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The Executive Branch and International Law

Arthur M. Weisburd

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The Executive Branch and International Law

Arthur M. Weisburd*

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I. INTRODUCTION

Public international law, through its rules regulating the dealings between independent nations, purports to impose limits on the actions of all governments, including those of the United States. In this context American lawyers interested in foreign relations may reasonably wonder whether American courts would enforce rules of public international law purporting to bind the United States against the United States government, particularly the executive branch. A fair number of Supreme Court cases have dealt with the enforceability of treaties in American courts.¹ Treaties, however, are only one source of international law. The other important source, customary international law,² is neither expressly mentioned in the Constitution nor much discussed in Supreme Court cases. Customary international law also differs in important respects from treaties. Treaties are by necessity purely consensual arrangements between the parties. Rules of customary law, as the definition implies, are matters of general practice that can come into existence if a practice can fairly be labelled "general." Thus, a state that did not actively participate in the practice that culminated in the creation of a rule could find itself bound by the rule anyway, at least if that state did not actively dissent during the period of the rule's gestation.³

Recently, the question whether the federal courts have the authority to compel the President to adhere to rules of customary international law has drawn comment from writers interested in the subject.⁴ Some have taken the position that the courts in fact possess such authority, at least when Congress has not by statute established for the United States a rule different from that which international law would apply to the issue in question.⁵ According to these writers, one with standing to complain of a contemplated presidential action that would violate customary international law should be able to obtain from a federal court an injunction forbidding the action. For example, some have suggested that the federal courts could, on the basis of customary inter-

1. See, e.g., *Foster & Elam v. Neilson*, 27 U.S. (2 Pet.) 253 (1829).

2. Customary international law is defined as "evidence of a general practice accepted as law . . ." I. BROWNLE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 4-5 (3d ed. 1979).

3. Waldock, *General Course on Public International Law*, 106 *RECUEIL DES COURS* 1, 49-50 (1962).

4. See, e.g., Note, *Agora: May the President Violate Customary International Law* (pts 1 & 2), 80 *AM. J. INT'L LAW* 913 (1986), 81 *AM. J. INT'L LAW* 371 (1987).

5. See, e.g., Glennon, *Can the President Do No Wrong?*, 80 *AM. J. INT'L LAW* 923 (1986) [hereinafter Glennon, *Can the President*]; Glennon, *Raising The Paquete Habana: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 *Nw. U.L. REV.* 321 (1985) [hereinafter Glennon, *Paquete Habana*]; Paust, *The President Is Bound by International Law*, 81 *AM. J. INT'L LAW* 377 (1987).

national law, forbid the Executive to mine Nicaragua's harbors⁶ or control the Executive's treatment of undocumented aliens.⁷

The implications of this view are unsettling. Respectable authorities contend that customary international law speaks to a number of fundamental questions of international relations, forbidding, for example, the use of force by one government against another except in self-defense, or the intervention by one state in another's internal civil strife.⁸ Thus, if the courts can compel presidential obedience to customary international law, the courts become the ultimate authority for determining the foreign policy of the United States in a wide variety of circumstances.

Judicial control of foreign policy is an obviously startling aspect of applying customary international law to the Presidency, but the idea raises other questions as well. Neither the Constitution nor any statute explicitly establishes any presidential duty to adhere to customary international law. If customary international law, nonetheless, is seen as binding on the President as a matter of American law, it is necessary to determine precisely how customary international law fits into the body of American law—a determination not easy to make. Moreover, to argue that the judiciary may control the President's actions on the basis of a body of nonconstitutional, nonstatutory law assumes the existence of a very broad reach for the lawmaking power of federal courts that would not likely be limited to the field of international law.

This Article argues that the President is not bound by international law. Of course, when statutes or constitutional provisions duplicate rules of international law, the President would act unlawfully if he violated these statutes or constitutional provisions. Whether the act was also a violation of international law would be irrelevant.

At the outset, one crucial assumption upon which this Article rests must be made explicit: The Constitution does not require obedience to international law by the United States as an entity. In other words, the President is not precluded from violating international law if that violation is authorized by statute. Some authors have disagreed with this assumption,⁹ but others who argue that the President acting alone is bound by international law agree that Congress is not so bound.¹⁰ In

6. Glennon, *Paquete Habana*, *supra* note 5, at 355.

7. *Garcia-Mir v. Meese*, 788 F.2d 1446, 1453 (11th Cir.), *cert. denied sub nom. Ferrer-Mazorra v. Meese*, 107 S. Ct. 289 (1986).

8. *Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 98-102.

9. See Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1130-34 (1985); Paust, *supra* note 5, at 389-90.

10. See Glennon, *Paquete Habana*, *supra* note 5, at 328-30; Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV.

any case the assumption seems justified because the Supreme Court not only has refused to read such a limitation into the Constitution, but also has upheld the power of Congress to breach one of the most basic rules of international law—the rule requiring that treaties be observed.¹¹

If the foregoing assumption is accepted, then the viewpoint this Article opposes—the view that the President *cannot* violate customary international law—must treat customary international law as a species of federal common law, binding on the President through his obligation to “take [c]are that the [l]aws be faithfully executed.”¹² This Article seeks to demonstrate that customary international law enjoys no such status. Part II demonstrates that customary international law was almost surely not intended to be among the “laws” that the President is obliged to take care are faithfully executed. Part III examines the development of the federal common law and establishes that the courts have never perceived their authority to establish rules of decision in certain matters as applying to subjects like customary international law. Finally, Part IV demonstrates that, apart from the general limitations applicable to courts applying the federal common law, judicial control of presidential discretion on questions of foreign affairs unencumbered by statutory or constitutional prohibitions would violate basic principles of separation of powers.

II. FAITHFUL EXECUTION AND CUSTOMARY INTERNATIONAL LAW

A. *The Question to Be Answered*

The President's duty to adhere to customary international law has been asserted to follow from a simple syllogism. According to *The Paquete Habana*,¹³ customary international law is “part of our law.”¹⁴ The Constitution imposes on the President the duty to take care that the laws be faithfully executed. Therefore, the President has the duty to see that the part of our law which is customary international law is faithfully executed.¹⁵

853, 877-78 (1987); Kirgis, *Federal Statutes, Executive Orders and “Self-Executing Custom,”* 81 AM. J. INT'L LAW 371, 373 (1987).

11. *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581 (1889).

12. U.S. CONST. art. II, § 3.

13. 175 U.S. 677 (1900). In *The Paquete Habana* the Supreme Court held that, under customary international law, coastal fishing vessels not involved in hostilities could not be captured in war, and therefore that certain vessels captured by the American fleet blockading Cuba during the Spanish-American War could not be condemned as prizes of war.

14. *Id.* at 700. This Article will later examine in more detail what can be meant by the assertion that customary international law is part of United States law. See *infra* notes 138-53 and accompanying text.

15. Charney, *The Power of the Executive Branch of the United States Government to Vio-*

Was customary international law among the laws that the Constitution expected the President to see faithfully executed? The issue is phrased in this way because some laws, applicable within the United States, obviously fall outside the President's responsibilities. This conclusion follows from the nature of the Constitution, which delegates only certain powers to the federal government. Those powers do not include powers necessary to deal with a number of subjects on which law can be expected to exist. The general criminal law is but one example. To give the President unlimited law enforcement responsibility would oblige the President to enforce laws clearly falling outside the federal government's area of authority; it would require, for example, the President to be responsible for enforcing the criminal law of the states. Clearly, the President's responsibilities do not extend so far; the President is not expected to take care that state criminal law is faithfully executed. If it is possible to identify one body of law to which the "take care" clause has no application, the clause likewise may not apply to other bodies of law. The immediate problem, then, is whether the "take care" clause was meant to apply to customary international law.

Unfortunately, few judicial constructions of this clause exist, and none has addressed the issue of whether the clause applies to customary international law. Similar constitutional provisions, however, have been construed many times. In particular, the courts have frequently considered section 2 of article III, extending the judicial power of the United States to "all cases . . . arising under . . . the laws of the United States . . ." If one may legitimately assume that the Framers meant to limit the President's enforcement obligations to the "laws of the United States" referred to in article III, then the extent of the President's duty may be determined by examining judicial readings of article III. Nothing in the language of the Constitution seems to cast doubt on this approach, and the assumption that the term "laws" was intended to have the same meaning in both articles hardly seems unreasonable. Further, as shown above, because the Framers could not have intended the President's obligation to extend to all conceivable laws, logic suggests reading into article II's use of the term "law" the qualifier "of the United States."

Following this approach, however, presents a problem. As is shown by any comparison of the thinking in *Swift v. Tyson*¹⁶ to that in *Erie Railroad v. Tompkins*,¹⁷ judicial understanding of the term "laws" has evolved greatly since the drafting of the Constitution. If the term

late Customary International Law, 80 AM. J. INT'L LAW 913, 914 (1986).

16. 41 U.S. (16 Pet.) 1 (1842).

17. 304 U.S. 64 (1938).

"laws" was intended to mean in article II what it was intended to mean in article III, must the reading of the term in article II change when the reading of the term in article III changes?

The answer to that question would appear to be a clear "no." Changes in judicial understanding of the term "law" as it affects judicial power do not necessarily reflect changes in the understanding of presidential responsibility. On the contrary, nothing in the cases suggests any change in the courts' understanding of what laws the Framers intended the President to see faithfully executed. On this issue, then, there is no reason to doubt that the Framers' intent should govern modern readings of the Constitution. Moreover, readings of the term "laws of the United States" closest in time to the drafting of the Constitution would seem most likely to reflect the obligation the Framers intended to impose on the President. Therefore, this discussion will focus on pre-*Erie* judicial interpretations of the article III phrase "laws of the United States" as the most likely indicators of the laws that the President was to see faithfully executed.

B. *General Law and the Law of Nations*

A late twentieth century lawyer, seeking to determine the extent to which the Constitution intended to compel the President to adhere to customary international law, faces the problem of avoiding anachronism. As noted above, ways of thinking about law have changed over the past two centuries. Accordingly, determining the obligations that the Framers sought to impose on the President requires figuring out how the Framers thought about the areas of law in question.

An essential prerequisite to deciding what lawmakers of the period thought about this subject is recognizing those discussions of law surrounding the subject. This task is not easy because of changes in terminology since the 1780s. The term "customary international law" was not employed during the late eighteenth and early nineteenth centuries. As Professor Dickinson has explained, the subjects now treated as falling within customary international law—subjects principally involving state versus state questions—were seen as elements of the "law of nations."¹⁸ The law of nations included not only these subjects, but also the law merchant, maritime law, and the subject presently known as conflicts of law rules.¹⁹ To confuse further the terminological problem, the term "general law," for which the term "common law" was sometimes em-

18. Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26, 26-29 (1952).

19. *Id.*; Jay, *Origins of Federal Common Law: Part Two*, 133 U. PA. L. REV. 1231, 1263-64 (1985) [hereinafter Jay, *Part Two*].

ployed, was occasionally treated during this period as a synonym for the term "law of nations," and was sometimes seen as embracing the "law of nations" along with other subjects.²⁰ Thus, when encountering references from this period to the "law of nations," one must not assume that the writer was discussing only, or even primarily, what is known as customary international law. Likewise, one must realize that references during this period to "general law" are references to an umbrella term that included what now would be called customary international law. Finally, it is important to note that late eighteenth and early nineteenth century descriptions and analyses of subjects such as the law merchant and maritime law addressed topics seen at the time as part of the law of nations. Thus, such descriptions and analyses are relevant to an understanding of the early thinking about other elements of the law of nations, such as the area now labelled customary international law.

Aside from the terminological changes of the past two hundred years, the alteration in jurisprudential thinking evidenced by the overruling of *Swift v. Tyson*²¹ in *Erie Railroad v. Tompkins*²² also makes difficult the investigation of this subject. *Erie* acknowledged the existence of and rejected the jurisprudential theory that "there is 'a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute.'"²³ The *Erie* court took the position that no rule can be law without some definite authority behind it, and that, if the authority for the particular rule is a judicial decision rather than a statute, the court handing down the decision is making law to the same extent that a legislature does when it enacts a statute.²⁴

During the period in question, however, courts analyzing "general law" accepted this theory of a "transcendental body of law outside of any particular state but binding within it." Under this view, general law, which governed subjects not strictly local in character, simply represented the concrete application of natural reason to a particular set of facts. The authority of general law did not derive from any particular government, although all governments were assumed to adhere to it; rather, general law was seen as an aspect of natural law, and binding for

20. See *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825) (referring to "Universal Law"); *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820); *Talbot v. Janson*, 3 U.S. (3 Dall.) 133, 161 (1795) (Iredell, J.); Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1524 (1984); Jay, *Part Two*, *supra* note 19, at 1263-64.

21. 41 U.S. (16 Pet.) 1 (1842).

22. 304 U.S. 64 (1938).

23. *Id.* at 79 (quoting *Black & White Taxicab v. Brown & Yellow Taxicab*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

24. *Id.* at 78-80.

that reason. Courts asserted, correctly or not, that law on those subjects falling within the realm of general law was uniform all over the world, and that all courts in all states attempted to determine what result reason would dictate in a particular set of circumstances. Judges who decided cases were not making law; they were discovering law by deduction. Judicial decisions were evidence of the content of general law, but were not the law itself; general law, rather, was whatever reason would dictate on the facts.²⁵

Distinct from general law was local law, including both judicial decisions on matters distinctly local and the statutes of particular localities. Just as all courts were expected to apply general law to those subjects it governed, so courts were expected to apply local law to matters properly determined by local rules.²⁶

Thus, the relevant jurisprudential context in the period under consideration was as follows: The law of nations embraced a greater variety of subjects than is now true of customary international law, and was perceived as a manifestation of natural law, rather than a law that proceeded from, in the language of *Erie*, "some definite authority."²⁷ Against this background, the question now becomes: Did the "laws of the United States" include this "law of nations"?

C. *The Law of Nations and the Laws of the United States*

1. Beginnings of the Controversy

Whether the law of nations formed part of the laws of the United States was an issue of debate during the early years of the Republic. In essence, the Federalists, in office during this period, contended that the federal courts established in 1789 had jurisdiction irrespective of the parties' citizenship to hear both common-law civil and criminal actions, which would have included actions grounded on the law of nations. The Republicans, on the other hand, insisted both that Congress had not conferred such jurisdiction on the courts, and that any attempt to have done so would have been unconstitutional.²⁸ The disagreement did not flow from concerns about abstractions, but was an aspect of the larger disagreement between the two parties concerning the powers of the federal government. The Federalists argued that the power of applying the common law necessarily inhered in all courts through their character as

25. Fletcher, *supra* note 20, at 1517-21; Jay, *Origins of Federal Common Law: Part One*, 133 U. PA. L. REV. 1003, 1053-61 (1985) [hereinafter Jay, *Part One*]; Jay, *Part Two*, *supra* note 19, at 1263-64.

26. Fletcher, *supra* note 20, at 1527-38.

27. *Erie*, 304 U.S. at 79.

28. The following discussion depends heavily on Jay, *Part One*, *supra* note 25.

courts. The Republicans countered that the common law was a complete system, regulating all subjects on which law might be made; if federal courts could apply that system, purely as a function of their being courts and without regard to diversity of citizenship, it followed that the federal Congress could legislate on the subjects comprising the common law, because it was taken for granted that legislative and judicial jurisdiction were coextensive. That the common law was a complete system, however, would mean that the authority of the federal Congress was unlimited, contrary to the clear limitations imposed on its powers by the Constitution.²⁹

This debate was very active for a time and can be traced through various authorities. In the early 1790s, Supreme Court Justices sitting on circuit courts charged juries that acts by individual American citizens compromising American neutrality in the wars of the French Revolution were violations of the law of nations and, therefore, violations of the law of the United States.³⁰ Similarly, Attorney General Bradford in 1795 expressed the opinion that acts by individuals within United States territory against states in amity with the United States violated American treaty commitments to maintain good relations, and therefore were offenses against the United States.³¹ Juries, however, refused to convict for nonstatutory violations of the law of nations,³² and the Washington Administration, in an effort to end doubts as to its authority in the absence of statute, obtained passage of neutrality legislation.³³ By 1802, Attorney General Lincoln of the new Republican administration expressed the view that an altercation apparently involving an insult to the Spanish minister was “an aggravated violation of the law of nations,” which “is considered as a part of the municipal law of each State.”³⁴ Attorney General Lincoln, however, “doubt[ed] the competence of the federal courts” because there was “no statute recognizing the offence.”³⁵

Eventually, it became clear that the Republicans had won the debate—the “laws of the United States” did not include either all of “general law” or its “law of nations” component. The Supreme Court’s first pronouncement on the subject, *United States v. Hudson & Goodwin*,³⁶ decided in 1812, established that the circuit courts of the United

29. Jay, *Part One*, *supra* note 25, at 1078-83.

30. *Id.* at 1042-52.

31. 1 Op. Att’y Gen. 57 (1795).

32. Jay, *Part One*, *supra* note 25, at 1051.

33. *Id.* at 1052-53; see also *The Three Friends*, 166 U.S. 1, 52-53 (1897).

34. 5 Op. Att’y Gen. 691, 692 (1802).

35. *Id.*

36. 11 U.S. (7 Cranch) 32 (1812).

