of the Provisional Government.”¹³⁷ That was, at least, the U.S. government’s argument. But the Court rejected it, reasoning that the government’s “action in recognizing a foreign government and in receiving its diplomatic representatives is conclusive on all domestic courts, which are bound to accept that determination, although they are free to draw for themselves its legal consequences in litigations pending before them.”¹³⁸ The Court also noted that although those “legal consequences” could not be altered through the power over recognition, they might be altered through an executive agreement.¹³⁹

III. COURTS AND THE RIGHTS THAT MAY FOLLOW FROM RECOGNITION

When courts apply international and other law related to the rights of foreign sovereigns, are they merely implementing the Constitution itself? As Bellia and Clark describe it, the Constitution “requires courts and states to uphold the rights of recognized foreign sovereigns under the law of state-state relations.”¹⁴⁰ Courts are required to enforce the rights of recognized states and governments “unless and until the political branches unequivocally abrogate” them.¹⁴¹ In doing so, courts do not make law but instead are merely respecting a decision made by the political branches.¹⁴² Indeed, the power over the rights related to recognition is exclusive to the President and Congress; thus, the courts are constitutionally precluded from decisionmaking over the rights related to recognition, except to “enforce” or “uphold” them.¹⁴³

Bellia and Clark’s description of the courts’ role is inconsistent with what courts actually do when they rule on common law immunity and act of state issues. Their description is also inconsistent with the Supreme Court’s description of what courts do and with the nature of customary international law itself. As described below, courts are sometimes involved in a law-making and law-developing enterprise. To apply customary international law is itself to make and reinforce customary international law, although the space to do so is today limited by federal statute. Bellia and Clark might respond that these points do not undermine their thesis: courts should apply customary international law as best they can, even if its content is uncertain. As a descriptive matter, however, there is tension between what Bellia and Clark *say* courts do – enforcing and upholding existing law – and what courts *actually* do which is sometimes making and developing law. What courts actually do, especially historically, is descriptively closer to federal common law-making than it is to the implementation of political branch decision-making.

137. *Id.* at 140.

138. *Id.* at 138.

139. *Id.* at 142.

140. BELLIA & CLARK, *supra* note 1, at 253.

141. *Id.* at 255 (using this language in the context of head of state immunity).

142. *See id.* at 271.

143. *See id.* at 271–72.

The act of state doctrine does not, for example, follow as the enforcement or application of customary international law. Most recently, the Supreme Court described the doctrine as one of judicial deference without mentioning customary international law.¹⁴⁴ Before that, the Court in *Kirkpatrick*, a case barely mentioned by Bellia and Clark, described the doctrine as requiring that “the acts of foreign sovereigns taken within their own jurisdictions . . . be deemed valid.” The Court not only eschewed the common law-like reasoning of *Sabbatino*, but it also made clear that the doctrine did not have its basis in international law and it said nothing about recognition.¹⁴⁵ And in *Sabbatino*, the Court said that the act of state doctrine is “compelled by neither international law nor the Constitution,”¹⁴⁶ contrary to Bellia and Clark’s argument that the act of state doctrine is compelled by *both* international law and the Constitution.¹⁴⁷ Bellia and Clark reason that courts must continue to apply the old act of state doctrine, which was once compelled by international law, until the political branches direct otherwise.¹⁴⁸ They do little, however, to show that the act of state doctrine was ever a constraint imposed by international law, as opposed to a matter of comity that one state afforded to another.¹⁴⁹

Immunity determinations also do not follow directly from recognition. Instead, courts actively developed the law itself. Legal historian G. Edward White writes that:

[N]ineteenth-century foreign sovereign immunity decisions took as a given that courts could make independent determinations on whether a foreign sovereign was immune from suit in a particular set of circumstances, even though they regarded themselves as bound by executive branch determinations of the existence of sovereign status. Judicial resolutions of foreign sovereign immunity issues were made on the basis of customary international law, which was treated as part of common law.¹⁵⁰

White’s description contradicts is in tension with Bellia and Clark’s view in multiple ways. Contrary to their position, White’s description shows that courts made their own decisions about immunity,¹⁵¹ developing the law as they did

144. See *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2084 (2015).

145. *W.S. Kirkpatrick & Co., Inc. v. Env'tl. Tectonics Corp., Int'l*, 493 U.S. 400, 409 (1990).

146. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 (1964).

147. BELLIA & CLARK, *supra* note 1, at 104–06.

148. *Id.*

149. See, e.g., *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 303–04 (1918); see also William S. Dodge, *Customary International Law, Change, and the Constitution*, 106 GEO. L.J. 1559 (2018).

150. G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 134 (1999).

151. See THEODORE R. GIUTTARI, *THE AMERICAN LAW OF SOVEREIGN IMMUNITY: AN ANALYSIS OF LEGAL INTERPRETATION* 42 (1970) (noting that immunity cases in the nineteenth century were not especially significant but also stating that “courts in this period expressed hardly any doubts about their competence to hear and determine controversies involving questions of sovereign immunity through the application of the rules and authorities they considered pertinent to the issues of law”).

so,¹⁵² and that courts were only bound by a decision concerning the existence of sovereign status (not about the rights accompanying that status). Another historical treatment of the period observes that courts often did not distinguish between the immunity of foreign states and the immunity of local governments,¹⁵³ a point that undermines the claim that immunity follows directly from the recognition of a foreign state as a function of customary international law.

During the early and mid-twentieth century, the judicial approach to immunity described above began to change. Courts gave the executive branch increasing authority to make determinations about the immunity of foreign sovereigns.¹⁵⁴ The trend culminated in the 1945 decision *Republic of Mexico v. Hoffman*, an admiralty case involving the immunity of Mexico.¹⁵⁵ The issue in *Hoffman* was whether a vessel owned by a foreign sovereign but operated by a private party for commercial purposes was entitled to immunity.¹⁵⁶ The Court reasoned that it is “not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize.”¹⁵⁷ The Court justified its deference to the executive branch as arising out of a concern that the denial of immunity and resulting seizure of property “may be regarded as such an affront to its dignity and may so affect our relations with it, that it is an accepted rule of substantive law governing the exercise of the jurisdiction of the courts that they accept and follow the executive determination that the vessel shall be treated as immune.”¹⁵⁸

Note that the Court’s justification for deferring to the executive branch is identical to the reasons it gave for developing federal common law of foreign relations in *Sabbatino*: a concern about the deleterious effect of judicial decisions on

152. Even during the period of absolute immunity, state and federal courts resolved many questions of law related to immunity, and in doing so, they contributed to the development of state and international law governing immunity. *See, e.g.*, *Mason v. Intercolonial Ry. of Can.*, 83 N.E. 876, 877 (Mass. 1908) (discussing whether state agencies are entitled to immunity as foreign sovereigns); *Hassard v. United States of Mexico*, 29 Misc. 511, 512 (N.Y. Sup. Ct. 1899) (discussing whether immunity applies in cases against foreign sovereigns and the agents who represent them, as well as against their property); *Manning v. State of Nicaragua*, 14 How. Pr. 517, 518 (N.Y. Sup. Ct. 1857) (discussing whether a foreign state may be named as a defendant in an action at all). Furthermore, as foreign states became more economically active and powerful at the beginning of the twentieth century, courts were called upon to resolve many new issues related to the immunity of foreign sovereigns when engaged in commercial conduct. *See generally* GIUTTARI, *supra* note 151.

153. GIUTTARI, *supra* note 151, at 38 (“The failure of American courts to distinguish sharply in this period between the immunities of local and foreign sovereigns led them to cite authorities and precedents involving the exempt status of each interchangeably.”); *see, e.g.*, *The Johnson Lighterage Co.* No. 24, 231 F. 365, 368 (D.N.J. 1916).

154. *White*, *supra* note 150, at 134–45.

155. 324 U.S. 30 (1945).

156. *Id.* at 31.

157. *Id.* at 35; *see also Ex parte Republic of Peru*, 318 U.S. 578, 588 (1943) (“More specifically, the judicial seizure of the vessel of a friendly foreign state is so serious a challenge to its dignity, and may so affect our friendly relations with it, that courts are required to accept and follow the executive determination that the vessel is immune.”).

