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Special Book Review

L'AFFAIRE *SABBATINO*: A WISTFUL REVIEW*

BY

BURNS H. WESTON**

'"Well, sir,' said Mr. Dooley, 'I jus' got hold iv a book, Hinnissy, that suits me up to th' handle, a gran' book, th' grandest iver seen. Ye know I'm not much throubled be lithrachoor, havin' manny worries iv me own, but I'm not prejudiced again' books. I am not. Whin a rale good book comes along I'm as quick as anny wan to say it isn't so bad, an' this here book is fine. I tell ye 'tis fine." '[1]

"How's that now?" Mr. Hinnissy might have queried. "Th' grrandest, ye say?"

"Well sir, maybe not th' grandest," Mr. Dooley might have allowed. "But be in large, Hinnissy, Mooney an' me we agree. An' that makes it fine. I tell ye, that makes it fine."

Professor Mooney, no mean champion of Finley Peter Dunne and Dooleyisms himself, has written a splendid little book. Not super-excellent, but splendid all the same. Assiduously and persuasively, he argues that the Act of State Doctrine—one of a number of legalisms by which domestic tribunals have both honored and dishonored the extra-territorial impact of foreign wealth seizures over the years—"when pushed beyond its proper purpose, becomes heretical and is utterly without justification in light of the realities of the past practice of our nation"[2] and "tends to disrupt the basic purpose of the international legal system."[3] *Banco Nacional de Cuba v. Sabbatino*[4] exemplifies this, he rightly complains, in three principal ways: its application of the Doctrine "is indefensible in the light of its origin, the history of its past application, and the pressing current requirements of our international economy."[5] In the end, he unmasks both the Doctrine's classic expression and its *Sabbatino* perversion for what they really are: respectively, (1) "the theory that strict territoriality authorizes every state in applying its own power to ignore everybody's law,"[6] and (2) "the idea that the courts of one nation *must* defer to foreign govern-

* A review of FOREIGN SEIZURES: SABBATINO AND THE ACT OF STATE DOCTRINE. By Eugene F. Mooney. Lexington: University of Kentucky Press, 1967. Pp. 186. $5.00 [Hereinafter cited as MOONEY].

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[1] DUNNE, MR. DOOLEY AT HIS BEST 99 (Ellis ed. 1943).

[2] MOONEY 5.

[3] *Id.* at 154.

[4] 376 U.S. 398 (1964).

[5] MOONEY 6.

[6] *Id.* at 155.

mental acts which wreck or undermine the international economy."[7]

RECAPITULATION

Chapter 1 begins at the historical beginning: in 1674 with *Blad v. Bamfield*,[8] to which the Act of State Doctrine owes its judicial genesis; in 1848 with *Duke of Brunswick v. King of Hanover*,[9] from which it draws its present "heraldric" and "rather pretentious" expression; and in the early nineteenth century with *Rose v. Himley* (1808),[10] *Hudson v. Guestier* (1808),[11] and *The Schooner Exchange v. McFadden* (1812),[12] in which its American debut was first foreshadowed. But not—or at least not mainly—to satisfy some personal aesthetic about proper historical exposition. The author's purpose is otherwise and twofold: first, to remind us that the Doctrine, which finally emerged full bloom under the pervasive influence of "analytical positivism," was formulated "as a natural outgrowth of the international law theories of the 'nationalist' writers"[13] of the 16th and 17th Centuries, most notably the territoriality-comity theories of Ulrich Huber; and second, to support his first claim (later substantiated) that with unwarranted Austinian enthusiasm the *Sabbatino* majority veered sharply from the Doctrine's originally and historically charted discretionary course—that is to say, if I may, from the Act of State Doctrine "properly so called."

In Chapters 2 and 3, Professor Mooney develops near exhaustively the second of his three-pronged indictment. In so doing, he demonstrates anew the central importance of examining "precedent" in contextual and policy-oriented terms. Reviewing first the "South American" and then the European seizure (and other) cases which have come before American courts over the last hundred years or so,[14] he properly concludes that, except for the "big anomaly" of the Nazi seizures cases, the Act of State Doctrine has always been applied (in all its variations) consistently with the popular—and only slightly less

[7] *Ibid.* The italics are Professor Mooney's and are intended to stress the fact that the *Sabbatino* Court erroneously equated the Act of State Doctrine with a doctrine of compulsory judicial abstention in cases involving, to quote the Court, "a taking of property within its own territory by a foreign sovereign government." The author may be criticized, however, for not making the compulsory import of this holding sufficiently explicit throughout his discussion.

[8] 36 Eng. Rep. 992.

[9] 2 H.L.C. 1.

[10] 8 U.S. (4 Cranch) 267.

[11] 8 U.S. (4 Cranch) 293.

[12] 11 U.S. (7 Cranch) 116.

[13] MOONEY 10.

[14] In view of the fact that many of Professor Mooney's "South American" cases concerned seizures undertaken in what I would call "Middle America" (*e.g.*, Mexico, Costa Rica, Haiti, etc.) the term "Latin American" would have been more appropriate.

often, the official–foreign policy perspectives of this nation:[15] in the Latin American cases, first to foster New World independence (in keeping with the once pretentious Monroe Doctrine) and then to satisfy both the "interventionist" and "non-interventionist" policies of a later era; and in the European cases, generally to validate our national rancor (hysteria?) toward Red regimes of all hues, judicial disgust for Nazi policies having been shockingly late in coming (and then only by explicit Executive encouragement via the famous "*Bernstein* letter"). Professor Mooney's point is, of course, that before *Sabbatino* the Doctrine was employed only exceptionally in any rigid or unrealistic sense. Foreign policy flexibility has traditionally and preeminently been its hallmark.