States had no jurisdiction over common-law crimes.³⁷ Because section 11 of the Judiciary Act of 1789 in fact conferred on the circuit courts "exclusive cognizance of all crimes and offences cognizable under the authority of the United States,"³⁸ *Hudson & Goodwin* necessarily stands for the proposition that common-law offenses were not cognizable "under the authority of the United States." This position was reaffirmed in *United States v. Coolidge*,³⁹ also involving a defendant indicted for a common-law offense. The Attorney General refused to argue the case for the United States; the defendant did not appear in the Supreme Court; and the Court was unwilling, without argument, to disturb the precedent of *Hudson & Goodwin*. The Court held that the case was controlled by *Hudson & Goodwin* and that the circuit court, therefore, had no jurisdiction on the facts presented.⁴⁰ Thus, the Supreme Court, by 1816, had signaled that the general law was not law of the United States.

2. Subsequent Developments

After *Coolidge* and throughout the nineteenth century, the Supreme Court consistently held that neither general law as a whole nor the law of nations, to the extent the two terms were not seen as coextensive, were "laws of the United States." The Court maintained this position in at least two contexts: Its dealings with admiralty and its construction of its authority to review decisions from state courts.

a. Admiralty

The Constitution extends the judicial power of the United States to admiralty and maritime cases.⁴¹ The First Congress not only granted that jurisdiction to the district courts, but also made that grant exclusive.⁴² As noted above, admiralty was seen during this period as an element of the law of nations. Not surprisingly, therefore, the courts invested with admiralty jurisdiction took for granted that the only rules to apply when dealing with matters in admiralty jurisdiction were those

37. *Id.* at 33-34.

38. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78-79 (approved Sept. 24, 1789) [hereinafter Judiciary Act of 1789].

39. 14 U.S. (1 Wheat.) 415 (1816).

40. *Id.* at 415-17. This result is mildly surprising, given that the offense charged, forcibly rescuing a ship from an American privateer, fell within the admiralty jurisdiction and that the Constitution, article III, clause 2, expressly provides that admiralty is within the judicial power of the United States. Indeed, Justice Story, sitting as a circuit justice at the trial, had relied in part on the admiralty character of the proceedings in upholding the circuit court's jurisdiction. *United States v. Coolidge*, 25 F. Cas. 619 (C.C.D. Mass. 1813) (No. 14,857).

41. U.S. CONST. art. III, cl. 2.

42. Judiciary Act of 1789, *supra* note 38, § 9, at 76-77.

suggested by the law of nations, deduced from scholars' writings and judicial decisions from various countries.⁴³ In applying these rules, the Supreme Court made clear that it did not see itself as applying the "laws of the United States," but rather a distinct body of law—the law of nations.

Although earlier decisions contained language demonstrating that the Court saw admiralty law as standing apart from the law of the United States,⁴⁴ *American Insurance Co. v. Canter*⁴⁵ most clearly states the Court's position. The Court in that case had to decide whether a court of the Territory of Florida could properly exercise admiralty jurisdiction. The Court considered the seventh and eighth sections of the statute establishing Florida's courts as the only possible bases for such jurisdiction.⁴⁶ The eighth section conferred on the territorial courts jurisdiction to hear cases "arising under the laws . . . of the United States."⁴⁷ Although the Court ultimately upheld the territorial court's admiralty jurisdiction on the basis of the seventh section of the statute, it expressly held that the eighth section did not confer such jurisdiction because admiralty cases do not arise under the laws of the United States.

The Court based this conclusion on two grounds. It first observed that article III of the Constitution extended the federal judicial power to cases arising under the laws of the United States in one clause, while extending that power to admiralty and maritime cases in a separate clause. The Court then reasoned that the Constitution assumes that the one grant of jurisdiction does not include the other. In other words, a grant of jurisdiction to hear cases arising under the laws of the United States would not amount to a grant of admiralty jurisdiction.⁴⁸ As a distinct ground for its conclusion, the Court stated that "[a] case in admiralty does not, in fact, arise under the constitution or laws of the United States. These cases are as old as navigation itself; and the law admiralty and maritime, as it has existed for ages, is applied by our

43. For example, see the authorities relied on by Justice Story dissenting in *The Nereide*, 13 U.S. (9 Cranch) 388, 449-54 (1815). For the proposition that the admiralty jurisdiction grant directed the courts to the general law, see *Panama R.R. v. Johnson*, 264 U.S. 375, 385-86 (1924).

44. Thus, in *The Schooner Adeline & Cargo*, 13 U.S. (9 Cranch) 244 (1815), the Court rejected an attack on a prize court judgment grounded on the departure of the prize court from common-law pleading rules, by holding that as a court of the law of nations, a prize court did not take its rules from the "mere municipal regulations" of any country. *Id.* at 284. Again, in *The Brig Alerta & Cargo*, 13 U.S. (9 Cranch) 359 (1815), the Court supported its result by reference to both "the general law of nations" and the "laws of the United States." *Id.* at 365. In making this reference, the Court distinguished the two bodies of law.

45. 26 U.S. (1 Pet.) 511 (1828).

46. *Id.* at 544.

47. *Id.* at 543.

48. *Id.* at 545.

courts to the cases as they arise."⁴⁹ As has been noted repeatedly in this Article, admiralty was seen as one aspect of the law of nations during the period under consideration. *Canter's* holding that admiralty cases do not arise under the laws of the United States necessarily means, therefore, that the "laws of the United States" do not include the law of nations.

The Supreme Court reiterated its dichotomous approach to admiralty and municipal law in a procedural context in 1866,⁵⁰ but the last cases illustrating the Supreme Court's distinction between admiralty and the "laws of the United States" do so from a different perspective than preceding cases. In *The Lottawanna*⁵¹ libellants attacked an admiralty rule of decision announced in an 1819 case on the grounds that the Supreme Court had misunderstood the rule actually applied in admiralty courts throughout the world.⁵² In refusing to overrule the earlier case, the Court held:

The proposition assumes that the general maritime law governs this case, and is binding on the courts of the United States.

But it is hardly necessary to argue that the maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country. In this respect it is like international law or the laws of war, which have the effect of law in no country any further than they are accepted and received as such

...⁵³

Holding that the rule declared in the earlier case remained the maritime law of the United States, the Court held itself powerless to alter the rule.⁵⁴

The Court reaffirmed the reasoning of *The Lottawanna* through dictum in *The Scotland*⁵⁵ and, speaking through Justice Holmes, relied on that reasoning in *In re Western Maid*.⁵⁶ Libellants in *Western Maid* had libelled certain merchant vessels that had been chartered to the United States during World War I and, while under government control, had collided with vessels owned by libellants. The libels had been filed after the vessels had reverted to their owners' control. The govern-

49. *Id.* at 545-46.

50. In *United States v. Weed*, 72 U.S. (5 Wall.) 62 (1866), the Court had to address the question whether the government, which incorrectly had libelled certain property as prize of war, could proceed against the property as subject to forfeiture under certain statutes simply by amending the libel. *Id.* at 66-71. The Court characterized the problem as one in which all proceedings had been in prize, though the suit was "not a case of prize, but of forfeiture under municipal law." *Id.* at 71.

51. 88 U.S. (21 Wall.) 558 (1874).

52. *Id.* at 571.

53. *Id.* at 571-72.

54. *Id.* at 576-78.

55. 105 U.S. 24, 31 (1881).

56. 257 U.S. 419 (1922).

ment, authorized by statute to defend the suits, sought writs of prohibition against the proceedings.⁵⁷ In granting the writs, the Court addressed the idea that general maritime law necessarily created liability on these facts:

In deciding this question we must realize that however ancient may be the traditions of maritime law, however diverse the sources from which it has been drawn, it derives its whole and only power in this country from its having been accepted and adopted by the United States. There is no mystic over-law to which even the United States must bow. When a case is said to be governed by foreign law or by general maritime law that is only a short way of saying that for this purpose the sovereign power takes up a rule suggested from without and makes it part of its own rules.⁵⁸

The Court then went on to hold that, because the United States had not consented to waive its sovereign immunity as to suits of this sort, no tort had been committed for which libellants could recover.⁵⁹

While the jurisprudential approaches taken by the cases from *The Schooner Adeline* through *Weed*, on the one hand, and the approach taken by *The Lottawanna* and the *Western Maid* on the other, could not differ more, neither approach is compatible with the argument that the law of nations is an element of the law of the United States. Both groups of cases see the law of nations and municipal law as distinct. The older group asserts the distinction and further asserts that admiralty courts apply the law of nations instead of municipal law. The latter group asserts the distinction, denies that an American court ever applies the law of nations itself, and insists instead that an American court only applies rules that the United States has elected freely to bring into municipal law. While there is absolute disagreement between them as to the binding character of the law of nations, the cases absolutely agree that rules of the law of nations are not binding because of the law of nations' alleged status as a part of the law of the United States. The older group maintains the separation of the two bodies of law and treats both as controlling in proper circumstances. The younger group also treats the two bodies of law as distinct, but in effect denies that general law necessarily must have any effect whatever within the United States. Taken together, the admiralty cases clearly reject the equation that "law of nations" equals "laws of the United States."

57. *Id.* at 429-32.

58. *Id.* at 432.

59. *Id.* at 432-34.

b. *Supreme Court Review of State Cases*

Section 25 of the Judiciary Act of 1789⁶⁰ permitted the Supreme Court to review decisions from the highest state courts in which the validity of a state statute or an exercise of state authority was being attacked on the grounds of its "being repugnant to the constitution, treaties, or laws of the United States."⁶¹ This language was retained throughout the nineteenth century,⁶² and therefore governed the Supreme Court's jurisdiction of appeals from the state courts during the period in question. The Supreme Court's consideration of its own appellate jurisdiction, therefore, obliged it to consider whether particular state actions involved the "laws of the United States." The Court consistently held that questions exclusively involving general law, including questions involving the law of nations, did not involve the "laws of the United States" and, therefore, were not reviewable under Section 25 and its successors.

In a number of cases in the early 1870s, the Court refused to review state decisions that addressed the effect of Confederate Government's existence on private transactions, holding that such cases involved matters of "public policy" or "general law" and, therefore, were not reviewable under Section 25.⁶³ In turn, all of these decisions were cited in *New York Life Insurance Co. v. Hendren*,⁶⁴ a case that is particularly relevant to this discussion. In that case, an insurance company sought review of a Virginia state court judgment holding it liable under an insurance policy on the life of a Virginia resident who died in Virginia in 1862. The company urged as a basis of Supreme Court review errors in the jury instructions concerning the effect of civil war on contracts. The Court held that it lacked jurisdiction because the case presented questions of general law alone.⁶⁵ The result was supported by the observation that "[i]t was not contended, so far as we can discover, that the general laws of war, as recognized by the law of nations applicable to this case, were in any respect modified or suspended by the constitution, laws, treaties, or executive proclamations, of the United States."⁶⁶ In other words, the court held that the "general laws of war" were not

60. Judiciary Act of 1789, *supra* note 38, § 25, at 85-87.

61. *Id.* at 85.

62. Section 25 was amended twice during this period, by the Act of Feb. 5, 1867, ch. 28, 14 Stat. 385, 386, and by the Act of Feb. 18, 1875, ch. 80, 18 Stat. 316, 318, but neither amendment substantially altered the language in question.

63. See *Rockhold v. Rockhold*, 92 U.S. 129 (1875); *Tarver v. Keach*, 82 U.S. (15 Wall.) 67 (1872); *Delmas v. Insurance Co.*, 81 U.S. (14 Wall.) 661 (1871); *Bethell v. Demaret*, 77 U.S. (10 Wall.) 537 (1870).

64. 92 U.S. 286 (1875).

65. *Id.* at 286-87.

66. *Id.*

part of the law of the United States. It should be noted that the Court took this position notwithstanding the vigorous dissent of Justice Bradley, who insisted that section 25 was satisfied because "unwritten international law" was the law of the United States.⁶⁷

For the rest of the nineteenth and well into the twentieth century, the Supreme Court adhered to the view that general law, including the law of nations, did not fall within the category "laws of the United States."⁶⁸ Three of the post-*Hendren* cases are particularly relevant to this discussion. The plaintiffs in *City and County of San Francisco v. Scott*⁶⁹ challenged as unauthorized a grant of land made by an official of the pueblo of San Francisco after California had been conquered by the United States but before San Francisco had been incorporated as a city. The Court observed that the case did

not depend on any legislation of Congress, or on the terms of the treaty, but on the effect of the conquest upon the powers of local government in the pueblo under the Mexican laws. That is a question of general public law, as to which the decisions of the State Court are not reviewable here.⁷⁰

This result is particularly significant because the Court in earlier cases apparently had seen this type of question as raising issues under the law of nations.⁷¹

*Huntington v. Attrill*⁷² also contains language bearing upon the subject under consideration. That case concerned a challenge to the refusal of the Maryland courts to enforce a New York judgment rendered on a claim based on a New York statute. The Maryland court had held that the statute was penal and that, under conflicts principles, the court was not obliged to enforce either a foreign penal statute or a judgment based on such a statute. The Supreme Court characterized the issue as one of "international law," and as such a matter of "general jurisprudence."⁷³ The Court observed that it would have no jurisdiction to review a state court's application of this "international rule" in dealing

67. *Id.* at 287-88 (Bradley, J., dissenting).

68. See *United States v. Thompson*, 93 U.S. 586, 588-89 (1876); *Dugger v. Bocoek*, 104 U.S. 596, 601-04 (1881); *Chicago & A.R.R. v. Wiggins Ferry Co.*, 119 U.S. 615, 623-24 (1887); *Pennsylvania R.R. v. Hughes*, 191 U.S. 477, 485-86 (1903).

69. 111 U.S. 768 (1884).

70. *Id.* at 769.

71. This result follows from the Court's treatment of *More v. Steinbach*, 127 U.S. 70 (1888), a diversity case also involving the effect of the American conquest on the authority of California officials. The *More* opinion addressed the appellants' argument that the laws of a conquered country, except those involving political institutions, remain in force. *Id.* at 81. The reporter's account of appellants' argument, *id.* at 75, shows that they relied on *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 749 (1835), for this argument. *Mitchel*, in turn, described the rule in question as established by the law of nations. *Id.*

72. 146 U.S. 657 (1892).

73. *Id.* at 683.

with a *suit* based on another state's statute.⁷⁴ When, however, the issue was a state court's refusal to enforce a *judgment* based on such a suit, the federal full faith and credit statute was implicated; the statutory question, the Court held, gave it jurisdiction to review the state's application of "international law."⁷⁵ *Huntington* did not involve what in 1987 would be labelled in the United States an "international law" question. Its use of that term teaches caution in assuming that the courts in this period mean by the term "international law" the same thing modern writers mean. Moreover, the *Huntington* Court's treatment of what it saw as an international law issue reinforces the thrust of *Hendren*: international law was a matter of "general jurisprudence" and matters of "general jurisprudence" did not involve the laws of the United States.

As late as 1924 the Court adhered to this view. In that year the Court held in *Transportes Maritimos do Estado v. Almeida*⁷⁶ that no question under federal law was presented by a case that turned on whether a defendant could rely on immunity as a foreign sovereign. For most of the history of the United States, then, the Supreme Court has held that general law, seen as including customary international law, is not part of the laws of the United States for purposes of appellate review.

3. Apparent Counterarguments

The foregoing discussion would appear to establish that the body of law now called customary international law was not seen, in the eighteenth and nineteenth centuries, as being among the "laws of the United States" as that term was used in article III. Various authorities, however, have disagreed with this view. Some rely on the views articulated by certain of the Framers. Others place much weight on the implications of the Alien Tort Claim Act.⁷⁷ Still others rely on language from particular cases or from certain opinions by attorneys general of the United States. This section examines these counterarguments and seeks to refute them.

a. Views of the Framers

Some have argued that statements by various Framers of the Constitution demonstrate that these individuals believed it important that

74. *Id.*

75. *Id.* at 683-84.

76. 265 U.S. 104 (1924).

77. 28 U.S.C. § 1350 (1982) (originally enacted as Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76-77).

the federal courts have jurisdiction to hear cases involving the law of nations, and that those courts in fact had such jurisdiction. Such assertions support the argument that international law was intended to be among the "laws of the United States."⁷⁸

Some of the modern writers who make such arguments have misunderstood the sources upon which they rely.⁷⁹ Moreover, the Framers were hardly of one voice on this subject.⁸⁰ Furthermore, this argument does not appear to give adequate consideration to the breadth and

78. See, e.g., Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1090-95 (1985); Note, *Federal Common Law and Article III: A Jurisdictional Approach to Erie*, 74 YALE L.J. 325, 334-37 (1964).

79. For example, the writer of *Federal Common Law and Article III: A Jurisdictional Approach to Erie*, asserts that Alexander Hamilton, in *The Federalist* No. 80, apparently believed that the law of nations was federal law. Note, *supra* note 78, at 335. He observed that Hamilton, in a portion of his argument, distinguished between "'cases arising upon treaties and the law of nations'" on the one hand, and those that involve foreigners but "stand merely on the footing of the municipal law" on the other, and suggested that Hamilton appeared to place the former within federal question jurisdiction and the latter within the diversity jurisdiction. *Id.* This reading of *The Federalist* No. 80 is clearly incorrect. In that document, Hamilton enumerated six categories of cases to which federal judicial authority should extend. THE FEDERALIST No. 80, at 499-500 (A. Hamilton) (B. Wright ed. 1961). He then discussed each category in turn, explaining why he thought federal jurisdiction was important in each case. *Id.* at 500-03. Finally, he listed the headings of jurisdiction set out in article III, stating which of his six categories was in fact covered by each jurisdictional grant. The discussion to which the Note writer referred is part of Hamilton's consideration of his fourth category, "all these [cases] which involve the *peace* of the *Confederacy*, whether they relate to the intercourse between the United States and foreign nations, or to that between the States themselves." *Id.* at 499-500 (emphasis in original). Hamilton's discussion did distinguish between the cases involving treaties or the law of nations, on the one hand, and municipal law cases, on the other, but not at all in the context the Note suggests. Rather, Hamilton observed that some people might think that only the former group needed to be in federal court, while the latter could safely be left to the states. Hamilton, however, rejected the distinction, arguing that maltreatment of aliens by state courts could lead to war. *Id.* at 501. That is, the distinction was one Hamilton did not accept, and was in any case not drawn in a discussion of the different headings of federal jurisdiction, but in a consideration of the allocation of cases between federal and state jurisdiction. Moreover, in the part of the discussion in which Hamilton linked his six categories to the various article III grants of jurisdiction, he stated that his fourth category was covered by the grants of jurisdiction over cases involving treaties, cases involving ambassadors, other public ministers and consuls, and diversity cases. *Id.* at 504. That is, he labelled none of the fourth category cases as falling under the grant of jurisdiction in cases arising under the Constitution and laws of the United States. In *The Federalist* No. 80, the only categories of cases Hamilton saw as falling under that grant were those arising "out of the laws of the United States, passed in pursuance of their just and constitutional powers of legislation" (implying that Hamilton thought "laws" meant "statutes") and those "concern[ing] the execution of the provisions expressly contained in the articles of Union." *Id.* at 499. Hamilton's prose is pellucid; the source of the Yale Note writer's confusion is not apparent.