158. *Hoffman*, 324 U.S. at 35–36.

foreign policy.¹⁵⁹ The outcome was different: in *Sabbatino*, the Court kept lawmaking in the federal courts rather than permitting state law incursions,¹⁶⁰ and in *Hoffman*, the Court attempted to transfer some decisionmaking authority to the executive branch.¹⁶¹ But the *Hoffman* decision was not based on any sort of analysis of the President's constitutional powers; instead, it was based on the Court's independent analysis of the potential foreign policy implications of all immunity decisions. In the end, the Court's institutional competence reasoning was wrong: executive control over immunity created more foreign policy problems than it solved, leading eventually to a statutory enactment.¹⁶²

The transformation of the law of immunity in the 1930s and 1940s does not support Bellia and Clark's position any more than the nineteenth century immunity practices do. In this context, too, immunity did not follow directly from the act of recognition. Instead, there were myriad intermediate, detailed, and often dispositive issues about the content of immunity law itself and the procedures that govern it. Even if immunity is a legal consequence that may follow from recognition, it is nevertheless the subject of a distinct body of law.¹⁶³ In the years following *Hoffman*, that body of law was made by courts in the United States through a combination of judicial and executive lawmaking.

Had immunity followed as a straightforward application of recognition, there would have been no need for the 1952 "Tate Letter," entitled "Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments."¹⁶⁴ The letter announced the adoption of the restrictive approach to immunity, a position that the government had already adopted in many contexts.¹⁶⁵ The restrictive approach is fundamental to the law of immunity; adopting it followed not from recognition, but instead from a lawmaking process shared between the courts and the executive branch. In explaining its desired effect on the courts, the Tate Letter said that although "a shift in policy by the executive cannot control the courts . . . it is felt that the courts are less likely to allow a plea of sovereign immunity where

159. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964).

160. *See id.* at 427 (concluding that "the scope of the act of state doctrine must be determined according to federal law").

161. *Hoffman*, 324 U.S. at 38.

162. Wuerth, *supra* note 19, at 924.

163. Several courts have even provided immunity to entities not recognized by the political branches. *See, e.g.*, *Wulfsohn v. Russian Socialist Federated Soviet Republic*, 138 N.E. 2d, 25–26 (N.Y. 1923) (holding immune the Russian Federated Soviet Republic, which was the de facto government of Russia, but which had not been recognized by the United States); *Telkes v. Hungarian Nat'l Museum*, 38 N.Y. S.2d 419, 423 (N.Y. App. Div. 1942) ("[T]he rule forbidding suit against a foreign sovereign without his consent does not rest on comity, but is applied because such suits involve claims of a political nature which are not entrusted to the municipal courts. Based on the reasoning that the immunity from suit is not a matter of comity, our courts hold that lack of diplomatic recognition does not affect the immunity.").

164. Letter from Jack B. Tate to Philip B. Perlman (May 19, 1952) [hereinafter Tate Letter], in 26 DEPARTMENT OF STATE BULLETIN 984 (1952).

165. *See* GIUTTARI, *supra* note 151, at 188–89.

the executive has declined to do so.”¹⁶⁶

The law of foreign sovereign immunity underwent another transformation when Congress passed the FSIA in 1976.¹⁶⁷ The FSIA included detailed rules governing claims and the enforcement of judgments against foreign states and their agencies and instrumentalities.¹⁶⁸ It aimed to resolve many issues that had long been uncertain under both international law and the law of the United States.¹⁶⁹ It was also intended to end the practice of deferring to the executive branch decisions on immunity.¹⁷⁰

The FSIA does not address all aspects of immunity related to foreign sovereigns. In particular, it does not apply in cases against individuals¹⁷¹ and it likely does not apply in criminal cases.¹⁷² Common law thus governs when an individual who is sued may be entitled to immunity based on her status, for example as a head of state, or based on her conduct, for example official conduct on behalf of a foreign state.¹⁷³ Bellia and Clark argue that status and conduct-based immunities are part of the “political branches’ constitutional power to recognize foreign states, governments, and heads of state.”¹⁷⁴

Bellia and Clark’s argument works best for head-of-state immunity, which, at its core, is uncontested under international law. After the president recognizes a country, its head of state is entitled to immunity in U.S. domestic courts, a process consistent with how Bellia and Clark depict the law governing immunity.¹⁷⁵ Even here, however, there are wrinkles that must be resolved through legal norms that

166. Tate Letter, *supra* note 164, at 985. The Tate Letter is part of a broader trend in international and domestic law away from “absolute immunity” in favor of a “restrictive approach” which denied immunity for private or commercial conduct by foreign sovereigns. See HAZEL FOX CMG QC & PHILIPPA WEBB, *THE LAW OF STATE IMMUNITY* 147–48 (3d ed. 2013).

167. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended in 28 U.S.C. §§ 1330, 1602–1611 (2012)).

168. *Id.*

169. See RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: SOVEREIGN IMMUNITY intro. note (AM. LAW INST. Tentative Draft No. 3, 2017).

170. See Wuerth, *supra* note 19, at 940–41; see also *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983) (stating the FSIA was passed “in order to free the Government from the case-by-case diplomatic pressures”).

171. *Samantar v. Yousuf*, 560 U.S. 305, 311–13, 320–21 (2010) (describing foreign sovereign immunity as governed by “common law” before FSIA’s enactment, and the immunity of individual government officials as governed by “common law” after FSIA’s enactment).

172. See RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: SOVEREIGN IMMUNITY § 451, reporters’ note 4 (AM. LAW INST., forthcoming 2018) (on file with author).

173. *Samantar*, 560 U.S. at 311–13, 320–21; see Wuerth, *supra* note 19, at 917–18. See generally Chimène I. Keitner, *The Common Law of Foreign Official Immunity*, 14 GREEN BAG 2d 61, 65–66 (2010).

174. BELLIA & CLARK, *supra* note 1, at 198.

175. Lewis S. Yelin, *Head of State Immunity as Sole Executive Lawmaking*, 44 VAND. J. TRANSNAT’L L. 911, 965 (2011) (discussing the relationship between the Reception Clause, recognition, and head-of-state immunity). Note that the relationship between head-of-state immunity and recognition suggests that the president has the power to make legally binding head-of-state immunity determinations. See Keitner, *supra* note 173, at 71–72. This argument is inconsistent with Bellia and Clark’s approach. The U.S. government has argued that the executive branch controls immunity determinations not governed by the FSIA. *But see* Wuerth, *supra* note 19, at 921 (arguing against executive branch control of immunity).

do not follow from recognition. For example, what officials other than the head of state are entitled to this form of immunity? A Prime Minister? A Secretary of State? Minister of Defense? Head of Parliament? Are they immune in criminal cases alleging violations of *jus cogens* norms?¹⁷⁶ The President's decision about recognition does not answer these questions about the content and scope of immunity law. Moving from status to conduct-based immunity, the issues multiply dramatically, as the basic contours of conduct-based immunity are at least arguably unsettled under domestic and international law.¹⁷⁷

Bellia and Clark argue that customary international law applies as a function of the recognition power. That is, courts must apply the international law of state-to-state relations and confer immunity “unless and until” the political branches “take action” to abrogate such immunity.¹⁷⁸ This argument misunderstands how customary international law works. Custom is by nature unwritten and often framed in general terms, in part because it is not subject to negotiation over specific language and terms, in contrast to how statutes, treaties, and much soft law are created.¹⁷⁹ To apply customary international law is itself to make or reinforce customary international law. Courts do not merely apply an extant body of law until directed otherwise. The term “common law,” used by the Supreme Court to describe the law of immunity in areas not covered by the FSIA, is a far better description of what courts actually do than the view offered by Bellia and Clark.

There is another problem with the direct application of customary international law to issues of immunity. In some countries, including the United States, many questions of foreign state and individual immunity have been resolved by statute, making it difficult to distinguish between the requirements of domestic and international law.¹⁸⁰ Issues such as waiver, commercial activity, and the status of entities as agencies and instrumentalities of the foreign states will be relevant to resolving claims against individuals who are arguably entitled to immunity, but they are also relevant in cases brought directly against the state under the FSIA. In these situations, individual immunity determinations should be consistent with the FSIA even if the statute is not controlling.¹⁸¹

176. See Beth Van Schaack, *Immunities and Criminal Prosecution within the United States & Beyond*, JUST SECURITY (July 9, 2014), <https://www.justsecurity.org/12679/immunities-criminal-prosecution-united-states/> [<https://perma.cc/96Y3-DEHC>] (noting the argument that “[w]hen a state violates international law or a *jus cogens* norm, it essentially waives any immunities from suit for itself or its agents”).