With all this in mind, the author then tackles l'Affaire *Sabbatino* itself,[16] leaving his final basic complaint to later development and substantiation. The progression, he hints, is natural because *Sabbatino* "incorporated all three now-familiar stress factors" by which, presumably, the bulk of past Act of State cases might be categorized: "1) a 'Communist' seizure, 2) by a South American government, 3) in which the State Department manifested disapproval of judicial inquiry into the merits."[17] But as Professor Mooney is quick to point out, historical similarities can be deceiving. For until *Sabbatino* "no case in the Supreme Court [or any other American court] clearly presented an instance of a foreign seizure [alleged to be] in violation of international law."[18] In other words, *Sabbatino* was unprecedented in a major and critical particular.

It is essentially this fact which underlies the author's enlightened, though not altogether ordered, call for a different result. For whatever

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[15] It deserves mention at this juncture that the author is concerned throughout principally with American Act of State Cases. The "international pattern" of Act of State cases is summarized in the author's "Appendix II" at 165-77, and to similar effect.

[16] MOONEY, chs. 4 and 5.

[17] *Id.* at 72. This allegation is not wholly accurate, however. Never before *Sabbatino* was there an Act of State case "in which the State Department manifested disapproval of judicial inquiry into the merits." What Professor Mooney has in mind is the State Department's explicit interposition following the first of the well-known *Bernstein* cases. See Bernstein v. N.V. Nederlandsche-Amerikaanshe Stoomvaart-Maattschappij, 210 F.2d 375 (2d Cir. 1954). But this was an expression of approval—not disapproval—of substantive judicial inquiry. What Professor Mooney no doubt means to say, therefore, is that an expression only of Executive *concern* was a familar "stress factor."

[18] MOONEY 76. I have inserted the phrase "alleged to be" for two reasons. First, because it is likely that this is what Professor Mooney intended. Second, because the statement is otherwise subject to double criticism. Without the insertion, the statement would deny that any of the foreign seizures in issue before *Sabbatino* were violative of international law in fact—a debatable proposition, for

(Continued on next page)

can be claimed to rationalize *Sabbatino's* "legalistic" and "parochial" break from the flexible past uses of the Act of State Doctrine—it is axiomatic, after all, that "precedent" alone is not and should not be controlling always—it must be said (if it can be at all) so as to justify beyond peradventure that a traditionally discretionary "rule" of judicial abnegation (which, in Mr. Justice Harlan's own words, is "compelled by neither international law nor the Constitution") is entitled to overcome the time-tested principle that the "law of Nations" is a part of the "law of the land" which American courts, in the absence of Congressional enactments to the contrary, are constitutionally bound to administer. In this regard, Professor Mooney rightly contends, and notwithstanding the majority's commendable wish "to preclude the possible application of narrow, parochial views by the American judiciary in matters having to do with foreign relations,"[19] *Sabbatino* failed to pass muster. Briefly, the Court's argument ran as follows: 1) the Act of State Doctrine, while not constitutionally required, has "constitutional underpinnings" in the system of the separation of powers;[20] 2) as such, it sometimes requires the Judiciary to defer to the Executive in order to maintain "the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs";[21] 3) this deferrence is necessary when the area of international law in question lacks "codification or consensus" and/or when the particular matter at bar involves politically sensitive questions;[22] 4) "[t]here are few if any issues in international law today on which opinion seems to be so divided as the limitations on a State's power to expropriate the property of aliens"[23] or "which touches more sensitively the practical and ideological goals of the various members of the community of na-

(Footnote continued from preceding page)
example, in the case of the anti-semitic Nazi seizures. The author's use of the word "clearly" may be mitigating, however. Also, the statement would flatly proclaim that the Cuban seizure involved in *Sabbatino* was internationally unauthorized. Again, there is room for debate. In this latter connection, see text at notes 60-63, *infra*.

19 MOONEY 94.

20 376 U.S. at 423.

21 *Id.* at 427-28.

22 *Id.* at 428.

23 *Ibid.* One of the references cited by the Court to support this conclusion is an article co-authored by this reviewer: Dawson and Weston, *"Prompt, Adequate and Effective": A Universal Standard of Compensation?* 30 FORDHAM L. REV. 727 (1962). This would not be worth noting but for the fact that the article does not fully support the Court's assertion, a point which was picked up by Mr. Justice White in his dissent at 376 U.S. 465 n.22. In the full context of the Court's argument, the article seems to have been cited for the view that the principle of compensation as such is subject to great division of opinion. The article makes no such claim, however. It asserts only that the *measure* of compensation is open to debate. This, to quote Mr. Justice White, is a more "discrete issue."