80. Compare THE FEDERALIST No. 3 (J. Jay) (stating that federal courts will have jurisdiction of cases arising under the law of nations) with FEDERALIST No. 80 (A. Hamilton) (stating that federal judiciary will have jurisdiction of law of nations cases because these cases are covered by jurisdictional grants for diversity cases and those involving treaties or ambassadors, and other public ministers, and consuls).

vagueness of the uses of the term "law of nations." As noted above,⁸¹ that term was applied to a much greater range of subjects than is the term "customary international law," and was sometimes even equated with the term "general law." This application of the term has two consequences for the argument here under consideration. First, without regard to article III's grant of jurisdiction in cases arising under the laws of the United States, the federal jurisdictional power clearly extended to much of the law of nations by reason of the other portions of article III. For example, treaty questions were seen as involving the law of nations;⁸² article III gives jurisdiction over cases involving treaties. Admiralty law was an element of the law of nations;⁸³ admiralty jurisdiction is expressly granted in article III. The law of nations was seen as providing special protections to ambassadors;⁸⁴ article III expressly grants jurisdiction over cases involving ambassadors. Finally, the Framers could rely on the diversity jurisdiction to bring into the federal courts many cases involving the law of nations in its law merchant aspect because such cases were particularly likely to involve local people litigating against people from either other states or other countries.

Hamilton apparently believed that the federal courts' authority to hear cases involving the law of nations flowed from the grant of diversity jurisdiction and the grants of jurisdiction over treaty questions and cases involving ambassadors, with the federal question grant simply not relevant to this subject.⁸⁵ Thus, persons asserting that article III granted jurisdiction over cases involving the law of nations need not have had the federal question jurisdiction in mind when making such statements. They easily could have been thinking about other elements of article III.

The broad meaning of "law of nations" raises a second problem for those relying on quotations from the Framers. At least some of the Framers who asserted that the laws of the United States included the law of nations took that position as an element of their broader belief in the unlimited common-law jurisdiction of the federal courts. As explained above, several of the early Justices of the Supreme Court, for example, took such positions.⁸⁶ As also explained above, however, the Supreme Court ultimately rejected the view that federal courts possessed unlimited common-law jurisdiction. This rejection obviously weakened the authority of those Framers who contended, as an element

81. See *supra* notes 18-20 and accompanying text.

82. Dickinson, *supra* note 18, at 32-33.

83. *Id.* at 28-29.

84. *Id.* at 30.

85. See *supra* note 79, for discussion of *The Federalist* No. 80.

86. See Jay, *Part One*, *supra* note 25, at 1042-52.

of their belief in unlimited common-law jurisdiction, that the laws of the United States included the law of nations.

This conclusion is reinforced by jurisdictional statutes of the time. Aside from a very short-lived provision enacted in 1801,⁸⁷ the federal trial courts had no "federal question" subject matter jurisdiction until 1875,⁸⁸ the year that Congress implemented the article III grant. That is, if the law of nations *was* part of the "law of the United States," the courts nonetheless lacked authority to apply it *as* "law of the United States" until 1875. If the courts applied the law of nations before 1875, therefore, their authority to do so could not rest on any determination that the law of nations was part of the law of the United States.

Finally, any canvass of the views of the Framers must include an examination of the structure of article III. As Chief Justice Marshall pointed out in the *Canter* case,⁸⁹ article III separately grants jurisdiction to hear cases arising under the laws of the United States, jurisdiction to hear cases involving ambassadors, jurisdiction to hear cases involving treaties, and jurisdiction to hear admiralty cases. The listing of the separate categories surely suggests that the Framers thought none was included within any of the others—that cases involving treaties, for example, did not arise under the laws of the United States. Yet cases involving treaties, admiralty, and ambassadors were all seen in 1789 as presenting questions arising under the law of nations. If the phrase "laws of the United States" had been thought to include the law of nations, the Framers would not have needed to spell out the categories of jurisdiction that they did spell out. Further, their designation of particular aspects of the law of nations as within federal jurisdiction suggests that the Framers took pains to make explicit the parts of that body of law that they particularly wished to come before the federal courts. Therefore, attaching significance to the Framers' omission of what is now called customary international law is not unreasonable.

b. The Alien Tort Claim Act

As originally enacted, the Alien Tort Claim Act provided that the United States district courts "shall . . . have cognizance, concurrent with the courts of the several States, or the circuits courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States."⁹⁰ Some argue that,

87. Act of Feb. 13, 1801, ch. 4, 2 Stat. 89, 92, *repealed by* Act of March 8, 1802, ch. 8, § 1, 2 Stat. 132.

88. Judiciary Act of 1875, ch. 137, § 1, 18 Stat. 470.

89. *See supra* notes 45-49 and accompanying text.

90. Judiciary Act of 1789, *supra* note 38, § 9, at 77.

because this section is not expressly limited to suits by aliens against Americans, it does not fall within the diversity jurisdiction, and that Congress, therefore, must have assumed that some other heading of jurisdiction was available under article III. The only possible alternative, however, is the federal question jurisdictional grant. Therefore, the argument goes, the First Congress must have assumed that "law of nations" questions involved the laws of the United States.⁹¹

It is true that in the twentieth century lower federal courts have read the Act in this way.⁹² Moreover, no apparent legislative history has survived to throw light on the intent of Congress in enacting the statute. While one cannot unequivocally demonstrate that this view is incorrect, alternative explanations do exist. Possibly this section originally was intended to operate as a diversity provision; or perhaps the First Congress thought alienage of either party, without regard to the other party's citizenship or the subject matter of the suit, was enough to support federal jurisdiction.

Preliminarily, it bears repeating that a reading which would bring the law of nations within the laws of the United States would have been a very controversial usage of those terms in 1789. Furthermore, the implication of these alternative readings—that an individual could violate the law of nations—would have made sense in 1789. As explained several times in this Article, the term "law of nations" applied to many subjects not now considered part of customary international law. Although modern customary international law generally may be violated only by governments, in 1789 it was clearly thought possible that an individual could violate the law of nations. For example, in the famous Pennsylvania case of *Respublica v. De Longchamps*,⁹³ which involved the criminal prosecution of an individual for an attack on an ambassador, the sole basis for the indictment was the rule of the law of nations protecting ambassadors.

All the foregoing responses, of course, do not explain how section 9's language purporting to grant the district courts jurisdiction to hear suits "by aliens, for torts only" can be read fairly as applying only to suits by aliens against Americans. To understand this point, one must compare the language of section 9 to the language of other sections of the Judiciary Act. First, the relevant language of section 9 in fact resembles that of section 11, which creates the alienage diversity jurisdiction. Specifically, section 11 provides, "[t]hat the circuit courts shall have original cognizance, concurrent with the courts of the several

91. For an example of this argument, see Note, *supra* note 78, at 335-36.

92. See, e.g., *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

93. 1 U.S. (1 Dall.) 111 (1784).

States, of all suits of a civil nature at common law or equity, where . . . an alien is a party."⁹⁴ That is, even the section that clearly must rely on article III's diversity grant to support its constitutionality does not require expressly that, in suits involving aliens, the other party be American. Again, section 12 of the Judiciary Act, establishing the federal court's removal jurisdiction, uses language similar to that of sections 9 and 11. Section 12 permits removal to the circuit courts in suits "commenced in any state court against an alien, or by a citizen of the state in which the suit is brought against a citizen of another state . . ."⁹⁵ This section omits any express requirement that suits against aliens, to be removable, be brought by American citizens. Yet such a requirement is clearly necessary to satisfy article III of the Constitution.

Only two apparent explanations exist for the wording of sections 11 and 12. Either the First Congress believed it was obvious that a reference to cases in which aliens were parties implied that the other party had to be an American, or the First Congress thought that it could confer on the federal courts jurisdiction to hear cases involving aliens without regard to either the citizenship of the other party or the subject matter of the suit. In either case, the same reasoning that must have inspired the wording of sections 11 and 12 dictates that section 9's lack of language expressly requiring diversity in alien tort actions does not mean that Congress saw itself as relying on the federal question jurisdictional grant with respect to section 9. Further support for this view flows from section 9's express provision that the alien tort jurisdiction it granted was to be concurrent with the jurisdiction granted the circuit courts under section 11. Section 11, however, grants the circuit courts no jurisdiction that conceivably could overlap with the alien tort jurisdiction except the alien diversity jurisdiction.⁹⁶ As noted above, the Congress must have assumed, therefore, either that at least some of the alien tort cases would be cases with aliens as plaintiffs and individual American citizens as defendants, or that alienage of one party was enough to support federal jurisdiction.

Finally, dealing in this way with this particular piece of the diversity jurisdiction may have been deemed sensible in light of the limitations imposed on the general diversity jurisdiction. As sections 11 and 12 make clear, the first of these limitations was that the vesting of diversity jurisdiction was in the circuit courts. As originally organized in the Judiciary Act, the circuit courts for each judicial district were to

94. Judiciary Act of 1789, *supra* note 38, § 11, at 78.

95. *Id.* § 12, at 79.

96. *Id.* § 11, at 78.

meet only twice annually.⁹⁷ District courts, in contrast, had four sessions a year.⁹⁸ The second disadvantage of the general diversity jurisdiction was the amount in controversy requirement, set at 500 dollars by sections 11 and 12.⁹⁹ Section 9, in contrast, imposed no amount in controversy requirement.¹⁰⁰ Particularly in light of the fears expressed in some quarters that the courts' maltreatment of aliens could lead to war,¹⁰¹ Congress may have wished to carve out a segment of alien diversity cases that it feared could be particularly sensitive and make sure that alien plaintiffs in such cases would not be able to complain of being denied access to courts either because of scheduling problems or monetary limitations.

In short, the argument that the Alien Tort Claim Act was not intended as a "federal question" provision is supported by the following: 1) The law of nations in 1789 included prohibitions that individuals could violate; 2) this reading fits the conventional usage of terms in 1789; 3) the original language of the Act resembles language in provisions of the Judiciary Act that clearly did not rely on the argument that the law of nations was part of the law of the United States; 4) the Act was intended to overlap with one such provision; and 5) splitting out a piece of the diversity jurisdiction would have made sense in light of the general organization of the federal courts and the fears of the Framers concerning denials of justice. The argument presented is obviously not conclusive. The argument does, however, at least counsel caution in reading the Alien Tort Claim Act as proving that the First Congress believed the law of nations to be federal law.

c. *Language from Cases*

Five cases from the general period in question include language that would appear to support the argument that the law of nations was seen as falling within the "laws of the United States." Examination of the cases in which this language appears makes clear, however, that the language in question was not addressing the question of the place of the law of nations in the constitutional system. Such cases, therefore, do not undercut the argument in this section.

In the first place, three of the five cases are admiralty cases. As has been made clear, courts of this period saw the admiralty jurisdictional grant as itself a basis for applying the law of nations, and in fact consid-

97. *Id.* § 4, at 74-75.

98. *Id.* § 3, at 73-74.

99. *Id.* §§ 11-12, at 78-79.

100. *Id.* § 9, at 77.

101. *See, e.g.,* THE FEDERALIST No. 80, *supra* note 79, at 500-01 (A. Hamilton).

ered admiralty courts as courts of the law of nations, rather than as municipal courts. The application by these courts of the law of nations, therefore, did not depend on the "laws of the United States" jurisdictional grant and, thus, their language cannot be seen as addressing the relationship between the laws of the United States and the law of nations.

Further, examining each of the three cases individually demonstrates that these cases cannot be used to prove that the law of nations was understood to be part of the "laws of the United States." The earliest, *Talbot v. Janson*,¹⁰² was an admiralty case that raised the issue whether the capture of a Dutch vessel by Americans allegedly privateering for France was a violation of American neutrality requiring restitution of the vessel. Because the case was an admiralty matter, all the Justices applied the law of nations as a matter of course.¹⁰³ The relevant language appears in Justice Iredell's opinion; after he observed that the act alleged was the capture by Americans in American ships of a vessel of a state friendly to the United States, he described such conduct as a "palpable . . . violation of our own law (I mean the common law, of which the law of nations is a part . . .)." ¹⁰⁴ Iredell either was affirming the utterly uncontroversial opinion that an admiralty court can apply the law of nations, or he was asserting that the common law, not merely the law of nations, is federal law—a view the courts, of course, later rejected.

The second case is *The Nereide*,¹⁰⁵ a prize case in which a Spanish shipper whose goods were aboard a British merchant vessel and were captured by American privateers sought to argue that his property could not lawfully be condemned as prize because Spain was neutral in the fighting between the United States and Britain. The captors argued that a treaty between the United States and Spain varied the rule of the law of nations as to neutral goods and permitted Americans to seize Spanish goods found on enemy vessels. The Court rejected this reading of the treaty. The captors then argued that, regardless of how the treaty was read by the United States, Spain in fact did not respect American goods in circumstances like those presented in the case and, therefore, urged the Court to retaliate by applying a similar rule to Spanish goods. The Court refused to do so; Chief Justice Marshall characterized retaliation as a political, not a legal, decision, and held that, until Congress legislated to change the rule of the law of nations protecting neutrals,

102. 3 U.S. (3 Dall.) 133 (1795).

103. Four of the five justices delivered opinions in the case, and Justice Wilson refrained from expressing an opinion because he had passed on the matter in the lower court. *Id.* at 168.

104. *Id.* at 161.

105. 13 U.S. (9 Cranch) 388 (1815).

"the court is bound by the law of nations, which is a part of the law of the land."¹⁰⁶ Clearly, Chief Justice Marshall meant no more than that the law of nations was law that the Court was obliged to apply; because the Court was sitting in admiralty, he was right. The case did not present the issue of whether the law of nations fell within the laws of the United States; when that question did arise, in *Canter*, Marshall answered with a flat negative.

The third case is *The Paquete Habana*,¹⁰⁷ containing the famous statement that "[i]nternational law is part of our law."¹⁰⁸ Again, the Court was sitting in admiralty. The issue of the Court's authority to apply international law in a case based solely on the laws of the United States simply was not presented by the case. Further, the case arose in a statutory context in which Congress in effect directed the Court to apply international law. Procedure in prize cases had been regulated extensively by Congress.¹⁰⁹ Although the relevant legislation clearly assumed that vessels captured as prizes might not be properly condemnable, the legislation provided no standard whereby a prize court could determine whether a given capture was lawful. The clear implication of the legislation, therefore, was that the courts were to look to existing sources of prize law—in this case, international law. Given the implicit statutory directive and, as Professor Henkin¹¹⁰ has recognized, the admiralty nature of a prize court's jurisdiction, *The Paquete Habana* cannot be seen as addressing the place of customary international law in American law cases in which the court has not been directed to apply it by both the Constitution and a statutory scheme.

Of the two remaining cases, *Hilton v. Guyot*,¹¹¹ was a diversity case that discussed whether American courts were required to respect judgments rendered by courts of foreign countries. In the opening pages of its opinion, the Court observed:

International law, in its widest and most comprehensive sense—including not only questions of right between nations, governed by what has been appropriately called the law of nations; but also questions arising under what is usually called private international law, or the conflict of laws, and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, . . . —is part of our law, and must be ascertained and administered by the courts of justice, as often as such questions are presented in litigation between man and man, duly submitted to their determination.¹¹²

106. *Id.* at 423.

107. 175 U.S. 677 (1900).

108. *Id.* at 700.

109. Prize Act, tit. 54, Rev. Stat. §§ 4613-4652 (1878).

110. Henkin, *supra* note 10, at 874 n.92. Professor Henkin is chief reporter of the *Restatement (Third) of the Foreign Relations Law of the United States*.

111. 159 U.S. 113 (1895).

112. *Id.* at 163.

The similarity between the language of *Hilton* and the frequently quoted language from *The Paquete Habana* is not surprising, because *Hilton* is the only authority cited in *The Paquete Habana* in support of the proposition that international law is "part of our law."¹¹³ *Hilton*, however, does not strengthen the argument that customary international law is part of the laws of the United States. In the first place, questions of enforcement of foreign judgments are understood by current law not to fall within the domain of public international law. Indeed, *Hilton's* use of the term "international law" to describe the subject now labelled "conflicts of law" illustrates the dangers of assuming that nineteenth century courts using that term intended the same meaning that a modern court would. Second, it was clear even at the time *Hilton* was decided that questions about the enforcement of judgments were matters of general law, not federal questions. The case of *Huntington v. Attrill*¹¹⁴ certainly asserts that proposition, and *Huntington* was decided only three years before *Hilton*. If anything, *Hilton* read with *Huntington* illustrates that the Supreme Court may label a subject "part of our law" without intending to suggest that it falls within the "laws of the United States." In short, *Hilton* cannot be said to further the argument that the law of nations is part of "the laws of the United States."