177. See Beth Stephens, *The Modern Common Law of Foreign Official Immunity*, 79 FORDHAM L. REV. 2669, 2704 (2011); Ingrid Wuerth, *Pinochet's Legacy Reassessed*, 106 AM. J. INT'L L. 731, 731 (2012).

178. BELLIA & CLARK, *supra* note 1, at 198.

179. See Laurence R. Helfer & Ingrid B. Wuerth, *Customary International Law: An Instrument Choice Perspective*, 37 MICH. J. INT'L L. 563, 567–68, 573–80 (2016).

180. See FOX & WEBB, *supra* note 166, at 20–24, 218–22.

181. See Wuerth, *supra* note 19, at 945–48.

IV. THE FUTURE (AND A PARTIAL DEFENSE) OF THE FEDERAL COMMON LAW OF FOREIGN RELATIONS

For those who do not see the Constitution's text and history as posing difficulties for federal common lawmaking, the act of state and immunity-related doctrines are unproblematic. For those who do, however, it is better to conclude—as some have—that state law should apply,¹⁸² than to distort beyond recognition existing precedent. But the best approach to both act of state and immunity-related issues is to acknowledge that they are narrow areas of federal common lawmaking, even if in some tension with the text and structure of the Constitution. Accepting federal common law in these two areas of foreign relations law does not depend upon characterizing customary international law as federal common law, nor does it depend upon the traditional justification that foreign relations issues are uniquely federal in nature. The future of the federal common law of foreign relations is accordingly different from the immediate past, which justified much of the federal common law of foreign relations on those grounds. Federal common law in act of state and immunity related areas is justified instead because international law, federal statutes, and stare decisis all function to reduce the Article III, Supremacy Clause, and separation of powers problems associated with federal common law.¹⁸³ In particular, contemporary federal common law, especially that governing immunity, allows courts to give effect to very closely related statutory frameworks.

Article III poses potential constitutional difficulties because federal common law arguably does not qualify as “laws of the United States” and thus cannot provide a constitutional basis for the subject matter jurisdiction of the federal courts. Although scholars have worked to establish that customary international law is (or is not) included in Article III as the “laws of the United States”,¹⁸⁴ very little, if any, current doctrine depends upon classifying customary international law in this way. After *Sosa*, Alien Tort Statute litigation satisfies Article III not because customary international law is federal common law, but because Congress delegated to the courts the power to create federal common law causes of action.¹⁸⁵ A federal common law cause of action confers federal question jurisdiction because cases “arise under” the law that creates the cause of action.¹⁸⁶ Federal common law provides subject matter jurisdiction in ATS cases exactly as it does in non-

182. Goldsmith, *supra* note 22, at 1624–25; see also Peter B. Rutledge, Samantar, *Official Immunity and Federal Common Law*, 15 LEWIS & CLARK L. REV. 589, 606 (2011) (arguing that courts should not give federal common law immunity to government officials).

183. See *supra* notes 19–24 and accompanying text.

184. See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980) (holding that an ATS suit satisfied Article III because customary international law is part of federal common law); William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 VA. J. INT'L L. 687, 701 (2002).

185. See *supra* notes 58–60 and accompanying text.

186. See *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916); Carlos M. Vázquez, *Alien Tort Claims and the Status of Customary International Law*, 106 AM. J. INT'L L. 531, 535 (2012).

foreign relations cases.¹⁸⁷ Cases involving the act of state doctrine, or foreign official immunity and those raising *Bancec* issues, do *not* involve a federal common law cause of action; federal courts have subject matter jurisdiction based on diversity or a federal statute such as the Foreign Sovereign Immunities Act.¹⁸⁸ There is no Article III issue.

Lower courts have occasionally reasoned or assumed that the act of state doctrine itself, or an issue of individual official immunity itself, or foreign relations issues more generally, confer subject matter jurisdiction on the federal courts. Some of these lower court cases find subject matter jurisdiction in act of state cases based on the “important foreign policy” issues raised by the case or similar reasoning.¹⁸⁹ These cases are based on unconvincing exceptionalist grounds and have become increasingly rare during the past decade.¹⁹⁰ In recent foreign official immunity cases, lower courts have sometimes incorrectly assumed without analysis that if an individual is immune from suit under federal common law, the court lacks subject matter jurisdiction.¹⁹¹ That is how the immunity of foreign states is handled under the FSIA,¹⁹² but there is no federal statute conferring or withholding subject matter jurisdiction on or from the federal courts based on an individual immunity determination. In the rare immunity-related case in which federal courts lack statutorily-conferred subject matter jurisdiction, based for example on diversity or the presence of a federal question, the case belongs in state court on *statutory* grounds. State courts have historically resolved foreign sovereign and related individual immunity issues without a problem.¹⁹³