tions";[24] 5) the "balance of relevant considerations" therefore dictates that the Act of State Doctrine *must* be applied to "a taking of property within its own territory by a foreign sovereign, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law."[25] In other words, the Judiciary is under a compulsory non-constitutional duty to ignore its constitutional obligations (a) whenever international law does come to it, to use the author's semi-hyperbole, "full grown, clear-cut, well settled and fully accepted by all other nations of the globe,"[26] or (b) whenever the foreign seizure question at bar is political in nature. "A narrower and more outdated view of the judicial process in general and the processes of international law in particular," Professor Mooney laments, "cannot be imagined than that projected by the Court."[27]

His critique of "(a)," above, is damning. Not only is the ruling—here quoting from Mr. Justice White's dissent—"'tantamount to a declaration excusing this Court from any future consequential role in the clarification and application of international law,'"[28] but it leaves "mercilessly vague" just "[p]recisely how a global consensus on the international law of expropriations, or any other point for that matter, will come into existence without the rational process of decision-making by responsible national agencies. . . ."[29]

> [I]t is a reasonable inference from the majority opinion that the mystic processes of international diplomacy are thought to be the only legitimate source of "international law," properly so called. Even the authoritative writings of lifelong international law scholars is downgraded and ignored in the majority opinion. It is as plain as the positivist nose on the face of the Court's opinion that the United States Supreme Court doubts both the existence and utility of international law for deciding other than rubberstamp cases.[30]

Detailing at some length the implications this bears for the existing horizontalism and future pattern of international claims settlements (with a few passing sallies against Professor Richard A. Falk, *Sabbatino's* principal defender or sponsor, as you will), he concludes:

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[24] *Id.* at 430.
[25] *Id.* at 428.
[26] MOONEY 94.
[27] *Ibid.*
[28] 376 U.S. at 458, quoted in MOONEY 94.
[29] MOONEY 94.
[30] *Id.* at 94-95.

The most questionable aspect of this whole approach is that it magnifies the existing diversity of international opinion concerning economic legislation and makes it an obstacle impossible to cross.[31]

Professor Mooney could also have noted that a "lack of consensus" over given legal questions, far from being a cause for judicial abstention, is among the best reasons for active judicial participation.

The author's censure of "(b)," above, is somewhat less trenchant. Noting that the Court "seems to state that the Act of State Doctrine . . . is closely related to the 'political question' problem of constitutional law,"[32] he adopts Mr. Justice White's analysis as his own:

> Without doubt political matters in the realm of foreign affairs are within the exclusive domain of the executive branch. . . . But this is far from saying that the Constitution vests in the executive exclusive absolute control of foreign affairs or that the validity of a foreign act of state is necessarily a political question. . . . And it cannot be contended that the Constitution allocates this area to the exclusive jurisdiction of the executive, for the judicial power is expressly extended by that document to controversies between aliens and citizens or states, aliens and aliens, and foreign states and American citizens or states.[33]

His parting riposte lays especially bare the Court's vulnerability:

> Assuming that the *Sabbatino* decision is grounded to some extent on the Constitution, either because it represents a particular application of the "political question" rule which may be of Constitutional origin or because the majority invoked the tripartite structure of our federal government (set up in the Constitution) for a particular ruling based on the "separation of powers" theme, then fascinating questions of Constitutional magnitude should arise if the Executive tries to exercise its Bernstein exception or when Congress undertakes to legislate on the subject. It is just a matter of time until the former case arises, and the latter event has already occurred. The Hickenlooper Amendment to the Foreign Assistance Act of 1964 purports to change the *Sabbatino* rule.[34]

The remaining discussion is devoted to an examination of the constitutionality of the Hickenlooper Amendment in the legislative-judicial

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[31] *Id.* at 127.
[32] *Id.* at 104.
[33] 376 U.S. at 461-62, quoted in MOONEY 104.
[34] MOONEY 105-06. The Hickenlooper Amendment referred to by Professor Mooney (and hereinafter by this reviewer) is an amendment to Section 301(c) of the Foreign Assistance Act of 1964. See Pub. L. No. 88-633, § 301(d)(4), 78 Stat. 1013. The effect of the amendment was to reverse the Sabbatino decision by prohibiting American courts from applying the "federal act of state doctrine" in cases involving "a confiscation or other taking" by a foreign State "in violation of the principles of international law" unless the Executive Branch affirmatively "determines that application of the act of state doctrine is required . . . by the foreign policy interests of the United States." This same section was inserted by Congress in the Foreign Assistance Act of 1965. See Pub. L. No. 89-171, § 301(d)(2), 97 Stat. 653. The effect of this latter legislation was to make the amendment permanent.

"separation of powers" context, its history, its purpose, and its recent and thus far sole judicial interpretation.[35] Lest Professor Mooney's basic point be missed, however, his final remark is worthy of note:

> The composition of the Supreme Court being substantially the same as it was in 1964 and assuming that Mr. Justice Harlan's opinion still farily represents the thinking of a majority of the justices of the Court, will the Court stick by its Doctrinaire Act of State rule announced in *Sabbatino,* acquiesce in the Hickenlooper Amendment, avoid the question altogether, or—perhaps—split the baby?
>
> The significance of these speculations into the Court's future maneuverings lies in the distinct possibility that if the *Sabbatino* ruling is truly based on "constitutional underpinnings" then the Hickenlooper Amendment may be tantamount to another attempt by Congress to alter the constitutional allocation of judicial duties, which under *Marbury v. Madison* cannot constitutionally be done.[36]