The last case containing language that could be seen as bearing on this subject, and one of the very few involving a construction of the "take care" clause itself, is *In re Neagle*.¹¹⁵ The language is, however, dictum. This case arose out of a bizarre state of facts, the essence of which involved United States Deputy Marshal Neagle's killing of a person attacking Justice Stephen Field while Neagle was acting as bodyguard to Justice Field in California. Neagle had been assigned as Field's bodyguard as part of his official duties; a plot against Field had become a matter of public knowledge. Nonetheless, California authorities arrested Neagle for murder, and he sought a writ of habeas corpus from the federal courts. The courts' authority to grant the writ was limited. One of the circumstances justifying the issuance of a writ was that the petitioner was in custody "in violation of the Constitution or of a law or treaty of the United States." Because no statute authorized the use of marshals as bodyguards, however, it was argued that no violation of federal law was involved and that the federal courts had no authority to grant the writ.

The Supreme Court, however, relied on the "take care" clause, ask-

113. 175 U.S. 677, 700 (1900).

114. 146 U.S. 657 (1892). See *supra* note 72.

115. 135 U.S. 1 (1890).

ing rhetorically whether the President's duty was limited to enforcing statutes and treaties, or whether the duty included enforcing "the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution?"¹¹⁶ The Court concluded that this clause in fact empowered the President to protect federal judges while in the course of their duties, and that the state's confining Neagle for an act he performed as the President's agent in extending such protection was, therefore, in violation of the Constitution. Thus, the Court's reference to "our international relations" had nothing at all to do with the case before it and cannot be seen as authority for the proposition that the President's "take care" duties extend to international law.

Two other cases, decided somewhat later than those previously discussed, deserve brief mention. In *Panama Railroad Co. v. Johnson*¹¹⁷ the Court described the status of admiralty law after the adoption of the Constitution as being "the law of the United States."¹¹⁸ The later case of *Detroit Trust Co. v. The Thomas Barlum*¹¹⁹ quoted that language with approval.¹²⁰ Neither case, however, addressed the issue here in question. Both were challenges to statutes alleged to deal unconstitutionally with an aspect of the admiralty jurisdiction. *Johnson* involved the assertion that Congress had sought to remove a question from admiralty jurisdiction that could not be removed. *The Thomas Barlum* involved the assertion that Congress had sought to add to admiralty jurisdiction something that could not be included. In both cases, the quoted language was used in the course of explaining the limits of Congress' power to legislate with respect to admiralty. The issue of the relation of the admiralty jurisdiction to the "laws of the United States" jurisdictional grant was not presented. Indeed, the last time this question was presented, in *Romero v. International Terminal Operating Co.*,¹²¹ the Court relied expressly on *Canter* and squarely held that admiralty questions did not arise under the laws of the United States within the meaning of section 1331 of Title 28.¹²²

In sum, none of the cases from the relevant period, despite language apparently to the contrary, stand for the proposition that the "law of nations" falls within the "laws of the United States" in the arti-

116. *Id.* at 64.

117. 264 U.S. 375 (1924).

118. *Id.* at 386.

119. 293 U.S. 21 (1934).

120. *Id.* at 43.

121. 358 U.S. 354 (1959).

122. *Id.* at 359-81.

cle III sense. All of the cases using that language were addressing quite different issues; to apply their language to this issue is to distort their meaning beyond recognition.

d. Opinions of Attorneys General

Aside from the opinions of the two United States attorneys general discussed above,¹²³ three others issued during the nineteenth century contain language supporting the proposition that the “take care” clause obliges the President to adhere to customary international law. Of course, such opinions are just that—opinions, albeit expressed by an officer obliged by his office to be knowledgeable. As such, these opinions lack the authority of judicial pronouncements, and to the extent they contradict the cases discussed above, are simply wrong. Even ignoring the weakness of these opinions as a source of law, however, a close examination of the opinions shows cause to be skeptical of each.

The first of these opinions,¹²⁴ propounded by Attorney General Wirt in 1822, concerned a slave who had escaped from the Danish colony of St. Croix by stowing away aboard an American ship and was, at the time the opinion was rendered, imprisoned by New York authorities as a vagrant. The Danish minister had demanded the return of the slave. Wirt expressed the opinion that the law of nations obliged the United States to comply with the minister’s demand. Addressing himself to the mechanism whereby that return could be accomplished, Wirt argued that the laws of nations were among the laws of the United States that the President was charged to enforce. This obligation, Wirt stated, carried with it the power to carry out the obligation, giving the President the authority simply to order the return of property that the United States was bound to return, even if such orders would interrupt judicial proceedings. Wirt went on to suggest that the President accomplish this objective by raising the question with the governor of New York.¹²⁵

Wirt’s opinion is clear; indeed the opinion is probably the most unequivocal, relatively authoritative assertion that the “take care” clause applies to the law of nations. Nonetheless, it does not deal directly with the problem addressed in this Article. Wirt treats the “take care” clause as a source of power, not as a limitation upon power. Wirt does not deal with the situation in which the President, exercising one of his other constitutional functions, elects to act in a fashion arguably violative of customary international law.

123. See *supra* notes 31-35 and accompanying text.

124. 1 Op. Att’y Gen. 566 (1822).

125. *Id.* at 568-71.

The second relevant opinion is entitled to considerably less respect. Issued in 1859 by Attorney General Black,¹²⁶ it dealt with the case of a naturalized American who had emigrated from Hanover and who, upon a visit to that state, was drafted into the army as a Hanoverian subject. The Attorney General insisted that international law guaranteed the right of expatriation. By refusing to acknowledge the new citizenship of its former subject, therefore, Hanover was violating international law. Black went on to assert that, even if the law of Hanover forbade expatriation, the law of nations would decide the conflict between the law of Hanover and the law of the United States, under which the naturalization had taken place. Black added that any state's laws that affect the interests of other states must be made and carried out according to the law of nations.¹²⁷

Black's opinion is somewhat ambiguous. He may have meant to assert nothing more than that a state's international obligations are not somehow avoided merely because its own law forbids meeting them. This principle is a black-letter rule of international law,¹²⁸ and therefore is irrelevant to our problem. If Black meant to assert that international law controls even within a state's domestic legal system, requiring a state in its internal workings to apply the rules of international law, he asserted something very different. If applied to the United States, such a rule would in effect elevate international law to superconstitutional status, controlling not merely statutes, but provisions of the Constitution. In response to this possibility, however, one may point to the ambiguous character of the opinion and to the fact that Black was addressing the responsibilities of Hanover, not those of the United States. By no means is it clear that he would have been as categorical if the subject had been whether an American statute had to give way in the United States court system to the law of nations. Further, during this period, the United States was strongly advocating the unlimited right to immigrate.¹²⁹ This last point alone renders the opinion somewhat suspect.

The last relevant opinion is even more dubious. Rendered in 1865, it addressed the question of whether the assassins of President Lincoln could be tried before a military tribunal, notwithstanding the fact that they were civilians and that the courts of the District of Columbia, where the crime was committed, were open.¹³⁰ Attorney General Speed

126. 9 Op. Att'y Gen. 356 (1859).

127. *Id.* at 358-63.

128. *See, e.g.,* L. HENKIN, R. PUGH, O. SCHACHTER, & H. SMIT, *INTERNATIONAL LAW: CASES AND MATERIALS* 137 (1987).

129. *See* 3 J. MOORE, *A DIGEST OF INTERNATIONAL LAW* 571-76 (1906).

130. 11 Op. Att'y Gen. 297 (1865).

asserted that the law of nations was part of the law of the land, that the law of war was part of the law of nations, that under the law of war military courts were the appropriate fora for trial of violations of that law, and that the assassination, as a violation of the law of war, was thus properly tried by a military tribunal.¹³¹ Two observations suffice to dispose of this opinion. First, its assimilation of the law of nations to the laws of the United States was for the purpose of enhancing, not limiting, executive authority. Second, its conclusion was wrong. The issue that the opinion addressed came before the Supreme Court in *Ex parte Milligan*,¹³² which arose from the trial and condemnation by a military tribunal in Indiana of certain persons accused of aiding the Confederacy. Rejecting all arguments to the contrary, the Supreme Court held that civilian American citizens could not be tried constitutionally by military authority in circumstances in which the civil courts were open and functioning.¹³³ The fact that Speed was incorrect in his conclusion does not prove the falsity of his premises, but it certainly counsels against excessive reliance on them. The need for caution is reinforced when the subject he was addressing is taken into account; perhaps the Attorney General was not terribly concerned about the preliminary legal niceties required to hang Lincoln's killers.

Taken together, then, none of these opinions addressed either the question whether the "take care" clause limited the authority of the President to breach the law of nations or the question whether the law of nations fell within article III's reference to the laws of the United States. All addressed quite different subjects and sought to enhance, not limit, the executive authority. Further, the correctness of at least some of their conclusions on the points addressed is doubtful. These opinions are, therefore, entitled to little weight in this analysis.

D. *The Law of the United States: A Summary*

The foregoing makes clear that, at least throughout the eighteenth and nineteenth centuries, customary international law was not seen as part of the law of the United States, as that term is used in article III of the Constitution. As argued above, that conclusion in turn supports the determination that customary international law was not among the laws that the take care clause was intended to require the President to obey.

The current status of customary international law in the law of the United States is uncertain.¹³⁴ Perhaps customary international law can

131. *Id.* at 299-313.

132. 71 U.S. (4 Wall.) 2 (1866).

133. *Id.* at 127.

134. *See infra* notes 138-96 and accompanying text.

now be considered federal common law.¹³⁵ If so, then customary international law may now be held to fall within the "laws of the United States"¹³⁶ for purposes of analyzing the jurisdiction of the courts. This result may follow from *Illinois v. City of Milwaukee*,¹³⁷ a decision holding that questions turning on the federal common law that governs uses of interstate waters "arise under" federal law for purposes of the statute granting the district courts subject matter jurisdiction in federal question cases. Nothing in that opinion, however, purports to deal with more than the jurisdiction of the courts. In particular, the opinion lacked any suggestion of an intention to broaden the President's responsibilities. Absent such a suggestion, it appears reasonable to continue defining "laws" for purposes of the President's responsibilities in the same way that the related term "laws of the United States" has been defined for most of the history of this country. Changes in the understanding of executive authority should not be deemed to flow by implication from changes in the understanding of the authority of the courts.

III. CUSTOMARY INTERNATIONAL LAW AS FEDERAL COMMON LAW: LIMITS ON LAWMAKING

The foregoing discussion explained why customary international law is not among the laws that the President must take care to see faithfully executed. Independent reasons, in any event, also prohibit the courts from relying on customary international law as a basis for restraining the President. Part III discusses some of these limits. Subpart A of Part III demonstrates that customary international law can be no more than federal common law. In other words, customary international law can enjoy no greater status in American law than other rules made by federal judges. Subpart B makes clear that the arguments supporting the status of customary international law as federal common law are weak and that customary international law does not fit within the limitations the Supreme Court generally has observed in creating federal common law.

A. *Customary International Law—No More than Federal Common Law*

Subpart B demonstrates reason to doubt that customary international law has attained the status of federal common law, and recom-

135. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 111, 112 (rev. ed. 1987) [hereinafter RESTATEMENT, THIRD].

136. See *infra* notes 138-96 and accompanying text.

137. 406 U.S. 91 (1972).

mends that customary international law should not be given that status. First, however, another matter must be addressed. Some have argued not only that customary international law is federal common law, but also that customary international law is in some sense of higher status than federal common law. Specifically, Professor Henkin has asserted that, as between a statute and a rule of customary international law, the later in time controls. That is, for purposes of American domestic law, a newly emerged customary rule can displace an Act of Congress.¹³⁸ Professor Henkin grounds this conclusion on the argument that treaties and customary law are law of the United States because they constitute binding international obligations of the United States, and that since treaties and customary law are of equal status in international law, they must likewise be of equal status in American domestic law.¹³⁹ International law differs from common law, he argues, in that international law is "found," not created, by courts.¹⁴⁰

These assertions are incorrect, as is demonstrated by consideration of both the cases dealing with the place of customary international law in the hierarchy of American legal rules and the structure of that hierarchy itself. The analysis should begin with the assertion that customary international law is "part of our law." What, precisely, can that phrase mean?

Purely as a matter of logic, that somewhat slippery phrase could conceivably have any of three meanings. The phrase could mean that United States lawmaking bodies determine the content of customary international law—that customary international law is part of our law in the sense that our legislation creates it. Alternatively, the phrase could mean that American law is part of international law and controlled by international law in the same way that, within American law, statutes are controlled by constitutional provisions. Finally, the phrase could mean that customary international law is part of American law in the sense that American lawmaking bodies make rules for use in our own courts on the subjects covered by customary international law. The rules on these subjects are not for the whole world, but only for ourselves.¹⁴¹

Merely to state the first of these formulations is to reveal its falsity. Subscribing to the first formulation would mean that the whole world is bound by the international law determinations of the United States.

138. Henkin, *supra* note 10, at 878.

139. *Id.* at 877-78.

140. *Id.* at 876.

141. For a generally similar breakdown of the possible ways international law can fit into a domestic legal system, see Sprout, *Theories As To the Applicability of International Law in the Federal Courts of the United States*, 26 AM. J. INT'L LAW 280 (1932).

While the United States certainly contributes to the creation of customary law, as do all states, the United States obviously does not dictate to the world the content of international law.

The second formulation amounts to asserting that United States law and international law form an integrated system, with domestic law subordinated to international law. This meaning is also necessarily incorrect, given the place of treaties and executive agreements in American law. In international law, the United States is bound not only by those agreements ratified by the President by and with the advice and consent of two-thirds of the Senate—"treaties," as the term is used in American domestic law—but also by agreements concluded by the President on his own authority, without congressional action.¹⁴² When such agreements are binding in international law, they retain that international law status without regard to their status in domestic law. Nonetheless, the Supreme Court has held that a treaty may be superseded in domestic law by a subsequently enacted statute, notwithstanding that a United States refusal to apply the treaty would breach an international legal obligation.¹⁴³ The Supreme Court has never addressed the relative status of agreements concluded by the President solely on his own authority and federal statutes, but one circuit court has held that, for purposes of domestic law, statutes necessarily control such agreements without regard to priority in time.¹⁴⁴ These judicial pronouncements necessarily mean that when otherwise constitutional American legislation violates American international obligations, whether these obligations are derived from treaty or executive agreement, the violation is irrelevant for purposes of applying that legislation domestically. Moreover, this conclusion necessarily means that international law does not control domestic law in the United States. Otherwise, legislation violating international obligations would be void, just as legislation violating constitutional restraints is void.

What remains then is the third possible formulation: That international law is part of the law of the United States in the sense that American lawmaking bodies develop rules on the subjects addressed by international law, and that these rules are binding not on the whole world, but only within the United States.¹⁴⁵ Assuming that this formu-

142. See generally McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy* (pt. 1), 54 YALE L.J. 181, 261-82 (1945) (listing many agreements concluded by the President both with Congressional sanction and on his independent authority).

143. *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581, 600 (1881).

144. *United States v. Guy W. Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953).

145. For a more thorough analysis, reaching the same conclusion, see Sprout, *supra* note 141.

lation is the rule in the United States, one must consider the power of those American lawmaking bodies in evaluating the argument that customary international law is, within the American legal system, the equivalent of federal statutes.

The most important case to do so is *Erie Railroad v. Tompkins*.¹⁴⁶ That case does more than reject the existence of a general federal common law. The reasoning *Erie* uses to support its result dictates a particular way of thinking about the authority of the federal courts. *Erie* rejects the notion that law can exist without being derived from some definite authority; rather, *Erie* holds that all law takes its force from the authority of the institution that promulgates it. That is, whatever a particular court's reasons for adopting a rule that is not based on a statute or a constitutional provision, that rule counts as law not because of the reasons the court gives for relying on it, but simply because the court holds that the rule is law. Correspondingly, the force of a common-law rule depends on the authority of the court that adopted it. If the court lacks authority to promulgate the rule, as the federal courts lacked authority to promulgate a general common law in *Erie*, then the rule is void. Moreover, if an institution is competent to promulgate rules only in certain circumstances, then those rules necessarily apply only in those circumstances. Finally, *Erie* makes clear that only one source can authorize lawmaking by federal courts: The Constitution.

This approach to the authority of the federal courts necessarily requires rejection of Professor Henkin's arguments regarding the place of customary international law in American law. He asserts, in effect, that customary international law is binding without any action by American institutions because the courts in applying it simply discover a rule they are required by some exterior source to apply. *Erie*, however, clearly rejects the very concept of such external authorities. Rather, *Erie* necessarily stands for the proposition that law can exist in the United States only as constitutionally developed by legislatures and courts, and that this law exists only to the extent that such bodies promulgate it. When an American court applies a rule of international law as a rule of decision, that international law rule is law in the United States only because that court is authorized to make it so. Treaties and customary law are not, as Henkin asserts, law in the United States because they are international obligations of the United States. As *Erie* makes clear, they are law in the United States because and to the extent they are made law by the Constitution, or by Congress, or by the courts. To say that courts "find" customary international law is to confuse the technique the judge uses to determine the rule with the essence of the rule's

146. 304 U.S. 64 (1938).

authoritativeness; the rule's authority flows not from the sources upon which the judge relies, but from the judge.