Supremacy Clause problems are vitiated if federal common law does not preempt state law but instead resolves issues that lie beyond state lawmaking

187. See *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972) (“[Section] 1331 jurisdiction will support claims founded upon federal common law as well as those of a statutory origin.”)

188. See, e.g., *First Nat’l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 615 (1983) (diversity); *Arch Trading Corp. v. Republic of Ecuador*, 839 F.3d 193 (2d Cir. 2016) (FSIA). The Supreme Court has held that the FSIA’s grant of subject matter jurisdiction to the federal courts in cases against foreign sovereigns comes within Article III’s grant of jurisdiction over cases that arise under the laws of the United States, even if the FSIA does not create the cause of action. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 495 (1983).

189. See, e.g., *Torres v. S. Peru Copper Corp.*, 113 F.3d 540, 543 (5th Cir. 1997) (“On the record before us we must conclude that plaintiffs’ complaint raises substantial questions of federal common law by implicating important foreign policy concerns.”).

190. See, e.g., *Patrickson v. Dole Food Co.*, 251 F.3d 795, 803 (9th Cir. 2001), *aff’d in part, dismissed in part*, 538 U.S. 468 (2003) (declining to follow *Torres* and similar cases); *Delgado v. Zaragoza*, 267 F. Supp. 3d 892, 897 (W.D. Tex. 2016) (describing how *Torres* has been limited).

191. See, e.g., *Lewis v. Mutond*, 258 F. Supp. 3d 168, 174 (D.D.C. 2017); *Mireskandari v. Mayne*, No. CV-123861-JGB (MRWx), 2016 WL 1165896, at *18 (C.D. Cal. Mar. 23, 2016).

192. 28 U.S.C. § 1330(a) (2012).

193. See, e.g., *Waters v. Collot*, 2 U.S. (2 Dall.) 247, 248 (1796); *Wulfsohn v. Russian Socialist Federated Soviet Republic*, 138 N.E. 24, 25–26 (N.Y. 1923); *Hassard v. United States of Mexico*, 29 Misc. 511, 512 (N.Y. Sup. Ct. 1899). See generally Chimène I. Keitner, *The Forgotten History of Foreign Official Immunity*, 87 N.Y.U. L. REV. 704, 713–29, 737–40 (2012) (describing *Waters* and other late-eighteenth century cases); Julian G. Ku, *Customary International Law in State Courts*, 42 VA. J. INT’L L. 265, 292–99, 307–32 (2001) (describing foreign sovereign and other immunity cases in state courts).

power.¹⁹⁴ Thus Bellia and Clark argue (unconvincingly) that the recognition power of the Constitution disables states from making law on issues of state-to-state relations.¹⁹⁵ But there is an important statutory argument that scholars have overlooked: the Foreign Sovereign Immunities Act, the background assumptions it incorporated, and related statutes have “federalized” the fields of official and state immunity.¹⁹⁶ That argument is strongest for the attribution issues involved in *Bancec*. Federal law comprehensively regulates issues of foreign state immunity and, for the purposes of immunity, explicitly respects the separate corporate form of agencies and instrumentalities.¹⁹⁷ Although the text of the statute does not control the issue of corporate form for the purposes of liability,¹⁹⁸ disregarding separate juridical status for the purposes of liability would undermine the statute, as the legislative history makes clear.¹⁹⁹ The question of when separate juridical status may be disregarded is thus regulated by federal common law. Federal common law governs similar issues in connection with many other federal statutes.²⁰⁰

Individual immunity, like the attribution issue in *Bancec*, is not governed by the FSIA.²⁰¹ Here, too, however, the law governing *individual* immunities is extremely closely linked to the law governing foreign *state* immunity. Indeed, individuals are only entitled to “official” immunity due to their relationship with a foreign state, and foreign state immunity is governed by the FSIA. The purpose of individual immunities is to protect foreign states by protecting the officials who work on their behalf.²⁰² In many contexts, it would make little sense to apply different rules to foreign state and official immunity. Doing so would undermine the FSIA itself in areas such as waiver, commercial activity, and the status of entities as agencies and instrumentalities of the foreign states.²⁰³