In Chapter 6, Professor Mooney lays the foundation for his third and final basic claim—carefully explained in his "Coda," following—that the Supreme Court misunderstood and/or disregarded the pressing demands of our contemporary world economy and, so, because of the interdependences of the entire world social process, of the international legal order itself. United States post-World War II foreign policy, he observes, has moved increasingly, though not unfalteringly, "to help build stable, peaceable, and economically sturdy nations,"[37] as perhaps best recently exemplified by the *Alianza para Progresso.* Crucial to this foreign policy, he continues, is the American private investor, party because of the efficiency with which he can contribute organization and skills (as well as capital) and partly, I would add, because there simply are not (for political and other reasons) sufficient public funds to go around. The underlying theory, not always borne out by past practices, is that widespread private enterprise helps to separate economic power from political and other forms of power and, so, is the keystone to the development of democratic societies. In any event, what concerns Professor Mooney (and what he says should have concerned the *Sabbatino* Court) is that American private entrepreneurs are today being deterred from investing in precisely those economies which need them the most—at least from the economist's point of view. The

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[35] See MOONEY 106-24. The "sole judicial interpretation" may be found in *Banco Nacional de Cuba v. Farr v. Compania Azucarera Vertientes-Camaguey de Cuba,* 243 F. Supp. 957 (1965).
[36] MOONEY 123-24.
[37] *Id.* at 136.

reason? increasing foreign wealth seizures in the laggardly developing underdeveloped world. Illustrative, he recounts, is an A.B.A. committee report which notes that an erstwhile president of the International Finance Corporation "'places $500 million of private capital as a conservative estimate of the funds held back from Latin American investment as a result of the Cuban nationalizations.'"[38] One may legitimately ask, of course, what these difficulties for American foreign policy in general and American private investors in particular have to do with the welfare of the world economy as a whole. For the doubting Thomases who might wrongly conclude that the author is moved more by provincial than worldly biases,[39] Professor Mooney has a disarming and rather discomforting answer:

> As the United States goes, so goes the world in this matter of private foreign investment. During the period 1946 through 1958 the United States' share of the net outflow of capital on an international scale amounted to two-thirds of the total. Direct investments constituted about 90 percent of the total American private long-term investment abroad, and thus a significant change in the amount or direction of American direct investment by private investors registers traumatically on the entire international pattern of investment outflow. . . . Economic development of the international community at this point in history depends largely on the quality and direction of the international flow of capital from investor to borrower nations. . . . American investors should be encouraged to run risks of nationalization of their foreign investments . . . if for no other reason than that distortion of economic development merely breeds trouble for the entire world for decades—perhaps centuries—to come.[40]

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[38] REP. BY THE COMM. ON INTERNATIONAL TRADE AND INVESTMENT, SECTION OF INTERNATIONAL AND COMPARATIVE LAW, A.B.A., THE PROTECTION OF PRIVATE PROPERTY INVESTED ABROAD 5 n.13 (1963), quoted in MOONEY at 144 n.12.

[39] The *Sabbatino* majority may properly be included in this group. For example, central to its reasoning was its reluctance to engage in what it called "the sensitive task of establishing a principle not inconsistent with the national interest or with international justice." 376 U.S. at 428. Implicit in this is the common but erroneous assumption that there exists some necessarily irreconcilable dichotomy between "national" and "international" interests. See, *e.g.*, FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 45-59 (1964). The difficulty with this view is that it lacks consistent empirical reference and so confuses the observational standpoint from which international law can be meaningfully understood and channeled. International law is predicated on the existence not of "national" and "international" interests, but on "special" and "common" interests, the latter of which may include both *exclusive* and *inclusive* interests. Thus, it may be entirely consistent with what the majority calls "international justice" (*i.e.*, the long-range *common* interest of the world community) that a particular legitimate *exclusive* interest of one community member be given preference over a particular *inclusive* interest of all community members, a possibility which of course requires the most delicate and enlightened balancing on the part of the decision-makers involved. It is a shortcoming of Professor Mooney's book that it does not touch upon this question more than obliquely.

[40] MOONEY 152.

In other words, "[t]he United States private investor is the mainspring of this entire global process."[41]

In these lights it is easy to see why Professor Mooney so deeply regrets the *Sabbatino* decision. It is not simply that it failed to serve the current and long-range interests of the United States or its nationals. "The most important economic stake in the *Sabbatino* case," he emphasizes, "was not the $175,000 [therein claimed]."[42]

> The larger issue may turn out to have been the fate of the long-range economic development program of the international community which now consists largely of the existing $66 billion in American foreign investments and the annual outflow of some $4 billion from American investors.[43]

For Professor Mooney, in other words, it was less the Court's misconstruction of the Act of State Doctrine (as traditionally invoked and applied) than its failure to appreciate the global interests at stake—and so its perpetuation of the widespread Austinian misconception that economic, political, and social considerations are not "legal" considerations—that causes him the greatest grief.