Indeed, one need not rely on deductions from *Erie* for this proposition. The Court made this proposition explicit in admiralty cases decided sixty years before *Erie*. As noted in Part II,¹⁴⁷ the Court expressly held in *The Lottawanna* that the general maritime law, as discoverable from the practice of all states, was law in the United States only to the extent it was adopted in the United States; the fact that a rule adopted in the United States might be an incorrect statement of such general law was irrelevant, for what controlled in this country was not the general law itself, but whatever version of it American institutions applied.¹⁴⁸ Again, as noted above,¹⁴⁹ the Court took the same position in the *Western Maid* case, rejecting the existence of some "mystic over-law to which even the United States must bow."¹⁵⁰ To be sure, these cases dealt with maritime law, not customary international law, but that distinction makes no difference on these facts. *The Lottawanna* asserts that its formulation applies also to international law and the laws of war,¹⁵¹ and every argument that could be made for the "mystic over-law" status of customary international law could equally have been asserted for maritime law in these two cases. Neither case denied the existence of a general maritime law, nor rejected the possibility of discovering its content by examining the practice of other states.

Any argument based on either the importance of the law of nations to the Framers or the need for unified determinations of the law of nations necessarily applies to maritime law no less than to customary international law, because both were considered part of the law of nations at the time the Constitution was written. Indeed, one can make a stronger argument that maritime law is binding in the United States without action by American authorities than that customary international law is similarly binding. This conclusion follows from the constitutional grant of admiralty and maritime jurisdiction. This grant of jurisdiction implies that the Framers believed that some law existed to be applied in the exercise of such jurisdiction, but in 1789 this law could only have been general law. Of course, there is no equivalent express jurisdictional grant for customary international law.

In short, the cases make impossible the assertion that international law can be law in this country by reason of some power other than that possessed by American institutions. International law can be law in the

147. See *supra* notes 51-54 and accompanying text.

148. 88 U.S. (21 Wall.) 558, 572 (1874).

149. See *supra* notes 56-59 and accompanying text.

150. *In re Western Maid*, 257 U.S. 419, 432 (1922).

151. *The Lottawanna*, 88 U.S. (21 Wall.) 558, 572 (1874).

United States only to the extent that the institutions that adopt it are empowered to make it law. If a court adopts a rule of customary international law as a rule of decision, then that rule is law only to the extent that the courts are empowered to make law. And the limits on the lawmaking powers of the federal courts necessarily restrict the extent to which those courts can apply international law to override a statute.

The Supreme Court has expressly addressed the question of the federal courts' power to create common law on a subject after Congress has legislated on the subject. The Court has held that when Congress legislates on a subject the courts lose power to develop a common law that would supplant the legislation, even regarding subjects on which the courts have previously claimed the authority to make common law.¹⁵² Indeed, the Court has held that once Congress legislates as to a part of a subject, assuming that the rest of the subject would continue to be governed by a particular common-law rule, courts lose the power to alter even that common-law rule.¹⁵³

The proper conclusion, then, is to reject the notion that international law must be seen in the United States as having higher status than federal common law, even assuming that international law ranks as federal common law. The opposite view cannot be reconciled either with *Erie's* explanation of the source and limits on federal courts' lawmaking power, or with the general limitations on the creation of federal common law.

B. Is Customary International Law Federal Common Law?

Sections 111 and 112 of the *Restatement (Third) of the Foreign Relations Law of the United States (Restatement)* assert that customary international law is federal common law.¹⁵⁴ That is, customary international law is part of the body of law that falls within the federal question jurisdiction, but does not involve application or interpretation of either the Constitution or federal statutes. Rather, its content is determined by decisions of the federal courts. The discussion below shows, however, severe weaknesses in the *Restatement's* position. First, authority does not support this position. Second, the subjects on which the Supreme Court has made federal common law are, with one uncertain exception,¹⁵⁵ all subjects as to which the Supreme Court has had

152. See *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978); *Arizona v. California*, 373 U.S. 546 (1963).

153. See *Edmonds v. Compagnie Générale Transatlantique*, 443 U.S. 256, 271-73 (1979). Because the federal courts cannot refuse to apply a statute in order to apply a common-law rule, international law—a mere element of the federal common law—likewise cannot supplant a statute.

154. RESTATEMENT, THIRD, *supra* note 135, §§ 111, 112.

155. See *infra* notes 185-91 and accompanying text.

ultimate lawmaking authority since the first days of the Republic; the Supreme Court had no such ultimate authority regarding customary international law.

Analysis of the general question of the status of international law in federal law necessarily starts with the *Restatement's* rationale for its conclusion. That the authority cited does not support the *Restatement's* position is immediately apparent. The only authority the *Restatement* lists¹⁵⁶ is *Banco Nacional de Cuba v. Sabbatino*,¹⁵⁷ which can at best be described as suggestive. The crucial jurisdictional issue was not present in the case, and the Court noted that issue only to the extent of stating that the Court was not addressing it.¹⁵⁸ Nor does the Court's treatment of the merits advance the *Restatement's* position. The case dealt with the act of state doctrine: the rule that, under certain circumstances, American courts will not pass on the legality of the acts of foreign governments. The Court clearly held that whether the doctrine was applied was a matter of federal, not state, law.¹⁵⁹ In doing so, however, the Court characterized the issue as "concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community."¹⁶⁰ Necessarily, apportionment of authority in the United States between the judges and the President must be a matter of American domestic law, not international law. Moreover, saying that an issue involving the implications of presidential authority is governed by federal law is clearly a long way from saying that customary international law is federal law.

Although *Sabbatino* is weak authority, proponents of the *Restatement's* conclusion might point to the Court's justification for its conclusion that application of the act of state doctrine must be a matter of federal law. The Court stressed the importance of avoiding the divergence of judicial opinions and parochialism in matters affecting international relations, and quoted with apparent approval Judge Jessup's cautions against extending the *Erie* doctrine to international law.¹⁶¹ These factors arguably justify treating international law as a matter of federal law, just as the act of state doctrine is treated.

These arguments, however, are weaker than they appear. First of all, questions concerning the application of the act of state doctrine can arise only in cases in which foreign acts of state are in issue; thus these

156. RESTATEMENT, THIRD, *supra* note 135, § 111 reporter's note 3.

157. 376 U.S. 398 (1964).

158. *Id.* at 421 n.20.

159. *Id.* at 425.

160. *Id.*

161. *Id.*

questions necessarily raise risks of foreign policy complications, which in turn raise questions regarding which agencies of government should address those risks. In essence, the *Sabbatino* court saw itself faced with a question of "who's in charge," and resolved that question. Obviously, leaving open the possibility of the state courts giving divergent answers to that question would mean both that the issue had not been resolved and that the apparently clear constitutional scheme of allocating control of foreign affairs to the federal government had been ignored.

All issues of international law clearly do not present similar dangers. For example, whether officials of an American state can arrest a suspected non-American drug smuggler on the sea outside American territorial waters is an issue of, among other things, international law. Even if the suspect's home nation objected to a state court's resolution of that issue, however, such a case would be unlikely to create the same kind of difficulties as would be created by a questioning of the legality of a foreign state's own acts. History also provides some perspective on this issue. After all, tremendous concern existed at the time of the framing of the Constitution about state judicial failures to properly apply international law.¹⁶² Yet, as the discussion in Part II demonstrates, that concern was not thought in 1789 to require treating international law as something on which the federal courts must have the last word. That the importance of this subject has so increased over the last 200 years as to require a different approach is by no means clear.

Sabbatino, then, does not hold that customary international law is federal common law, and neither does history support that proposition. Furthermore, this position suffers from an additional problem. This position depends on the assumption that all which is needed to permit the federal courts to fashion common law on a subject is the conclusion that the subject is "federal"—not properly controlled by state law. This assumption, however, is false.

The Supreme Court has never held that a grant of authority to the political branches to deal with a subject is enough to permit the Court to frame common-law rules on that subject, even if federal authority is exclusive of the states.¹⁶³ For example, the commerce clause has never

162. See *supra* note 79 and accompanying text.

163. See *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972). That case held only that "federal common law" is "federal law" for purposes of 28 U.S.C. § 1331(a). *Id.* at 98-101. It did not address the question of how federal common law is created. *Illinois v. City of Milwaukee* extended previous decisions recognizing a federal common-law rule governing regulation of interstate waters to cover water pollution, but did not create a body of law from scratch. Moreover, the federal law of interstate waters as developed fits the pattern described for the third category of federal common law discussed below: (1) It was developed in cases between states—an explicit article III heading of jurisdiction; (2) it was a subject on which the law of no one state could govern, see *Hinderlider v.*

been used to justify a federal common law of interstate commerce.¹⁶⁴ Rather, the Court has engaged in common-law rulemaking only in much more limited circumstances.

Preliminarily, a definition of what is meant in this context by "common-law rulemaking" is helpful. As used here, the term is applied to the creation or limitation of a right to recover in circumstances when no statute or constitutional provision purports to create or limit such a right. While the subject of federal common law is murky,¹⁶⁵ and sharp categorizations are suspect, federal common law apparently can be broken down into four broad groupings.

First are those groups of rules developed by the courts in response to Congress' apparent intent that federal law generally govern a particular subject even though Congress has regulated only portions of that subject by legislation or by treaty. Most, if not all, of these cases involve situations in which the congressional intent is not seen as indicating what the content of a particular federal rule should be, but only that the rule—whatever the rule is—be determined by federal law. An obvious example is the category of cases in which the federal courts deduced their authority to frame rules of decision from the enactment of statutes that conferred jurisdiction to deal with subjects on which Congress had possessed but not exercised the power to frame substantive law.¹⁶⁶ Another example is provided by *Illinois v. City of Milwaukee*,¹⁶⁷ in which the Court inferred the existence of a federal common law of water pollution from the numerous congressional enactments dealing with interstate waters and with pollution, none of which, however, purported to regulate the subject in question.¹⁶⁸

The second category of federal common-law rules focuses on the implications, not of congressional action, but of the Constitution itself. The federal courts have crafted rules in this second category to deal with situations in which the Constitution is thought to require, by im-

La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938); and, (3) the Supreme Court had control of the matter through its exclusive original jurisdiction in state versus state cases.

164. See M. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 98-99 (1980).

165. This subject is one on which much has been written. See generally P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (1973); M. REDISH, *supra* note 164, at 79-107; Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881 (1986); Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964); Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024 (1967); Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797 (1957).

166. See, e.g., *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

167. 406 U.S. 91 (1972).

168. *Id.* at 101-08.

plication, a particular result in legal proceedings in which Congress has not acted to bring about that result. This group of rules seems limited to issues involving limitations on the power of the state governments vis-à-vis the federal government, or on the power of the federal government, or on the power of one of its branches. The Court has not created rules purporting to govern the conduct of society at large simply on the basis of the implications of the Constitution. Examples of this category of rules include *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,¹⁶⁹ creating a private right of action for persons whose fourth amendment rights were violated by federal officers; *Sablatino*,¹⁷⁰ limiting the authority of federal and state judges to take actions that might interfere with conduct of foreign policy by the political branches; and the cases establishing immunities for individual federal officials from state court suits grounded on actions that the officials took in the course of their duties.¹⁷¹ To repeat, in all these cases, the Constitution implicitly requires a particular legal outcome: That federal officials not violate the fourth amendment, for example, or that the states not second-guess the federal government in the form of state suits against federal officials for actions taken in the course of duty. Given these constitutional requirements, the courts have framed claims and defenses to implement them, despite the absence of congressional action or express constitutional warrant for judicial activity.

In the third category of cases, both Congress and the Constitution have indicated a desire that the federal courts address the issues involved, but have provided no particular indication of the desired outcomes. Three identifying characteristics mark each case in this category. First, these cases fall under express jurisdictional grants, exclusive of "arising under" jurisdiction contained in article III. Second, since 1789 Congress has implemented those grants regarding all these subjects either by giving the federal courts exclusive jurisdiction of the subject, or by vesting in the Supreme Court jurisdiction to hear appeals on the subject from the state courts. Finally, in all these cases, the subjects on which the federal courts have framed law would have been held, under the system of *Swift v. Tyson*,¹⁷² to fall in the domain of general law. As indicated above, federal courts seeking to determine general law during the reign of *Swift v. Tyson* analysis were not expected to defer to the courts of any particular locality. The effect of a combined constitutional and congressional grant to the Supreme Court

169. 403 U.S. 388 (1971).

170. 376 U.S. 398 (1964).

171. See, e.g., *Howard v. Lyons*, 360 U.S. 593 (1959).

172. 41 U.S. (16 Pet.) 1 (1842).

of ultimate appellate authority on such general law subjects was, therefore, that the Court became empowered to determine the appropriate public policy on such subjects.

This third group of subjects falling within the federal common law includes admiralty¹⁷³ cases involving interstate boundaries and waters¹⁷⁴ and cases in which the federal government acts as a participant in transactions rather than as a regulator of them.¹⁷⁵ Each category is the subject of an explicit jurisdictional grant in article III. Moreover, all these subjects are ones over which the Supreme Court has actually had control since 1789, either through Congress' vesting exclusive jurisdiction over the subject in the federal courts, or through Congress' permitting appeals on the subject from the state courts to the Supreme Court. Examining the Judiciary Act of 1789 bears out this observation. Section 9 vests exclusive original admiralty and maritime jurisdiction in the federal district courts.¹⁷⁶ Section 13 vests in the Supreme Court exclusive original jurisdiction over cases in which states sue other states;¹⁷⁷ necessarily, this class of cases will include many that present disputes over state boundaries or control of interstate waters. Section 22 gives the Supreme Court jurisdiction to review decisions of the circuit courts upon a writ of error, which procedure would have permitted the Court to review cases in which the United States was a party.¹⁷⁸ Section 25 gives the Supreme Court jurisdiction to re-examine on writs of error cases decided by the state courts in which

is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity, . . . or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party . . .¹⁷⁹

This language is surely broad enough to reach any case in which the United States is litigating in a state court, and will also reach cases in which issues of state boundaries or control of water are raised, although the federal nature of those questions may not have been apparent in 1789.¹⁸⁰ With respect to these areas, then, the final authority

173. See, e.g., *The Lottawanna*, 88 U.S. (21 Wall.) 558 (1874).

174. See, e.g., *Hinderlider*, 304 U.S. at 92.

175. See, e.g., *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943).

176. Judiciary Act of 1789, *supra* note 38, § 9, at 76-77.

177. *Id.*, § 13, at 80.

178. *Id.*, § 22, at 84.

179. *Id.*, § 25, at 85-86.

180. Apparently, the Supreme Court first squarely held to this effect regarding waters in

since 1789 has been the Supreme Court. Not only does article III envisage this scheme, in permitting the Supreme Court to have appellate jurisdiction on these subjects, but the vision has also been realized through jurisdictional legislation.

Additionally, all three of these subjects fall within the "general law." As discussed at length in Part II, admiralty clearly fell within the area of general law. Questions of interstate boundaries and waters necessarily cannot be resolved on the basis of the law of any one state, as the Court held in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*¹⁸¹ Finally, the Court has applied federal common law to cases involving the United States as a participant in circumstances in which the subject in question was a general law subject. *Clearfield Trust Co. v. United States*,¹⁸² for example, involved negotiable paper—a subject that was seen as covered by general law as early as the *Swift* case.¹⁸³ When the Supreme Court has been asked to develop federal common law under this third category on subjects that in 1789 would have been local law, the Court has generally backed off.¹⁸⁴

Thus, with respect to all subjects in this third category of federal common law, the Supreme Court has been applying jurisdiction specifically provided for in article III. In each of these jurisdictional areas, ultimate Supreme Court appellate authority on a matter not subject to "local law" presumably implies a constitutional and congressional decision that the states should defer to the Court on these subjects—a decision that justified not simply developing a federal rule distinct from that of the states, but requiring the states to adhere to the federal rule. In short, on all these subjects the Constitution and the Congress in their jurisdictional grants have absolutely and unambiguously indicated that the Supreme Court is to determine the law.

The fourth and final category in which the Supreme Court has created federal common law involves cases in which the proprietary inter-

Hinderlider, decided in 1938. 304 U.S. at 110-11. Presumably, the issue had not reached the Court earlier. Similarly, the boundary issue apparently did not reach the Court until 1916. *Cissna v. Tennessee*, 246 U.S. 289, 295 (1918).

181. 304 U.S. at 110.

182. 318 U.S. 363 (1943).

183. *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842).

184. For example, in *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977), the Court overruled *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973), which had held that federal common law governed questions regarding the effect of a river's movement on title to the riverbed. The Court explained the overruling by observing that *Bonelli's* reliance on *Borax, Ltd. v. City of Los Angeles*, 296 U.S. 10 (1935), as to the applicability of federal law, had been misplaced. *Borax*, according to the Court, had applied federal common law on a much narrower basis than did *Bonelli*. Further, the Court held that *Bonelli* had ignored a line of cases indicating that issues of the sort in question were properly questions of state law. *Corvallis*, 429 U.S. at 376-77.

ests of the federal government are at stake, although private persons are the actual litigants in the suit. This category includes only the very recent case of *Boyle v. United Technologies Corp.*,¹⁸⁵ that established an immunity from state tort suits for persons contracting with the United States, at least in some circumstances.¹⁸⁶ In that case, the Court deduced its authority to create federal common law by analogy to the cases that applied federal common law to the proprietary interests of the United States and established immunities for federal officers. The justification for the result in *Boyle* was the federal interest in avoiding the difficulties in procurement that would arise if the federal government wished to purchase equipment with features that could give rise to liability under state tort law.¹⁸⁷ The Court limited the immunity to situations in which the equipment was not an off-the-shelf model, but rather had been designed according to federal specifications; only in such a case, the Court held, was there a possibility of a significant conflict between state law and a federal function, because application of tort law in such a case could inhibit the discretion of federal officials seeking a design which, in their judgment, best met the government's needs.¹⁸⁸

While this discussion may appear disjointed, a unifying principle that ties together the first three categories of federal common law does seem to emerge. In all cases, some authority other than that of the courts has created a situation requiring a federal rule of law in circumstances in which only the courts can supply a rule. In the first category, Congress has indicated a desire to occupy a subject, but has left gaps that require filling. In the second, the Constitution demands a particular outcome, but Congress has failed to legislate to obtain that outcome. In the third, both Constitution and Congress have required the courts to hear cases that state law cannot control, but have provided them no rules of decision, thereby forcing the courts to devise the rules.