The Supreme Court reached a similar conclusion in *Boyle v. United Technologies Corp.*, in which it held that the liability of military contractors “arising out of the performance of federal procurement contracts” is governed by

194. See Nelson, *supra* note 15, at 4–5.

195. See *supra* Part II.

196. See Nelson, *supra* note 15, at 5 (quoting Paul Lund, *The Decline of Federal Common Law*, 76 B. U. L. REV. 895, 914 (1996)).

197. See 28 U.S.C. §§ 1603(a)-(b) (distinguishing between foreign states and their agencies and instrumentalities); *id.* § 1605(a)(3) (distinguishing the immunity available to foreign states from that available to agencies and instrumentalities).

198. *First Nat’l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 620 (1983).

199. See *id.* at 627–28 (discussing the legislative history of FSIA § 1610(b), dealing with execution of judgments).

200. See Sarah C. Haan, *Federalizing the Foreign Corporate Form*, 85 ST. JOHN’S L. REV. 925, 990–91 (2011) (discussing the Packers and Stockyards Act, the Sherman Act, the Trading With the Enemy Act, and various federal labor laws, including ERISA, the Worker Adjustment and Retraining Notification Act of 1988, COBRA, and the Railway Labor Act, among others).

201. *Samantar v. Yousuf*, 560 U.S. 305, 325 (2010).

202. See Dapo Akande & Sangeeta Shah, *Immunities of State Officials, International Crimes, and Foreign Domestic Courts*, 21 EUR. J. INT’L L. 815, 822–24, 826–27 (2010); see also *Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia* [2006] UKHL 26, [2007] 1 AC (HL) 270 (appeal taken from EWCA (Civ)).

203. See Wuerth, *supra* note 19, at 945–48.

federal common law.²⁰⁴ A federal statute provided a defense to such suits for government officials, but not for private contractors.²⁰⁵ The Court created a federal common law defense for private contractors because some suits against them would “produce the same effect sought to be avoided by the FTCA exemption.”²⁰⁶ Similar reasoning applies to suits against individual foreign officials and foreign heads of state: suits against them under circumstances in which the state itself would be immune would undermine the state itself.

Professor Clark has offered a defense of *Boyle*, arguing that the case should be understood in terms of “constitutional preemption,” not federal common law.²⁰⁷ Although Clark’s characterization of *Boyle* as involving *constitutional* preemption is debatable—a federal *statute* is doing the preemptive work in that case—his perceptive analysis of *McCulloch v. Maryland*²⁰⁸ and *Osborn v. Bank of the United States*²⁰⁹ supports the result in *Boyle* and also supports the application of federal common law in individual immunity cases. In both *McCulloch* and *Osborn* the Court invalidated state efforts to tax the Bank of the United States, although the Bank was not a public institution and the statutes in question did expressly exempt the bank from taxation.²¹⁰ The *Osborn* Court reasoned that “[i]t is not unusual, for a legislative act to involve consequences which are not expressed” and cited in support the immunity of federal officers as an example.²¹¹ Such immunity is “incidental to, and is implied in, the several acts by which these institutions are created.”²¹² If individual immunities are incidental to the statutory creation of institutions, individual immunities are also incidental to the statutory conferral of immunity on the foreign state represented by that individual. Finally, immunity does not involve a substantive resolution of the case, it is merely a procedural bar to the litigation, a distinction which reduces separation of powers concerns.²¹³

The same reasoning at least arguably applies to the act of state doctrine, which is closely linked to foreign sovereign immunity. Both doctrines limit, in part, the power of domestic courts to deprive sovereign states of their property interests. Indeed, after the FSIA was enacted, considerable concern arose

204. *Boyle v. United Techs. Corp.*, 487 U.S. 500, 506 (1988).

205. *Id.* at 531 (Brennan, J., dissenting).

206. *See id.* at 511 (majority opinion).

207. Bradford R. Clark, *Boyle as Constitutional Preemption*, 92 NOTRE DAME L. REV. 2129, 2134 (2017).

208. 17 U.S. (4 Wheat.) 316 (1819).