> There is no cogent reason [why] American municipal courts should be foreclosed from the international judicial process of clarifying the basic international community policies concerning economic activity. On the contrary, there is every reason in favor of their participation. . . . Pressing national and international policies dictated that the Doctrine should be restated pragmatically so as to conform to past realities, satisfy present demands, and be applicable to future problems. The obvious step was to except from the sweeping prohibition of the dogmatic version foreign seizures alleged to be in violation of international law and permit rational judicial inquiry to determine legality. Permitting our domestic courts access to an arena already occupied by the domestic courts of other nations can be regarded as catastrophic only by those whose concept of international law must now be reframed to incorporate what was previously an unthinkable.[44]

The Hickenlooper Amendment, he resolves, is the saving grace.

> With all its faults, ambiguities and limitations . . . [it] is an acceptable, although somewhat timid . . . , policy declaration by the Congress to the Judiciary that to the extent of its jurisdiction the courts should lend whatever support they can muster to the larger task of implementing international economic development through an emerging international legal order.[45]

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[41] *Id.* at 155.
[42] *Ibid.*
[43] *Ibid.*
[44] *Id.* at 157-58.
[45] *Id.* at 156-57.

CRITIQUE

So much for Professor Mooney's praiseworthy argument. It remains now to consider what prevents his study from being superexcellent. The questionability of its title,[46] the inelegance of some of its organization and syntax, the lack of sufficient footnote references —these and other minor imperfections (some of which have already been mentioned) could be belabored. But it is not so much these minor sins, regrettably, as those of a more significant character which prevent Professor Mooney from reaching truly Olympian heights. To these sins—more of omission than commission—we may now turn.

First and perhaps foremost is the author's failure to take more than a passing shot at *Sabbatino's* jurisprudential substructure: Nineteenth Century legal positivism. Salutary in all respects would have been no less than a wholesale assault upon this doctrinal base, if only to have made more meaningful the author's primary discontent—that the Court failed to think in policy-relevant terms. For Professor Mooney, strongly influenced by the progressive policy-oriented jurisprudence of Professors McDougal and Lasswell of the Yale Law School, no doubt this would have come swiftly. Consider, for example, the statement on which hangs the Court's precise holding of compulsory abstention:

> It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice.[47]

Here is Nineteenth Century legal positivism in a nutshell: answers to legal questions can be arrived at only by deductively applying the facts to pre-existing rules as to which there is overwhelming, if not absolute, consensus; rules of international law—if they are truly to represent law "properly so called" and so be binding, or "imperative"—are principally to be found in the explicit and "unambiguous" agreements of sovereign states; the courts, concerned with the law as it is, are barred from considering what the law ought to be and why—a "legislative function"; and so forth. A more disappointing theoretical

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[46] The book is not about "FOREIGN SEIZURES," the primary title, but about "SABBATINO AND THE ACT OF STATE DOCTRINE," the secondary or auxiliary title. Unless the auxiliary title is included in all indexes and references, one will be misled to assume that the book treats of the substantive issues bearing upon foreign seizures. The objection is minor, to be sure.

[47] 376 U.S. at 428.

posture for the highest court of one of the most legally and psychologically sophisticated societies of all time can scarcely be imagined. The hard truth is that it is fundamentally ill-premised. Among other things, it places undue reliance upon what formal logic can realistically achieve with the kind of material with which jurists are accustomed to deal in resolving conflict. It all but repudiates the basal significance that customary legal prescription has had for the development of international law. And it mistakenly assumes that law cannot be defined in terms of morality and/or policy considerations. In sum, it describes a non-existent decision process. It is no exaggeration to say that its effect can be corrosive in the extreme, and would have been after *Sabbatino* were it not for the partially redeeming Hickenlooper Amendment. Mr. Justice Harlan unwittingly pinpointed its effect himself:

> When one considers the variety of means possessed by this country to make secure foreign investment, persuasive or coercive effect of judicial invalidation of acts of expropriation dwindles in comparison. The newly independent states are in need of continuing foreign investment. . . . Foreign aid given to many of these countries provides a powerful lever in the hands of the political branches to ensure fair treatment of United States nationals. Ultimately the sanctions of economic embargo and the freezing of assets in this country may be employed. Any country willing to brave any or all of these consequences is unlikely to be deterred by sporadic judicial decisions directly affecting only property brought to our shores.[48]

In other words, it promotes a world ruled more by the brute force naked power than by the autoritative processes of rational persuasion. No exponent of "neo-realism" himself, it would have behooved Professor Mooney to have probed more deeply the perniciousness of *Sabbatino's* Austinian foundations and, coextensively, to have tendered a comprehensive description of how the international decision process does in fact operate, albeit imperfectly, as a constructive shaping force in the transnational affairs of man.

Second and jurisprudentially related is the author's apparent reluctance to reply in detail to Professor Richard A. Falk, *Sabbatino's* principal defender. This is not to say that Professor Mooney provides no answers whatsoever. Quite to the contrary, he delivers a laudable overall rebuke. A specific blow for blow repudiation of the Falk thesis, however, would have proved extremely valuable, if only because the *Sabbatino* majority relied heavily upon Professor Falk's assessment of "the role of domestic courts in the international legal order."[49] The

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[48] *Id.* at 435-36.