Given this breakdown of the types of federal common law, where does customary international law fit? Obviously, the first category is irrelevant; this category is not a subject on which Congress has legislated. Nor is the second category relevant. The Constitution has no implicit requirements regarding particular outcomes on the merits in cases involving customary international law. To be sure, as *Sabbatino*¹⁸⁹ clearly holds, the Constitution requires that the states not interfere with the conduct of foreign policy under the rubric of applying international law

185. 56 U.S.L.W. 4792 (U.S. June 27, 1988).

186. *Id.* at 4793-96.

187. *Id.* at 4793-94.

188. *Id.* at 4795-96.

189. 376 U.S. 398 (1964).

in their courts, but this matter is quite different from the one at issue. Nor can customary international law fall within the third category of federal common law. While customary international law is, of course, a subject falling within "general law," it is clearly not a subject which either the Constitution, through an express jurisdictional grant, or the Congress, through grants of appellate jurisdiction, intended to be controlled by the Supreme Court. Applying the unifying principle, no authority outside the courts has required them to act; there remain no gaps to be filled, no outcomes to be ensured, and no grants of jurisdiction to be implemented. Customary international law, in short, does not show the hallmarks of the first three types of federal common law.¹⁹⁰

190. It might be argued that, despite the arguments in the text, the federal courts must be able to implement rules of customary international law in cases not involving the Executive, and that an argument that they cannot do so proves too much. Granting such a need, it does not follow that the need must be met by calling customary international law "federal common law." Whether that step is needed depends on the actual limits on the ability of the federal courts to determine the content of customary international law and the likelihood of state court interference in the process.

In considering the actual situation, it first can be argued that, whatever the intended scope of the Alien Tort Claim Act, 28 U.S.C. § 1350 (1982), the power of Congress over international commerce and the power granted by the "define and punish" clause, U.S. CONST., art. I, § 8, cl. 10, amply sustain that statute, assuming it is read, as it may be, as a direction to the federal courts to apply international law in the cases it covers. For a similar approach, see Casto, *The Federal Courts Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 510-22 (1986); Paust, Book Review, 56 N.Y.U. L. REV. 227, 232 n.23 (1981). On the theory cited in the text, the Alien Tort Claim Act would arguably be more easily defended than the statutes involved in either *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957), or *Verlinden v. Central Bank of Nigeria*, 461 U.S. 480 (1983), because the Alien Tort Claim Act can be read as expressly providing a rule of decision for the courts if the Act's reference to the law of nations is seen as a direction to the courts to rely on that body of law. The statutes upheld in *Lincoln Mills* and *Verlinden* contain no such references to a body of law. Since an alien plaintiff could sue under the Act in federal court if he chose, while a defendant could remove a case within the Act to federal court if the alien commenced it in a state court, see 28 U.S.C. § 1441(a) (1982), getting such suits into federal court is not difficult if either party wants a federal determination. Also, the statute apparently permits suits against anyone. While the political question doctrine, the act of state doctrine, and the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 (1982), may limit application of the Alien Tort Claim Act, compare *Siderman v. Republic of Argentina*, No. C.V. 82-1772-RMT (MCx), slip op. at 2-3 (C.D. Cal. filed March 7, 1985) with *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421 (2d Cir. 1987), cert. granted, 108 S. Ct. 1466 (1988), such limitations would presumably apply equally to claims based on customary international law seen as federal common law. It would appear that any suit by an alien for international law torts cognizable in American courts could be heard under this statute. Thus, federal jurisdiction in suits by aliens for tortious international law violations does not require reliance on nonstatutory authorized federal common law.

A second possible group of suits would be those against foreign governments brought by Americans or by aliens with nontort claims. In such cases, 28 U.S.C. § 1330 grants jurisdiction to the federal trial courts for all claims on which the foreign state cannot claim sovereign immunity. Cases in which sovereign immunity are available will not be resolved on the basis of substantive law, no matter who devises the substantial law. Thus, the existence of § 1330 at least guarantees that a federal court can hear all the cases in which the occasion to apply customary international law to a foreign state defendant could arise.

Admittedly, the fourth category of federal common law represented by the *Boyle* case does not fit the "external authority" model. No authority external to the court has created a situation either requiring a particular outcome to *Boyle* type suits or requiring the Court to address such suits without providing a rule of law for the courts to apply. While this fact casts doubt on the correctness of the decision,¹⁹¹ it provides no

This statute does not contain the Alien Tort Claim Act's express reference to international law. However, the federal interest in the subject would arguably justify also reading § 1330 as a direction to the federal courts to develop international law to the extent it applied. Again, removal can ensure that foreign state defendants are in federal rather than state courts.

Yet a third group of suits would be those by or against the United States government, or against its officials in their official capacity. Here, either the United States would be a party or, if the party were nominally a particular official, the interests of the United States clearly would be implicated. Given the article III grant of jurisdiction in cases in which the United States is a party, and the *Clearfield* precedent for developing federal common law when analogous important interests of the federal government are involved, there is also a basis here for the federal courts' application of international law without seeking to derive a federal common-law grant from the federal question language of article III. Again, the political question doctrine might apply, but that doctrine would apply no matter what the source of rules the courts applied.

The only suits not covered by any of the foregoing categories are those by Americans, foreign governments, or aliens with nontort claims against someone other than the United States, a United States government official, or a foreign government. While several of these cases could be brought in federal court under the diversity jurisdiction, 28 U.S.C. § 1332(a), a federal court deciding the case would apply state law (assuming customary international law is not held to be federal common law), and state court decisions would not be reviewable by the Supreme Court. This result, however, is not necessarily fatal. The subject matter of such suits is hard to imagine; it seems doubtful, however, that these suits could involve crucial issues of international law. Whether much harm would come from letting the states develop the rules of law in such cases is unclear. At least the likelihood of harm in this last class of cases is not so obvious as to justify the constitutionally risky step of having the federal courts proclaim a new area of federal common law without either constitutional or statutory sanction.

191. The problem with the *Boyle* case is that the Court's majority never really explained why the belief that a given rule would be a good rule empowers the federal courts to create that rule. Of course, the Court's other federal common-law cases were very often silent on the source of the Court's power to act, but those other cases fit the model expounded in the text; the Court in those cases could plausibly have pointed to the implications of either congressional action, constitutional language, or both as compelling the Court to act. Since such sources of compulsion are absent in *Boyle*, the Court would have simplified its holding if it had more clearly justified its result. Certainly the reasons advanced by Justice Scalia are no justification.

While it may be true that state tort law applied in the *Boyle* setting could force the government to pay higher prices for its purchases than it would otherwise pay, any element of state law could drive up federal outlays. Defense contractors presumably pay state taxes, thus driving up the prices the government pays; does this mean the Court could set state tax rates? State laws regulating testamentary dispositions or family matters could make residence in the state unattractive to persons who might otherwise apply for federal jobs there, forcing the government to either increase salaries to attract workers or rearrange its operations in a possibly costly way. In such a case, could the federal courts set aside such state rules and invent their own? To be sure, the Court expressly stated that the fact that a state rule might drive up federal costs does not alone justify substitution of a federal rule; the Court held that a "significant conflict" with a federal policy or interest is also required. Again, however, the Court's explanation of what counts as a significant conflict was opaque. Such a conflict was said to exist if a state rule interferes with discretionary decisions by federal officials. The Court's explanation of what counts as a discretionary decision, however, was

support to an argument that customary international law is federal common law. The *Boyle* type of suit involves only cases touching on the federal government's proprietary activities; customary international law obviously has nothing to do with the government as a participant in the market. Further, the core of *Boyle's* rationale is the Court's desire to protect the discretion of federal officials from even indirect interference by state tort rules. A case aimed at enhancing governmental discretion is weak authority for the proposition that federal common law includes rules of customary law that would limit such discretion. Thus, even this new category of federal common law cannot be seen as including customary international law.

Relying on the federal common law to control executive discretion to the degree suggested by some would be taking the courts beyond areas sanctioned by precedent. To be sure, federal courts *have* limited the executive without *express* congressional authorization, but only in much different circumstances. *Clearfield* can in a sense be seen as a case imposing constraints on the Executive, but in that case the Executive was involved as a participant in a transaction, not as a regulator of public policy.¹⁹² Other cases limiting the Executive likewise involve the Executive as a participant,¹⁹³ except for the cases in which the Court

most unclear. The exercise of discretion, said the Court, can be identified if the product that is the basis of suit was manufactured according to government specifications, rather than simply being selected off-the-shelf by a government official. *Boyle*, 56 U.S.L.W. at 4795. But what about the official who, in exercising his discretion, decides to save time and money by ordering off-the-shelf rather than devising his own specifications? Would not his discretion somehow be affected if the prices of off-the-shelf items were driven up by state tort law rules? Indeed, consider the examples given in this footnote. Surely the discretion of officials is affected when they know that they must pay more to deal with contractor X than with contractor Y because X operates in a high tax state. The limiting principle is thus quite befuddling, and appears not to be much of a limit.

The rule of *Boyle*, in short, could be used to set aside almost any provision of state law. The Court has never claimed to have such power. Justice Scalia needed either to give the basis for such a claim of power or explain why the rule he crafted was not such a claim. He did neither.

192. Further, rules of the *Clearfield* type cannot be seen as actually limiting executive discretion, since they serve to provide a framework within which discretion can be exercised in circumstances in which the absence of a framework would preclude action. *Clearfield* itself, for example, could be seen as limiting executive discretion by imposing a duty on the government, when a bank has presented for payment a United States government check on which an endorsement has been forged, to give notice of forgery within a reasonable time if greater delay would damage the bank. Any rule the Court promulgated on the subject, however, would have limited executive discretion in the same way, except for a rule that the United States has no duties whatever to persons dealing with its commercial paper. Such absolute license to the United States would, practically at least, limit executive discretion, because it would increase the risk of dealing in United States paper so greatly so as to impede the financial operations of the government. The government needed some rule legally binding on itself to give itself the credibility needed to engage in the transactions in which it sought to engage. In this sense *Clearfield* was empowering, not limiting.

193. See, e.g., *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979) (United States as lender and loan guarantor); *United States v. Seckinger*, 397 U.S. 203 (1970) (United States as contractor).

had much stronger reason to believe that the Constitution and the Congress had intended for the Executive to be controlled than would be true in the case of customary international law. For example, in *The Paquete Habana*, the Court certainly limited the Executive acting in his sovereign capacity. The Court did so, however, against the background of both the express admiralty jurisdictional grant in the Constitution and the action of Congress in heavily regulating prize law.¹⁹⁴ The authority for applying customary international law is not comparable.

This line of reasoning exposes the problem with Professor Kirgis' suggestion that some elements of customary international law can be self-executing, and thus automatically binding on the Executive.¹⁹⁵ His argument ignores the point explained above: That after *Erie*, the promulgation of rules of common law clearly amounts to legislation by courts, and thus the courts' power to promulgate rules is limited by the general limits on their authority. As just discussed, the courts have not relied on federal common law to limit Executive discretion without relatively explicit constitutional and congressional direction. This stance means, in effect, that there can be no "self-executing custom." This conclusion follows because in context "self-executing custom" would refer to a common-law rule that federal courts could use to control executive discretion without such constitutional and congressional direction. As explained above, the creation of such rules is without precedent.

In sum, examining the argument that customary international law is federal common law reveals that the *Restatement's* authority for its assertion to that effect is weak and that customary international law does not share basic characteristics of the subjects in which the Supreme Court has made federal common law. Further, neither precedent nor basis in constitutional language and congressional action supports the Courts' control of the Executive to the extent suggested by the *Restatement*. To say the least, all these factors counsel caution in accepting the idea that customary international law is federal common law.¹⁹⁶

194. See *supra* notes 107-10 and accompanying text.

195. Kirgis, *supra* note 10, at 372.

196. Judge Jessup apparently disagreed with this view. In a 1939 "editorial comment," he expressed the view that *Erie* should not be interpreted as obliging the federal courts to defer to the courts of the states in matters of international law, which he believed to be a part of federal common law. Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM. J. INT'L LAW 740 (1939). His argument, however, has several weaknesses. He relied on the language from *The Paquete Habana*, 175 U.S. 677, 700 (1900), *Hilton v. Guyot*, 159 U.S. 113, 163 (1894), and *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815). See *supra* notes 105-14 and accompanying text. He did not, however, take note of the difficulties discussed in this Article in applying those cases outside their own contexts. He stressed the policy difficulties presented by, in effect, conceding to the state courts' control of this subject. He also asserted that the United States is obliged as "an international person" to apply international law in its courts, but gave neither authority for

Any conclusions on this subject are perhaps speculative, given the lack of Supreme Court precedent. When the issue is sharpened, however, to focus on the relative competence of the Executive and the judiciary in areas implicating foreign relations, much more judicial guidance is available. Part IV addresses that topic.

IV. INTERNATIONAL LAW AND THE SEPARATION OF POWERS

The foregoing discussion has presented a number of arguments against the proposition that the courts can compel the President to adhere to international law. First, it is doubtful that international law should be included among the laws that the President is to faithfully execute. Second, and aside from the first point, if international law is in some sense federal law—a debatable proposition—international law is at best only federal common law. There is simply no precedent authorizing the courts to control the discretion of the political branches on the basis of federal common law.

Aside from these two arguments, a third focuses on the separation of powers. The subject matter of international law is primarily the relations between independent states. The judiciary's requiring the President to adhere to international law, therefore, amounts to controlling his discretion with respect to the foreign policy of the United States. As Part IV demonstrates, the Supreme Court has repeatedly held that the judiciary is without power to substitute its judgment for that of the Executive in the realm of foreign policy. In some cases, this result has been grounded on the argument that a particular question was beyond judicial competence. In other cases, similar results have been reached by recognizing the Executive's authority to prescribe a rule of decision.¹⁹⁷ In either case, the result has been the same: The courts do not interfere with Executive decisions in the area of foreign policy.

Before developing this argument, a preliminary objection must be met. The position put forward in Part IV is related to the political question doctrine,¹⁹⁸ yet the famous case of *Baker v. Carr*¹⁹⁹ observed that "it is error to suppose that every case or controversy which touches

this assertion nor consideration to the suspect character of such an "obligation" in the American constitutional scheme. Jessup, *supra*, at 743. Judge Jessup's position, in short, seems grounded primarily on the undesirability of the federal courts' deferring to the states on matters of international law, and does not appear to reflect a thorough examination of the objections to his conclusions.

197. See *infra* notes 212-74 and accompanying text.

198. The text does not simply label these subjects "political questions" because, with regard to some of them, the Court does not assert the nonexistence of a rule of decision, but rather recognizes the Executive's authority to create a rule binding the courts.

199. 369 U.S. 186 (1962).

foreign relations lies beyond judicial cognizance."²⁰⁰ This statement may appear to support the objection that this Article seeks to apply the political question doctrine to a subject to which the Supreme Court has stated the doctrine does not apply.

This objection fails. *Baker* clearly sought to assert only that not all cases involving foreign relations were political questions; the case did not go to the other extreme of claiming that no case involving foreign relations could fall into the political category. This conclusion follows from an examination of the language of the case. The Court observed, for example, that efforts to resolve foreign relations issues "frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the Government's views."²⁰¹ Further, the Court's discussion distinguished a number of foreign relations cases it perceived as presenting political questions from others it saw as presenting no such questions. The common thread running through the Court's analysis was deference to unambiguous executive or congressional action. Thus, the Court will defer to "governmental action" on the question whether a treaty is terminated, addressing the matter itself only if no conclusive governmental action is taken. The Court defers to the Executive on matters of recognition of states, territorial claims, existence of belligerency abroad, diplomatic status, and sovereign immunity, using its own judgment only to construe actions by the Executive.²⁰² In short, *Baker* is clearly consistent with the view that cases which would require the judiciary to control executive discretion in foreign affairs matters present insuperable separation of powers problems.

Given that *Baker* does not foreclose the arguments in Part IV, what follows demonstrates that judicial control of executive discretion in the form of requiring executive adherence to customary international law raises separation of powers problems in at least two senses. First, judicial control would interfere with the President's discretion to participate in the formation, at the international level, of customary international law. Second, judicial control would fly in the face of two hundred years of precedent recognizing the controlling domestic legal effect of presidential discretion in foreign relations matters.

200. *Id.* at 211.

201. *Id.*

202. *Id.* at 212-13.

A. The President and the Formation of International Law

However limited the President's domestic lawmaking authority may be, he clearly has considerable authority to create legal effects in the international context. The President's authority to take actions in the field of international relations that will, among other things, create rules of decision for domestic courts is discussed below.²⁰³ Aside from this type of authority, however, the President has authority to "legislate" with respect to customary international law. The existence of this legislative authority on the international level necessarily affects the subject here under discussion.