209. 22 U.S. (9 Wheat.) 738 (1824).

210. Clark, *supra* note 207, at 2135, 2137–38.

211. *Id.* at 2137 (quoting *Osborn*, 22 U.S. (9 Wheat.) at 865).

212. *Id.* (quoting *Osborn*, 22 U.S. (9 Wheat.) at 865).

213. *See Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 140 (2018) (expressing particular concern with separation of powers when federal common law creates causes of action because “the Legislature, which is better positioned ‘to consider if the public interest would be served by imposing a new substantive legal liability’”(quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017))).

that the act of state doctrine would undermine the statute.²¹⁴ The Court has substantially limited the act of state doctrine, however,²¹⁵ minimizing the opportunities for conflict.²¹⁶ Stare decisis and the very limited scope of the doctrine today provide better justifications for common lawmaking in this area, as does the implicit approval of Congress for the act of state doctrine through the FSIA itself and the Hickenlooper Amendment. Legislative history to the FSIA suggests that Congress intended to preserve the doctrine;²¹⁷ the Hickenlooper Amendment has the same effect by limiting, but not eliminating, it.²¹⁸

Finally, the separation of powers objection to federal common law, namely that judges should not engage in lawmaking,²¹⁹ are minimal in the act of state and immunity-related contexts. As Caleb Nelson has described, “even if all common law is properly characterized as ‘judge-made,’ one should not leap to the conclusion that each individual court brings common-law rules into being in the way that a legislature might enact a new statute.”²²⁰ Nelson distinguishes between rules that judges create “out of whole cloth” and rules that are “firmly grounded in sources outside the federal judiciary.”²²¹ The federal common law doctrines in the area of foreign relations are highly constrained, and not just by stare decisis. Decisions related to immunity are hemmed in by the FSIA and the content of customary international law. Both doctrines are constrained to some degree by the views of the executive branch, which may be relevant to determining which entities qualify as foreign states entitled to protection under either doctrine.²²²

CONCLUSION

Today’s federal common law of foreign relations rests neither upon broad generalizations about the exceptional nature of foreign relations, nor upon judicial assessment of foreign relations dangers, nor upon the classification of customary international law as federal common law. Instead, in its current and very limited form, it is best understood and best legitimated as fundamentally interstitial,

214. See, e.g., Ifeanyi Achebe, *The Act of State Doctrine and Foreign Sovereign Immunities Act of 1976: Can They Coexist?*, 13 MD. J. INT’L L. & TRADE 247, 248 (1989).

215. See *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp.*, Int’l, 493 U.S. 400, 405 (1990).

216. See Hon. Marianne D. Short & Charles H. Brower, II, *The Taming of the Shrew: May the Act of State Doctrine and Foreign Sovereign Immunity Eat and Drink as Friends?*, 20 HAMLINE L. REV. 723, 738 (1997) (“Not surprisingly, jurists and scholars initially voiced concern that the act of state doctrine might devour the FSIA’s commercial exception. However, the Supreme Court’s recent decision . . . [in *Kirkpatrick*] makes such fears unwarranted.”).

217. See *id.* at 732 n.81.

218. See Michael J. Bazylar, *Abolishing the Act of State Doctrine*, 134 U. PA. L. REV. 325, 392–96 (1986) (describing various legislative attempts to limit the act of state doctrine, including the enactment of the Hickenlooper Amendment).

219. See *supra* note 21 and accompanying text.

220. Nelson, *supra* note 15, at 7 (internal citation omitted).

221. *Id.* at 9.

222. See William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2133 (2015); Wuerth, *supra* note 19, at 970. The executive branch does not have the power to determine which entities qualify as foreign states under the FSIA. See RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 452, cmt. a (AM. LAW INST., forthcoming 2018).

limited largely by federal statutes but also by international law and *stare decisis*, all of which minimize potential constitutional objections. Bellia and Clark offer a different way to avoid constitutional objections: reconceiving the doctrines as constitutional law itself, not federal common law. Their argument, if successful, would strike a blow to federal common law as a whole, a point that their book does not emphasize. Although their argument is ultimately unconvincing, the book serves as an erudite and challenging reminder that the federal common law of foreign relations was long overdue for stocktaking and reevaluation, which this Article has endeavored to provide.