[49] See Falk, *Toward a Theory of the Participation of Domestic Courts in the International Legal Order: A Critique of Banco Nacional de Cuba v. Sabbatino,*

(Continued on next page)

basic Falk thesis, premised on the commendable conviction that in this thermonuclear age domestic courts should help to ease global tensions by fostering "minimum trust" in international relations, and substantially quoted by Professor Mooney, is briefly restated:

> [I]n general, municipal courts should avoid interference in the domestic affairs of other states when the subject matter of disputes illustrates a legitimate diversity of values on the part of two national societies. In contrast, if the diversity can be said to be illegitimate, as when it exhibits an abuse of universal human rights, then domestic courts fulfill their role by refusing to further the policy of the foreign legal system. In instances of illegitimate diversity, where a genuine universal sentiment exists, then the domestic courts properly act as agents of international order only if they give maximum effect to such universality.
>
> It is postulated here that the existence of capitalist and socialist national societies is an instance of legitimate diversity in the world community. Domestic courts . . . should approach any legal controversy emerging out of this diversity with tolerance and respect, developing principles of self-restraint and justifying interferences with foreign economic policy by reference to variables such as extraterritoriality rather than to differences implicit in the two societies. . . . The location of domestic courts within the national system makes it desirable to curtail their consideration of the hostile substantive policy of another unit in areas of legitimate diversity. In order to guard against provincialism, domestic courts should be deprived of competence over such a case by the use of quasi-jurisdictional doctrines like act of state. . . . Many lawyers allege that it is a progressive tendency to encourage substantive review by domestic courts because this tends to increase the application of international norms. . . . The difficulty with this plausible position is that it overlooks the confusion of substantive norms in the economic area that exists as a result of the widespread emergence of socialism. Domestic courts are not equipped emotionally or technically to cope with this confusion, and tend to invoke norms that correspond with the national preference.[50]

A variation on this theme is also substantially noted by Professor Mooney:

> An insistence upon consensus as a basis of obligation in international law takes account of the structure of international society. There are no developed central legal organs able to change old law that conflicts with new patterns of values. Therefore, law must be administered in accord with the national governmental structure that persists. The dispersion of governmental institutions on the national level and the patterns of effective control both affirm the territorial nature of law. In the absence of an overwhelming consensus to the contrary, domestic courts should accept the validity of the territorial acts of the foreign government. . . . [A] restrictive view of the judicial function acknowledges the weakness of

(Footnote continued from preceding page)
16 RUTGERS L. REV. 1 (1961) on which the majority relied heavily. Professor Falk later expanded this article into a book: FALK, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER (1964).

[50] FALK, *op. cit. supra* note 49, at 72-75, quoted in part in MOONEY at 125 n.45.

> substantive international law in a world divided along ideological, cultural and economic lines.[51]

As Professor Mooney says, "[o]ne has the distinct impression Mr. Justice Harlan said just that in his *Sabbatino* opinion."[52] He then proposes to authenticate, though all too casually, the falsity of the "no consensus" argument when addressed to "the basic international norm" that "a taking must be compensated" and, thereafter, to demonstrate the manner in which this "basic norm" has been prescribed and applied.[53] The comedown of Professor Mooney's critique, however, is that he says little more. One longs for incisive comment on a number of critical points: Professor Falk's failure to supply meaningful empirical guidelines by which domestic courts can make the requisite initial determination of whether "legitimate diversity" exists or not; the theoretical inconsistency between his approval of substantive competence only in cases governed by universally accepted principles—an essentially rule-oriented theory—and his major contention that substantive competence should be allocated according to prevailing control and reciprocity patterns—basically a policy-oriented theory; his policy blurring and positivistic advocacy of "quasi-jurisdictional" euphemisms rather than contextual criteria as agents for guarding against parochialism in given cases; the fallacy of his assuming that domestic courts will be less immune from political bias and expediency than executive and legislative decision-making organs; his seeming inability to recognize that the tendency of domestic courts "to invoke norms that correspond with the national preference" is not necessarily destructive of the international legal order but merely reflective of the vast process of claim and counterclaim by which, indeed, that order is established; the apparent anomaly in his conviction that domestic courts should respect international law, on the one hand, and his conclusion that they should ignore certain claimed violations thereof, on the other; and so forth. To the extent that Professor Mooney touched on any of these issues, he did so only cursorily. He could have added immeasurably to this complex subject, however, if he had written (at least in part) "The Role of Domestic Courts in the International Legal Order—A Reply."

A third ground for criticism is Professor Mooney's failure to treat more conclusively the "political questions" theory which seemed to underlie the Court's construction of the Act of State Doctrine. It is sub-

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[51] Falk, *The Role of Domestic Courts in the International Legal Order*, 39 IND. L.J. 429, 443-44 (1964), quoted in part in MOONEY at 127 n.48.
[52] MOONEY 127.
[53] See MOONEY 127-32.

mitted that he could have demonstrated that *Sabbatino* failed even to follow this theory as it has been traditionally understood and applied. A starting- or ending-point could have been the famous case of *Baker v. Carr*[54] in which the "political questions" doctrine was recently clarified. Following a brief survey of past trends on the subject, Mr. Justice Brennan concluded, for the majority, that one or more of the following "elements" must be present if there is to be dismissal for non-justiciability pursuant to the "political questions" theme:[55]