Preliminarily, it is important to stress that the President's capacity to take actions having international legal effects is significantly greater than his capacity to create legal effects domestically without congressional authority. The President can, on his own authority, enter into executive agreements with foreign states.²⁰⁴ Whatever the domestic effect that such agreements may have, their international status is no different from that of treaties; executive agreements are legally binding obligations of the United States.²⁰⁵ Again, the President may, on his own authority, terminate treaties to end a legal relationship with a foreign state.²⁰⁶ Further, the President's role in making treaties that clearly have the effect of domestic law is much greater than his role in the enactment of statutes. Statutes may and usually do originate in the Congress; only the President can negotiate to determine the content of treaties, and he, not the Congress, decides whether to submit treaties to the Senate for consent. Moreover, whereas a statute can be enacted over a Presidential veto, the President may refuse to ratify a treaty even if the Senate has consented to ratification.

Against this background, in what sense can the President be said to have lawmaking authority with respect to customary law? Responding to this question requires consideration of both the process by which customary international law is made and the structure of the United States government. Considering first the formation of customary international law, it is important to note that this body of law is a distillation of the practice of states; accordingly, determining its content requires consideration of all the various types of activity that can be

203. See *infra* notes 212-74 and accompanying text.

204. See, e.g., *United States v. Belmont*, 301 U.S. 324 (1937).

205. *Id.* at 330-31. In *Weinberger v. Rossi*, 456 U.S. 25, 28-32 (1982), the Supreme Court clearly assumed that an executive agreement may be an international obligation of the United States.

206. See STAFF OF SENATE COMM. ON FOREIGN RELATIONS, 95TH CONG., 1ST SESS., *ROLE OF THE SENATE IN TREATY RATIFICATION* app. 4, at 74-76 (listing cases in which President has terminated treaties).

denominated "state practice"—for example, diplomatic contacts, policy decisions, executive actions, practice and votes in international organizations, and patterns of treaties.²⁰⁷ In essence, every time a state takes a position with respect to a particular question in international relations, the state is not only acting to deal with that particular question, but also providing an example of state practice that can affect the content of customary international law. In that sense, every state action in the international arena has a double quality. Each state action is simultaneously a response to a given concrete problem and, in effect, a legislative act. Through its own actions and its responses to the actions of other states, the state provides evidence on a given subject either that a "general practice of states" exists, or that one does not. Because the existence of a general practice is an essential prerequisite to the formation of a rule of customary international law, if no general practice exists, then no rule of international law on the subject can exist. States' choices of practice, therefore, amount to "votes" for or against particular rules of customary international law.

Against this method of forming customary law, the importance of the United States government's structure becomes obvious. Most of the activities of the United States that can amount to state practice are under the control of the President, as a matter of American law.²⁰⁸ All communication with foreign governments on behalf of the United States as an entity is carried on by the President, which means that the President or his subordinates decide what the content of the United States side of these communications shall be. Diplomatic correspondence is a form of state practice; it must conform to the views of the President. Responses to overtures from other states depend on the President's views. Patterns of treaties can create customary international law, and the President determines both the positions the United States takes in particular negotiations and whether to ratify treaties, assuming the Senate consents to ratification.²⁰⁹ The positions that the United States asserts in the international arena—the claims the United States makes regarding its entitlements under international law—also are determined by the President. Thus, to the extent the United States participates in the formation of customary international law, it does so largely through the President's acts.

Both the nature of customary international law and the authority of the American President are obviously relevant to the problem here under discussion. Professor Charney has stressed that the process of

207. See, e.g., I. BROWNIE, *supra* note 2, at 5-6.

208. See generally L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 45-50 (1972).

209. *Id.* at 130.

changing the content of customary international law often involves violating existing rules of law, and that a rule of American domestic law requiring the President to obey existing rules of customary international law would, in effect, disable this country from participating in the process of changing customary law.²¹⁰ While Professor Charney is correct in these assertions,²¹¹ the problem is more fundamental than the functional difficulty of the United States' participating in the formation of customary international law if the courts can forbid the President to violate that body of law. The problem is rather that a judicial effort to control the President's discretion as to the day-to-day state practice of the United States amounts to control of legislative choice. Such control would be precisely identical to the courts' seeking to control the votes of individual members of Congress in matters of domestic law for reasons unrelated to the constitutionality of the members' actions.

This latter type of effort at control would obviously be a usurpation, but it is helpful to make explicit why this result is obvious. The answer follows from the nature of the legislator's task. Not merely the right, but the duty of a legislator is to vote as he thinks best with respect to a given measure. By establishing the Congress and leaving it free to exercise its discretion as to most matters, the Constitution indicates that it expects the members of Congress to behave as legislators behave with respect to the vast range of matters left to congressional discretion. A judicial effort, not grounded in the Constitution, to require a particular legislative outcome amounts to depriving officials of discretion vested in them by the Constitution. The effort itself thus would be unconstitutional. Similarly, since the President acts as the primary American legislator in the field of customary international law by determining the day-to-day practice of the United States, judicial efforts to control that practice on nonconstitutional grounds amount to interference with legislative discretion vested in the President by the Constitution. The field of legislation is different—international as opposed to domestic law—but the constitutional question is the same. By giving the President control of most of the state practice of the United States, the Constitution vested the President with legislative discretion to cast the "vote" of the United States in matters of customary law. If

210. Charney, *supra* note 15, at 914-21.

211. Some commentators criticize the view that states change international law by violating it, by asserting that there is no difference between a violation of international law by a state and violation of a rule of domestic law by a subject of the domestic legal system. See, e.g., Paust, *supra* note 5, at 388. This view ignores the fundamental difference between the status of states in the international legal system and that of subjects of domestic systems. The former are simultaneous subjects *and* legislators. The latter are merely subjects. Violations of international law by states can thus be legislative acts; violations by individuals in domestic systems cannot be legislative.

the Court has no basis in the Constitution for limiting that discretion, the Court acts unconstitutionally if it in effect seeks to limit a discretion the Constitution has left unlimited.

B. *The President and Domestic Law*

The foregoing argument stresses that separation of powers principles foreclose the courts' interference with the President's legislative duties on the international plane. Aside from this international legislative aspect of the question, however, the President clearly has the authority to create legal effects within the domestic legal system of the United States on a wide variety of matters without regard to the strictures of customary international law. In some cases, the courts have held that the President's decisions create a rule of decision that the courts are obliged to follow without regard to international law. In others, the courts have held that domestic law gives the President a discretion on certain subjects that the courts may not control and that these subjects include matters regulated by international law. In both categories of cases, however, it is abundantly clear that the courts simply have not seen customary international law as a basis for judicial limitation of presidential discretion.

The cases recognizing the President's authority to, in effect, make law for the courts without regard to international law cover a number of subjects. One of these subjects is the question of the territorial extent of the United States. Such an issue arose in *Jones v. United States*,²¹² in which the defendant, convicted of a murder committed upon a guano island in the Caribbean claimed by the United States, challenged the federal court's jurisdiction. The defense turned on whether the island was subject to the sovereignty of the United States. The Court held that it was bound to defer to the Executive's assertion that the island had not been subject to the sovereignty of any other nation when the United States claimed it pursuant to an act of Congress that permitted the United States to claim such unclaimed guano islands. The Court deferred to the Executive's assertion, despite Haiti's claim of sovereignty. The Court held:

[I]f the executive, in his correspondence with the government of Hayti, has denied the jurisdiction which it claimed over the Island of Navassa, the fact must be taken and acted on by this court as thus asserted and maintained; it is not material to inquire, nor is it the province of the court to determine, whether the executive be right or wrong; it is enough to know that in the exercise of his constitutional functions he has decided the question.²¹³

212. 137 U.S. 202 (1890).

213. *Id.* at 221.

It must be stressed that, at this time, customary international law included a well-developed body of rules for determining sovereignty over disputed territory,²¹⁴ as the *Jones* court clearly understood.²¹⁵ Nonetheless, the Court held that it was bound by the President's determination.

Similarly, the Court has held itself bound by executive determinations of competing foreign state claims of sovereignty over particular territory. This issue arose in *Williams v. Suffolk Insurance Co.*,²¹⁶ a suit upon a maritime insurance policy. The vessels insured had been seized by the government of Buenos Aires for engaging in seal fishing in the Falkland Islands, contrary to Buenos Aires law. The insureds argued that the seizure was illegal because Buenos Aires was not, in fact, sovereign of the Falklands; the insureds pointed to the fact that members of the United States executive branch, in diplomatic correspondence, had refused to recognize Buenos Aires' sovereignty. The Court noted that problems involving determination of sovereignty over particular territories frequently arise before maritime courts, and that inquiry on the subject would be possible if the question were open. The Court held, however, that it was bound by the opinions expressed by officials of the executive branch, whether those opinions were right or wrong, and further held that expression of such opinions through diplomatic correspondence was sufficient.²¹⁷ This latter point is significant, because the insurance company had argued that only an act that "has the force and sanction of regular enactment"²¹⁸ should count as an act of government binding on the courts. This judicial deference to executive identifications of the sovereignty of particular foreign territories has continued. As recently as 1978, the Court of Appeals for the Fifth Circuit held that a case turning on a territorial dispute between three foreign states was so political that the court would not seek to address the matter without affirmative guidance from the executive branch.²¹⁹

Again, the President has absolute authority under familiar law to recognize foreign states and governments, and to create domestic legal effects in so doing. Thus, in *United States v. Belmont*,²²⁰ the Court held that the question of recognition was a purely political one, com-

214. See, e.g., *Island of Palmas Case (U.S. v. Neth.)*, 2 R. Int'l Arb. Awards 829 (Perm. Ct. Arb. 1928).

215. *Jones*, 137 U.S. at 212.

216. 38 U.S. (13 Pet.) 415 (1839).

217. *Id.* at 420.

218. *Id.* at 418.

219. *Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum*, 577 F.2d 1196 (5th Cir. 1978), cert. denied sub nom., *Occidental of Umm Al Qaywayn, Inc. v. Cities Service Oil Co.*, 442 U.S. 928 (1979).

220. 301 U.S. 324 (1937).

mitted exclusively to the Executive, and once made, binding on the state and federal courts in applying the act of state doctrine.²²¹ Similarly, *Guaranty Trust Co. v. United States*²²² held that recognition was so far conclusive on the courts as to compel them to regard as the competent government of a state whatever government the Executive recognized. The consequence of *Guaranty Trust* was that a statute of limitations was held to have run against the Soviet Union during the period in which that government was unrecognized and thus unable to bring suit in American courts. During the relevant period the United States had recognized another group as the government of the Russian state, and the Russian state, as opposed to the particular government, was thus at all times able to sue if it chose to do so.²²³ International law more clearly establishes legal criteria for evaluating the existence of a state than for determining the group of people who are the government of the state,²²⁴ and the foregoing cases relate to recognition of governments rather than recognition of states. Nonetheless, the sweeping language of those cases regarding the extent of the President's control over recognition, and the holdings of the foregoing group of cases—holdings that established the President's authority to determine the identity of the sovereign of a particular territory—would seem to indicate that the President has absolute discretion over questions of recognition of states as well as governments. This discretion exists notwithstanding the existence of objective legal criteria regulating the labelling of any particular entity as a state.

The President's authority with respect to recognition extends as well to recognition of the existence of war, as was held in *The Santissima Trinidad*,²²⁵ *The Protector*,²²⁶ and *The Three Friends*.²²⁷ The latter case also provides illustrations of the legal effect in both the domestic and international legal systems of such recognition by the Executive.²²⁸

The Court has shown similar deference to the Executive on a number of questions regarding treaties. For example, the petitioner in *Terlinden v. Ames*²²⁹ raised a question regarding the continued

221. See *id.* at 330.

222. 304 U.S. 126 (1938).

223. *Id.* at 136-41.

224. Compare I. BROWNIE, *supra* note 2, at 74-82 with I. BROWNIE, *supra* note 2, at 95 (stating that "[n]on-recognition of governments seems more 'political' than that of states").

225. 20 U.S. (7 Wheat.) 283, 337 (1822). The Court noted that clearly, it was the Executive that had recognized belligerency. *Id.* at 305-06.

226. 79 U.S. (12 Wall.) 700, 701-02 (1871).

227. 166 U.S. 1, 63-66 (1897).

228. *Id.* at 62-63, 64.

229. 184 U.S. 270 (1902).

effectiveness of a treaty, seeking to block his extradition to the German Empire on the grounds that the treaty purporting to permit the extradition was no longer in force because the treaty had been concluded with Prussia rather than with the German Empire. The Court rejected this argument, holding itself bound by the determination of the executive branch that the treaty was still in force.²³⁰ Similar deference on the question of the continued vitality of a treaty was shown in *Factor v. Laubenheimer*.²³¹ Again, in *Clark v. Allen*,²³² when it was argued that a treaty permitting German nationals to inherit personal property had lapsed after World War II because Germany had ceased to exist, the Court held itself bound by the Executive's determination that Germany could still perform its treaty obligations.²³³

The foregoing groups of cases all involved situations in which the Executive could be seen as providing a rule of decision for the courts. The Court in these cases held that a particular executive determination regarding a question of law was binding on the courts. Distinguishable from these cases are others in which the challenged executive action does not purport to establish a rule of decision; the issue in these other cases is simply whether the courts can subject the executive determination to legal evaluation.

Perhaps the subject on which judicial deference to the Executive is most striking is the use of the armed forces. One group of cases upholds seizures by the armed forces in violation of customary international law. Thus, the Court held in *The Ship Richmond v. United States*²³⁴ that the jurisdiction of the district court sitting in admiralty over a particular American ship captured for violating the Non-Intercourse Act was not affected by the fact that the U.S. Navy had, in violation of the law of nations, seized the ship while it was in Spanish territorial waters.²³⁵ Similarly, in *The Merino*,²³⁶ the capture of an American slave-trading

230. *Id.* at 282-90.

231. 290 U.S. 276 (1933).

232. 331 U.S. 503 (1947).

233. *Id.* at 514.

234. 13 U.S. (9 Cranch) 102 (1815).

235. *Id.* at 104.

236. 22 U.S. (9 Wheat.) 391, 401-03 (1824). To be sure, *Cook v. United States*, 288 U.S. 102 (1933), held unlawful the seizure of British vessels for violating the liquor laws because the laws were in violation of a treaty with Britain that the Court characterized as self-executing. *Cook* distinguished the earlier cases as, first of all, dealing with American vessels and, secondly, as involving only the jurisdiction of the court, not the jurisdiction of the United States itself. In the case before it, the Court felt the jurisdiction of the United States was limited by the treaty in question. *Id.* at 119, 122. Subsequent lower court decisions, however, have distinguished *Cook* as relying on a self-executing treaty, and refused to apply *Cook* to void seizures of even foreign vessels on the high seas when the only illegality involved was the violation of customary international law or of non-self-executing treaties codifying customary international law. See *United States v. Postal*, 589 F.2d

ship by elements of the U.S. armed forces in Spanish territory was held not to affect the jurisdiction of the Court.

A second group of cases labelled as beyond judicial scrutiny the President's decision to employ American armed forces in a particular fashion. Thus, in *The Prize Cases*,²³⁷ the Court held that the Constitution empowered the President to declare a blockade, effective in international law, of portions of the United States engaged in insurrection, and that the President's judgment that circumstances justified the blockade was beyond judicial scrutiny.²³⁸ Again, in *Johnson v. Eisen-trager*,²³⁹ the Court held that the judiciary could not entertain challenges by private persons to the President's use of the armed forces abroad, even when those challenges apparently were based on constitutional grounds.²⁴⁰ A logical corollary of *Johnson* is that challenges grounded on authority of less standing than the Constitution must likewise be beyond judicial scrutiny. This judicial refusal to apply legal standards to the use of troops abroad was echoed by a number of lower court decisions during the Vietnam war, refusing on political question grounds to hear various international law-based challenges to the conduct of that war by the Executive.²⁴¹

The President likewise has been held to have the power, exempt from judicial scrutiny, to control any claims under international law that the United States might have, even when executive actions operate to reduce the rights of individual American citizens. Thus, in *Charlton v. Kelly*,²⁴² the Court held that, although Italy's refusal to perform all its obligations under an extradition treaty with the United States rendered that treaty voidable by the United States, the Executive's determination to continue adhering to the treaty as in force bound the Court to give the treaty effect, and thus to uphold the extradition of the petitioning American citizen.²⁴³ Similarly, in *Dames & Moore v. Regan*,²⁴⁴ the Court held that the President's authority to settle any claims American citizens might have against foreign states authorized the President to terminate litigation commenced in the United States by individual

862 (5th Cir.), cert. denied, 444 U.S. 832 (1979); *United States v. Cadena*, 585 F.2d 1252 (5th Cir. 1978). Presumably, then, the holdings in *The Richmond* and *The Merino* are unaffected by *Cook*.

237. 67 U.S. (2 Black) 635 (1863).

238. *Id.* at 665-71.

239. 339 U.S. 763 (1950).

240. *Id.* at 788-89.

241. See *Simmons v. United States*, 406 F.2d 456 (5th Cir. 1969); *Luftig v. McNamara*, 373 F.2d 664 (D.C. Cir. 1967); *United States v. Hogans*, 369 F.2d 359 (2d Cir. 1966).

242. 229 U.S. 447 (1913).

243. *Id.* at 476.