1) *a textually demonstrable constitutional commitment of the issue to a coordinate political department;*
   [As noted, Professor Mooney comments at some length on this point. A "textually demonstrable constitutional commitment" of foreign seizure issues is not only nonexistent, but is repudiated, he infers, by the explicit constitutional allocation of the foreign affairs power among the several branches of our government, including the Judiciary. The history of foreign seizure cases in American courts is alone ample evidence. At best, such issues must rely on "constitutional underpinnings."]
2) *a lack of judicially discoverable and manageable standards for resolving it;*
   [Professor Mooney broaches this also. As indicated, it constitutes a basic part of *Sabbatino's ratio decidendi.* The Court's assumptions, however, were unwarranted in the extreme. Without relying on Professor Mooney's limited documentation, one must admit that there is in the foreign seizure field both a plethora of "discoverable" standards and an abundance of agreement about them, among capitalist and non-capitlist societies alike. The difficulties that arise inhere less in the standards themselves than in their particular applications. But then this is normal. To deny their discoverability or manageability in this area, therefore, is but to abdicate commonly accepted judicial functions and to misconstrue the decision process altogther.]
3) *the impossibility of deciding without an initial policy determination of a kind clearly for non-judical discretion;*
   [The only possible issue in *Sabbatino* which might have relevance here concerns the so-called *Bernstein* letter—an official and explicit policy declaration by the Department of State to the Court of Appeals for the Second Circuit that it

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[54] 369 U.S. 186 (1962).
[55] See *id.* at 217. [Italicization of the "elements", following, is mine.]

would not object to that court's reversing a prior position by asserting substantive competence over the legality of a Nazi seizure.[56] Applying this to the question at hand, one might argue—as was done in *Sabbatino*—that the Judicary is prohibited from engaging in substantive review unless and until the Executive has determined that such review is permissible. The difficulty with this proposition, as Professor Mooney observes, is that it has never before been invoked in a case involving a claimed violation of international law and that it has never been sanctioned by the Supreme Court. Moreover, the "*Bernstein* letter" was issued in order to bring judicial policy into line with official national policy; the "*Bernstein* exception" has never been demanded in cases where, as was clearly true of *Sabbatino* in the lower courts, these respective policies have been at one—which is to say that foreign seizure issues do not in and of themselves demand "non-judicial discretion." In sum, there is little or no authority for saying that the "*Bernstein* exception" requires an "initial policy determination" without which decision is impossible, a conclusion which is lent credence by the fact that while it did not disapprove the "*Bernstein* exception" neither did the *Sabbatino* Court approve it.]

4) *the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;*

[Arguably, if the State Department were to issue a "*Bernstein* letter," judicial disregard thereof would likely constitute the kind of disrespect of which Mr. Justice Brennan was speaking. Bearing in mind the "elements" following, this appears to be the only way in which such disrespect could have been manifested in *Sabbatino*. There having been no "*Bernstein* letter," however, the question turns on whether the State Department's Supreme Court brief and argument on the side of judicial non-review constituted a functional equivalent. The majority seems to have so concluded.[57] But Professor Mooney's contrary assessment, virtually identical to that of Mr. Justice White's dissent, is the more persuasive. Prior to this particular interposition (even while *Sabbatino* was in the

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[56] See note 17 *supra*.

[57] Clarity was not one of the majority's virtues on this matter. The extent to which the State Department's presence in the case may have influenced its outcome is therefore open to conjecture. Professor Mooney believes, however, that it may have been "actually determinative." See MOONEY 73.

lower courts), the State Department was officially and publically on record as being opposed to the Cuban seizure in question on the ground that it was violative of international law. In its brief, the Government disclaimed any interest in the substantive outcome of the case. And at no time did it say that adjudication would impede its functions; it sought only to establish a general principle of judicial non-review. Under these circumstances, it is hard to see how substantive review could have been in any way deemed disrespectful.][58]

5) *an unusual need for unquestioning adherence to political decision already made;*
[Of all the "elements," this is the most clearly inapposite. As noted, no "*Bernstein* letter" was ever issued. If, however, we are to assume that the State Department's perplexing decision to interpose was of the kind contemplated here, then one must also consider the Department's prior decision publicly to denounce the Cuban seizure involved. In these contradictory lights, it seems obvious that not even the Executive saw "an unusual need for unquestioning adherence." If anything, indeed, there was an "unusual need" to adhere to "political" decisions made by the Continental Congress in 1788.]

6) *the potentiality of embarrassment from multifarious pronouncements by various departments on one question.*
[As Professor Mooney makes clear, the possibility of embarrassing the Executive greatly concerned the majority. But he does not ask whether the Court's concern was warranted. Analysis suggests not. We must recognize, preliminarily, that while judicial abstention may avoid Executive embarrassment in some cases, it may not in others. In the well-known Bernstein Affair, for example, it was judicial abstention that proved ultimately embarrasing to national policy, not judicial review. In any event, how substantive review could have embarrassed the Executive in *Sabbatino* is difficult to fathom. As Professor Mooney recounts, the State Department had already publicly censured the Cuban seizure in question and the United States had already severed diplomatic relations with Cuba by the time the case reached the Supreme Court. Of

[58] This view is given strength by the fact that when the *Sabbatino* case was on remand to the United States District Court for the Southern District of New York, after passage of the Hickenlooper Amendment, the State Department contemplated no "determination" pursuant to the Hickenlooper Amendment to request the court to abstain from review in the interest of United States foreign policy. See MOONEY 123.

course, it is always possible that the Judiciary may *properly* validate or invalidate a foreign act which some other branch may *improperly* condemn or praise, respectively. But then is it correct to assume that domestic courts should automatically be forestalled from bringing national policy into line with the requirements of international law—to assume, that is, that the political branches may disregard international law with impunity? In other words, this may be the kind of embarrassment which, in the interest of a world rule of law, sometimes should be suffered. On the other hand, it is equally possible that the courts may *improperly* validate or invalidate a foreign act. Then, however, it is properly the Judiciary and not the Executive who should be embarrassed.]