244. 453 U.S. 654 (1981).

citizens against Iran in the wake of the overthrow of the Shah.²⁴⁵

The Court's reasoning on this question is worth detailing, because this reasoning is useful for analyzing aspects of the President's foreign affairs authority other than those directly in issue in *Dames & Moore*. The Court in that case noted that no statute authorized the action the President took,²⁴⁶ but also noted the existence of statutes that assume a broad degree of presidential discretion to deal with the foreign policy problems presented by the claims of individual citizens against foreign states.²⁴⁷ Moreover, the Court acknowledged the long history of congressional acquiescence in claims settlements negotiated by the Executive, as evinced by the enactment of statutes necessary to carry out such settlements.²⁴⁸ In upholding the President's authority, the Court relied both on this history of congressional acquiescence in presidential claims settlement and on the fact that such a settlement was, on the facts, determined to be necessary to resolve a major dispute between the United States and another state.²⁴⁹

The Court's analysis in *Dames & Moore* requires emphasis. The Court was unwilling to consider the issue of presidential authority in the abstract. Rather, it focused on congressional acquiescence in particular exercises of authority and relied on that acquiescence as vindication of the President's acts. Clearly, the Court saw the President's constitutional authority on these subjects to be so great as not to require prior congressional authorization to permit actions having an effect in international law. Indeed, congressional *action* apparently is not necessary at any time; congressional acquiescence suffices. A second point, made by a note writer in the *Columbia Law Review*, also bears repeating. If international law is part of the law that the President is to "take care" to see faithfully executed, it seems inconsistent with the President's responsibilities to permit him to waive claims for violations of international law.²⁵⁰ The fact that after *Dames & Moore* the President clearly has authority to waive such claims certainly casts doubt on the assumption that international law fits within the language of the "take care" clause, at least in the sense of being a judicially enforceable obligation.

Finally, the courts' handling of treaties in a number of respects demonstrates that in that area, too, there is a zone of executive discre-

245. *Id.* at 686.

246. *Id.* at 675-77.

247. *Id.* at 677-79.

248. *Id.* at 679-84.

249. *Id.* at 688.

250. Note, *The Iranian Hostage Agreement Under International and United States Law*, 81 COLUM. L. REV. 822, 855 (1981).

tion into which the courts may not enter. As noted above, a number of instances exist in which the President has, on his own authority, terminated treaty relationships, apparently with the acquiescence of Congress.²⁵¹ As *Dames & Moore* indicates, this congressional acquiescence in a long-standing presidential claim of authority reinforces that claim. The President's authority to waive the rights of the United States resulting from breaches by other parties to treaties was discussed above. Beyond these two subjects, the President has a considerable zone of discretion in the day-to-day carrying out of treaty obligations. Discussion of this subject, however, requires a brief explanation of the concept of the self-executing treaty.

Although the Constitution labels treaties "the supreme law of the land," along with statutes and the Constitution,²⁵² the Supreme Court held relatively early in the history of the Republic that not all treaties could be enforced by the judiciary. In the famous case of *Foster & Elam v. Neilson*,²⁵³ the Court held that treaties imposing an obligation to bring about some state of affairs in the future amounted to a contract between states that only could be carried out, on the part of the United States, by the political branches of government. In the case of such a treaty, therefore, judicial enforcement was not possible until the political branches had actually carried out the promise.²⁵⁴ In the *Head Money Cases*,²⁵⁵ the Court amplified its treatment of this subject, noting that a treaty was primarily a compact between independent states and that its enforcement depended entirely on diplomatic negotiation—not upon the judiciary. A treaty was judicially enforceable, the Court held, only to the extent it conferred rights upon individuals.²⁵⁶ Finally, the necessary implication of *Johnson v. Eisentrager*²⁵⁷ is that even treaties conferring rights on individuals are not judicially enforceable if, as properly interpreted, they evince an intent that they be enforced by some agency other than the judiciary. This conclusion seems to follow from the Court's holding that the Geneva Convention of July 27, 1929,²⁵⁸ many provisions of which clearly confer rights on individuals,²⁵⁹ cannot be enforced against the executive branch of the United States government by American courts because the Convention's terms

251. See *supra* note 208 and accompanying text.

252. U.S. CONST. art. VI.

253. 27 U.S. (2 Pet.) 253 (1829).

254. *Id.* at 313-14.

255. 112 U.S. 580 (1884).

256. *Id.* at 598-99.

257. 339 U.S. 763 (1950).

258. 47 Stat. 2021, T.S. No. 846.

259. See, e.g., *id.* arts. 6, 10-12, 16, 19, 42, 50, 61, at 2032, 2034-37, 2045, 2048, 2052.

demonstrate that a different enforcement mechanism was intended.²⁶⁰ Reading these cases together yields the clear conclusion that a treaty not expressly addressing the question of the manner of its enforcement will only be treated as judicially enforceable and self-executing—that is, treated upon its proclamation as law of the United States without further action by the United States government—if the treaty's subject matter can be said to confer rights upon individuals, and then only if judicial enforcement appears to be intended by the treaty.

The implications of the concept of self-executing treaties are obvious. First, the concept is further proof that international law is *not* of constitutional stature in the American legal hierarchy; if it were, how could the courts fail to implement the international legal obligation created by non-self-executing treaties? Beyond this point, the Executive clearly may take actions violative of treaties that the courts will not address. The alleged treaty violations in the *Johnson* case provide an example;²⁶¹ others are provided by the lower court cases refusing to nullify searches carried out by the armed forces on the high seas in violation of treaty obligations.²⁶² The courts in these cases do not deny that actions by the Executive can amount to violations of United States obligations in international law. These courts, nonetheless, hold that the Executive is beyond judicial control with respect to the carrying out of American obligations under non-self-executing treaties.

In drawing together the foregoing discussion, it becomes clear that the President has broad-ranging authority to create legal effects in domestic law with respect to international legal matters and is exempt from judicial scrutiny with respect to other actions having effects in international law. Taken together, these circumstances simply are incompatible with the argument that the President can be compelled by the courts to adhere to international law, or even with the argument that the President has a constitutional obligation, albeit unenforceable, to adhere to international law. The last assertion, in particular, is irreconcilable with, for example, the Supreme Court's recognition of presidential power to make the law with respect to questions of sovereignty over particular territory. Given the broad scope of presidential authority in this area, judicial efforts to control his discretion would amount to usurpation.

Professor Glennon, who takes a position contrary to the one taken in this portion of the Article, has raised a counterargument that deserves addressing. Glennon asserts that “[t]he trend in recent foreign

260. 339 U.S. at 789 n.14.

261. *Id.* at 788-89.

262. *See supra* note 236.

relations cases, particularly those relating to recognition and sovereign immunity, indicates that the courts will consider questions of international law and may decide them in a manner at odds with executive policy.²⁶³ He discusses only two cases in support of this surprising assertion, neither of which supports the assertion.

The first case he mentions is *Zschernig v. Miller*,²⁶⁴ in which the Court held an Oregon statute limiting the rights of nonresident aliens to inherit property in Oregon unconstitutional as an impermissible state intrusion into the federal foreign affairs power.²⁶⁵ Professor Glennon characterizes the Court's decision as "declin[ing] the Executive's invitation to let the statute stand;" the "invitation" referred to was apparently a State Department characterization of the statute as having little effect on American foreign relations.²⁶⁶ Professor Glennon's reliance on this case is misplaced for several reasons. First, the executive branch was not arguing that the Oregon statute should stand; rather, the executive branch urged the Court to reverse the Oregon court's application of the statute, albeit on the ground that the statute conflicted with an applicable treaty rather than on the constitutional ground the Court applied.²⁶⁷ Second, the case had nothing to do with international law; the case simply held that, under the Constitution, the statute represented an invasion by the state of an exclusively federal domain. To the extent that the Court based its opinion on the actual effect of the statute, the Court apparently was rejecting the government's characterization of the statute as innocuous. Whether the Court *was* relying on the actual effect of the statute, however, is not entirely clear; the opinion states that the statute "has a direct impact upon foreign relations and *may well adversely affect* the power of the central government to deal with those problems."²⁶⁸ This statement suggests that the Court may have been seeking to underline the impropriety of even the possibility of the state interference with national foreign policy. The case, however, presented no question of international law, and certainly cannot be said to represent judicial rejection of executive foreign policy determinations; the government, after all, had asked the Court to overturn the statute, and the Court did, albeit for reasons different than those the government urged.

The second case on which Professor Glennon relies, *First National*

263. Glennon, *Paquete Habana*, *supra* note 5, at 351.

264. 389 U.S. 429 (1968).

265. *Id.* at 440-41.

266. Glennon, *Paquete Habana*, *supra* note 5, at 352.

267. Amicus Curiae Brief of the United States at 15, *Zschernig v. Miller*, 389 U.S. 429 (1968) (No. 21).

268. *Zschernig*, 389 U.S. at 441 (emphasis added).

City Bank v. Banco Nacional de Cuba,²⁶⁹ is likewise inapposite. As Professor Glennon correctly indicates, six Justices in that case “declined to require lower-court deference to a State Department determination that the United States could disregard the act-of-state doctrine.”²⁷⁰ Here again, however, the determination was a matter of American constitutional law, not international law. Justice Brennan, writing for four of the six justices and advancing an analysis with which Justice Douglas agreed,²⁷¹ insisted that the subject of the suit, a taking of property by Cuba, was a political question,²⁷² and insisted that the “Executive Branch, however extensive its powers in the area of foreign affairs, cannot by simple stipulation change a political question into a cognizable claim.”²⁷³ In an accompanying footnote, Justice Brennan rejected an analogy to cases involving recognition and sovereign immunity, insisting that the key difference between such cases and the act of state doctrine was that, in following executive determinations in those areas,

[i]n no event has the judiciary necessarily been called upon to assess a claim under international law. The effect of following a “*Bernstein* letter,” of course, is exactly the opposite—the Judicial Branch must reach a judgment despite the possible absence of consensus on the applicable rules, the risk of irritation to sensitive concerns of other countries, and the danger of impairment to the conduct of our foreign policy.²⁷⁴

Far from claiming authority to apply international law, the four dissenters plus Justice Douglas objected to an approach that could force them to apply international law. This case, like *Sabbatino*, was a separation of powers case, not an international law case; the Justices upon whom Professor Glennon relies were not seeking to control executive foreign policy determinations on the basis of international law. Quite the contrary, they were refusing to accept a construction of the powers of the judiciary, urged by the Executive, that would permit such judicial interference in the actual conduct of foreign policy. These Justices clearly rejected the argument that the courts have the power Professor Glennon claims they possess.

While both of these cases have a foreign relations aspect, neither involves the Court’s setting aside an executive foreign policy determination on the basis of international law. In both, to the contrary, the issue involved the Constitution. While the Court did not defer to the Executive in either case, that the Supreme Court read the Constitution for

269. 406 U.S. 759 (1972).

270. Glennon, *Paquete Habana*, *supra* note 5, at 353 (citing *First Nat’l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 762 (1972)).

271. *First Nat’l City Bank*, 406 U.S. at 772 (Douglas, J., concurring).

272. *Id.* at 789 (Brennan, J., dissenting).

273. *Id.*

274. *Id.* at 789-90 n.13.

itself, not as the executive directed, is certainly not news. In neither case, however, was the Court seeking to control the Executive's choices in foreign policy; the Court simply held that, however advantageous for the Executive, neither the states nor the courts could exercise judgment in matters of foreign policy that were the province of the federal political branches. The existence of the trend that Professor Glennon recognizes is certainly not proved by the cases he discusses.

The foregoing discussions indicate the breadth of the President's legislative authority in the field of international relations. This authority simply is different in kind from that which the President exercises in domestic affairs. The President can take steps that create international legal relationships in a number of ways: by entering into executive agreements or ratifying treaties, and also by controlling the day-to-day state practice of the United States, which amounts to "casting the vote" of the United States in the process by which customary international law is created. This state of affairs does not mean that the President's authority is superior to that of Congress on these subjects; this Article does not purport to address the question of the relative foreign relations powers of the two political branches. This Article only asserts that the President's authority does not depend on a congressional grant. Indeed, *Dames & Moore* seems to permit the conclusion that, in the field of foreign relations, affirmative congressional disapproval is needed to cast doubt on the President's authority to take actions in our relations with other nations that bind the courts, at least when such actions have been taken by Presidents over an extended period.

These cases make clear that the courts may not control the discretion of the President in international relations. The courts have always assumed their authority over foreign relations to be essentially nonexistent relative to that of the executive branch. Because asking the courts to apply customary international law to control the executive in foreign relations matters is, as *Erie* makes clear, asking them to claim authority over foreign relations matters, if the courts do not have that authority they must decline the invitation to act as though they had the authority. Further, as shown above, customary international law is, at best, federal common law. The Supreme Court has repeatedly held that federal common law cannot be applied to override a congressional legislative determination, so by parity of reasoning, federal common law cannot override a President's legislative determination regarding those subjects on which he can legislate. Because, as demonstrated above, the President can bind the courts concerning our relations with other states, at least when Congress or the Senate in its treaty-making capacity has not acted, then federal common law may not override this Presidential "legislation." Whichever route one takes, the result is the same:

even under the rubric of applying customary international law, control of foreign relations belongs, as between the Executive and the courts, to the Executive.

V. CONCLUSION

The contention that the courts of the United States may compel the President to adhere to customary international law raises questions of constitutional law that can be analyzed by the tools of traditional legal analysis. This Article has sought to provide that analysis. This Article questions the applicability of the "take care" clause to legal obligations created by customary international law. It stresses that, to the extent the federal courts may apply customary international law, this law is subject to all the limitations to which other branches of federal common law are subject. This limitation lends significance to the fact that the courts, absent clear direction from either or both the Constitution or Congress, have never relied on federal common law to control the discretion of the political branches of government. Finally, this Article has tried to make clear the extent to which presidential policy choices in international matters bind the courts, and thus, necessarily, cannot be controlled by the courts.

Before concluding, however, it is necessary to make explicit attitudes which may underlie the courts' analyses. The first attitude concerns the nature of policy decisions relating to international issues. To say that a subject is governed by law is to say that it is controlled by an overarching policy determination embodied in a legal rule. To enact a legal rule on a subject is to fix the government's response to each occasion in which that subject presents itself. If for some reason it is deemed inexpedient to predetermine a particular governmental response to a particular public question, the only possible legal rule is that there can be no rule—a situation that leaves the government free to react as the circumstances of the individual case seem to dictate.

The assertion that American foreign policy, as determined by the President, must conform to customary international law, is thus to say that foreign policy issues are not to be decided on an ad hoc basis, but that the questions that foreign policy issues present are to be resolved according to the responses customary international law has programmed. The decisions, however, make clear that American courts simply are not convinced that the subject of international relations lends itself to the fixed responses that are the hallmark of legal rules. From the statement in the *Chinese Exclusion Case*,²⁷⁵ justifying the conclusion that a statute may override an earlier treaty, that "[u]nexpected events

275. 130 U.S. 581 (1889).

may call for a change in the policy of the country,²⁷⁶ to the statement in *Frolova v. Union of Soviet Socialist Republics*,²⁷⁷ in the course of refusing to hold articles 55 and 56 of the United Nations Charter self-executing, that "judicial resolution of cases bearing significantly on sensitive foreign policy matters, like the case before us, might have serious foreign policy implications which courts are ill-equipped to anticipate or handle,"²⁷⁸ the courts have seen foreign relations as presenting highly mutable questions that simply do not lend themselves to the fixing of policy choices by freezing them in a rule of law. The courts clearly are unwilling to assume that the public interest of the United States can be served if the government's responses to foreign policy issues are limited to those that international law permits.

Closely related to the foregoing issue is the matter of democratic control of national decisionmaking. The federal courts' reluctance to make common law obviously reflects a belief that policy choices not fixed in the Constitution are properly left to the branches of the government directly responsible to the people. Holding that the Executive is constrained by international law, however, runs counter to this deference to democracy in two ways. Most obviously, such a holding would shift power from the elected President to the unelected courts. Such a holding also could leave the United States bound by policy choices in which no element of the American government actively participated. This result could occur because the United States can easily be held to be bound by a rule of customary international law to which it did not object during the process of its formation, even if it did not actively participate in advancing the rule.²⁷⁹ Consciously or not, the courts' refusal to hold the Executive to the limits fixed by international law amounts to leaving policy choices to a branch of government clearly controlled by the American people, rather than making the policy followed by the United States in the first instance a judicial determination and at least partly dependent upon the other states participating in the process of forming customary international law.

Finally, implicit in discussions of this subject is a disagreement about the proper role of American courts in dealing with the international legal system. Professor Glennon has justified his expansive view of the courts' role by arguing that action by the courts can help preserve the international legal system.²⁸⁰ If anything is clear in the opinions of the Supreme Court, however, it is that American courts are

276. *Id.* at 601.

277. 761 F.2d 370 (7th Cir. 1985).

278. *Id.* at 375.

279. Waldock, *supra* note 3, at 50.

280. Glennon, *Paquete Habana*, *supra* note 5, at 362-63.

American courts. Their primary obligation is *not* to the international legal system, but to the well-being of the United States. Arguments certainly can be made that adherence to customary international law is in the interests of the United States, but the courts focus on the interests of the United States. Chief Justice Marshall asserted that “[i]t is not for its courts to interfere with the proceedings of the nation, and to thwart its views,”²⁸¹ and his successors have agreed.

In short, beyond strict legal analysis, the cases make clear that the courts see themselves as obliged to further the interests of the United States as decided by policymakers responsible to the American people. To hold the Executive bound by customary international law is to impose rigidities on policy choices that the courts do not believe will always be in the nation’s interest, to weaken the control of foreign policy by persons responsible to the American electorate, and to impose these harms in the name of an international legal system that has at best a secondary claim on the courts’ loyalty. Not surprisingly, the courts have not taken this route.

281. *The Nereide*, 13 U.S. (9 Cranch) 388, 422 (1815).