The point is, in sum, that none of the "elements" contained in the *Baker* case were, to use Mr. Justice Brennan's word, "inextricable" from *Sabbatino*. And even if one could claim, contrary to *Baker*, that the list is not exhaustive, considerable deference would have to be paid Mr. Justice Brennan's warning that "[t]he political question doctrine, a tool for maintenance of governmental order, will not be so applied as to promote only disorder."[59] The *Sabbatino* Court overlooked this warning, however. Improperly invoking the "political question doctrine" by tautologically assuming, in essence, that an issue is a "political question" if it concerns the conduct of foregn affairs, it substantially foreclosed the American judiciary from any significant role in the international decision process, thereby misconstrued the Act of State Doctrine and, so, promoted only disorder. Professor Mooney's failure to entertain these and related considerations leaves one, therefore, with a sense of disappointment, and all the more so because of his enlightened point of view overall.

A fourth and final criticism differs from the three preceding in that it concerns a sin more of commission than omission. In his commendable endeavor to distinguish *Sabbatino* from past foreign seizure cases, Professor Mooney several times makes statements to the effect that *Sabbatino* involved a clear violation of interiational law.[60] One statement suggests that he intends these to mean only—and more precisely—that *Sabbatino*, unlike its "precedents," involved a *claimed*

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[59] 369 U.S. at 215.

[60] *E.g.*, MOONEY 74: "None of these early [Act of State] cases involved [like *Sabbatino*] foreign seizures in violation of international law. . . ;" MOONEY 76: "Throughout their long histories no case in the Supreme Court clearly presented [like *Sabbatino*] an instance of a foreign seizure in violation of international law."

violation of international law.[61] His perspective is by no means self-evident, however. If he is saying that *Sabbatino* involved a *claimed* violation, then, to be sure, he can be chastised only for creating an unnecessary ambiguity. But if he is saying that the case involved a *clear* violation of international law, he is open to criticism of a much harsher kind. For nowhere does he substantiate this assertion, and one is led inevitably to question his basis for making the judgment and, so, his right to make it at all. Is it premised on a comprehensive, multifactoral assessment of the "Law of State Responsibility"? Is it based on the findings of three American courts? Or is it the product, simply, of a natural tendency "to invoke norms that correspond with the national preference"? If his judgment is based on anything but the first of these possibilities, then Professor Mooney has committed an error of the very kind that Professor Falk and the *Sabbatino* Court have sought to guard against: he has forgotten to maintain his impartiality. This, obviously, is no way to answer *Sabbatino's* defenders. To the contrary, it only strengthens their argument and, so, does his own cause a great disservice. In other words, if blindly conventional, arbitrary, and biased judgments are to be avoided—if, that is, Professor Falk's and the *Sabbatino* Court's intuitions are to be disproved—then there is no escaping the deliberate and concededly sometimes vexing performance of all the tasks of rational inquiry: the clarification of goals, the description of past trends in decision, the analysis of conditions affecting decison, the projecton of future trends, and the invention and evaluation of policy alternatives—in respect of all points of disagreement in the particular case.[62] Perhaps Professor Mooney has done this. But if he has, he does not say so. If he has, indeed, he might even have told us that Cuba's alleged delinquency was by no means clear-cut.[63]

CONCLUSION

This review ends where it began. Professor Mooney has written a splendid little book. He has made a convincing, enlightened and, one

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61 "The *Sabbatino* case finally presented to the Supreme Court a fact situation involving a foreign seizure of American-owned movables alleged to be in violation of international law. . . ." MOONEY 72.

62 For extensive indications of the kind of inquiry that is necessary in this field, see Weston, *Community Regulation of Foreign-Wealth Deprivation: A Tentative Framework for Inquiry,* soon to be published by the Ohio State University Press in ESSAYS ON EXPROPRIATION and Weston, *International Law and the Deprivation of Foreign Wealth: A Framework for Future Inquiry,* soon to be published by Princeton University in THE FUTURE OF THE INTERNATIONAL LEGAL ORDER.

63 In this connection, see Dawson and Weston, *Banco Nacional de Cuba v. Sabbatino: New Wine in Old Bottles,* 31 U. CHI. L. REV. 63 (1963).

may hope, lasting contribution to the great debate that has raged so furiously over the *Sabbatino* case and its multifarious implications for the international legal order. Perhaps this plaudit has been forgotten along the way. Lest a mistaken impression be gotten, however, let it be understood that the best measure of this reviewer's appreciation for Professor Mooney's book is not the number nor the sharpness of the foregoing criticisms, but the amount of attention it has here been given and deserves. After all, as the formidable Mr. Dooley has said: "Ivrybody is inthrested in what ivrybody else is doin' that's wrong."[64]

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[64] DUNNE, THE WORLD OF MR. DOOLEY 29 (Filler ed. 1962).

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