Vanderbilt Law Review

Volume 22
Issue 1 *Issue 1 - December 1968*

Article 9

12-1968

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INTRODUCTION

Professors Cheatham and Maier raise the question, "What are the sources of the law applied in private international cases?" The authors consider this question under two main headings. The first deals with the "authoritative sources" of private *international law as applied in United States courts. It considers the question, "Where, within the complex governmental structure of the United States, does power over private international matters rest?" Several possible sources are considered: public international law, state law, and federal law, and within federal law, the major components: international agreements, legislation, federal common law and executive law. The second part of the article deals briefly with the "fundamental sources" of private international law. Here, the authors seek to identify those basic policies which guide a law-making body in laying down and developing principles of private international law. In the process, they suggest a number of "threats" to the development of effective private international rules.*

In economic and social matters the United States is a unit. Under the protection of the Constitution, goods move freely and people drive or fly across the continent almost without thought of state lines. In government and law, however, the United States is diverse,[1] and the diversities give rise to many problems. Analogously, increased speed and ease of transportation have made trade and intercourse between nations as easy as it was between the states a generation ago and easier than it was between counties when the nation was founded. Consequently, diversities in government and law among the nations ereate problems in the international field parallel to those within the United States. This article is concerned with some aspects of the enlarging international relations, the sources of private international law.

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1. "[T]he United States . . . has perhaps the most complicated legal structure that has ever been devised and made effective in man's effort to govern himself. . . . Only an American who has grown up in the system, and come to think of it as a part of the order of nature, can fail to see how intricate it is." E. GRISWOLD, LAW AND LAWYERS IN THE UNITED STATES 3, 64 (1964).

"Source of law" is a term of many meanings. In this article, two separate uses are employed in succession. The first part of the article deals with the "authoritative sources" of private international law in the United States. It is directed to the question: under our complex system of government, which component has the power to formulate the rules of law to be applied in private international law cases? In more specific terms, to which of our political divisions must the citizen look for the legal directives with which he must comply? In discussing possible answers to these questions, the first part outlines the governmental and legal complexities of our nation, placing special emphasis upon federal common law and on federal executive law.

The second part of the article is concerned with the "fundamental sources" of private international law; that is, the basic values existing throughout the law of all nations which give direction and content to the legal principles in this field, regardless of their authoritative sources. It is these values, together with the practicalities involved in implementing them, which are the "fundamental sources" of private international law.

A. Diversities in Laws

As a federal nation the United States preserves the government and laws of the fifty states. Their coordination with one another creates many intranational problems of conflict of laws, and their coordination with the laws of other nations gives rise to similar problems of private international law.

Inherent in this federal structure is also the conflict between laws of the component units and laws of the nation. In the United States the conflict is between the laws of the states and the steadily widening federal law which the supremacy clause of the Constitution makes "the law of the land." Vertical conflicts is the helpful name given to such conflicts by Professors von Mehren and Trautman in their fine casebook, *The Laws of Interstate Relations*.

A third kind of conflict derives from the tripartite division of the institutions of government. Under the federal and the state constitutions the legislative, executive and judicial departments have their respective fields of control. This separation of powers creates the additional question: which department of government can make the law?

In the United States there is a further complexity not found in most other federal nations—a separate set of federal courts which has its own laws on procedural matters and which functions alongside the state courts. To cap it all, there is the doctrine of judicial review, which gives

the courts the last word on the problems of high politics which are created by these complexities and cast in legal form.

The use of the term "conflict of law" to describe any of these legal complexities within our federal system is misleading. There are diversities of legal rules, but there is no diversity of purpose between the states and the national government or between the various law-makers functioning within the federal system of divided power. The common interest which all components of the system seek to advance is that of all the people of the nation. Thus, the solution to the legal complexities spawned by federalism is best thought of, not as a process of arbitration between conflicting and jealous lawmakers, but rather as a process of coordination of efforts to make the system work well and to provide justice and security for all the nation's people.

In this process of coordination the particular complexity raised for purposes of this article concerns the body of law to which American courts and lawyers look to find authoritative guidance in an international "conflict of laws" case. Thus, what is the commanding source for choice of law rules in private international law matters in the United States? It is not necessary for us to try to draw the imprecise and blurred line between "public" and "private" international law.[2] It is enough to say that most international transactions and controversies are between private individuals or corporations and come before the ordinary municipal tribunals for decision according to some system of law. It is essential to identify the law to be applied to them, and it is to such ordinary international cases that this discussion is directed.

B. Authoritative Sources

The phrase, "authoritative sources," connotes bodies politic, the organs of which exercise power in the development of controlling legal principles. So the question of authoritative sources is put here in terms of the several bodies of law which in the United States may control a private international law matter.

The several sources can be illustrated by reviving the case of *Hilton v. Guyot*.[3] An action was brought by a French citizen against an American citizen in a federal court in New York City on a judgment which had been rendered in favor of the plaintiff against the defendant in a French court. In giving judgment for the American defendant on

2. "Transnational law" is a comprehensive term proposed to cover the whole international legal area. *See* JESSUP, TRANSNATIONAL LAW (1956).

3. 159 U.S. 113 (1895).

appeal, a bare majority of the Supreme Court of the United States relied on the principle of reciprocity. Finding that at this time France would deny conclusiveness to an American judgment in a parallel case,[4] they held that the French judgment should be denied conclusiveness here. If the same case were brought today in the same court, what would be the source of the law which would determine whether the principle of reciprocity (the principle of "retorsion" as the minority in the *Hilton* case stigmatized it) should be applied? Would it be the law of the State of New York, since a federal court ordinarily must follow the conflict of laws principles of the state in which it sits? Would it be federal law, that is, the law of the United States which could set the measure of protection of a foreign nation's judgment in all courts throughout the nation? Would it be federal courts' law, a special body of law on the subject employed in the federal courts alone? Would it be international law, a law applicable throughout the family of nations and supplanting the municipal law of the United States?

Reverting to terms used earlier it will be observed that the situation involves both a horizontal conflict of the laws of the nations, France and the United States, and also a vertical conflict of the several bodies of law of the United States or of the international order which may be used to settle the horizontal conflict in a court in this country. It is the vertical conflict with which we are concerned.

C. *The Structure of the Government*

It is useful to take note of the structure of our government. There are sharp differences between the first and second of our great state papers, and the third. The Declaration of Independence declares that "these United Colonies" are severally "Free and Independent States." The Articles of Confederation continue the use of the term "States" in the plural number as the source of the central government, and in consonance with the plurality of creators, refers to the nation as "this confederacy" and "a firm league of friendship." By contrast, in the first words of the preamble the Constitution gives as the creators of the nation, "We the People of the United States" who "do ordain and establish this Constitution." So the United States of America is a federal nation created by the people of the whole country, not a "confederacy" or a "league" created by the agreement of the component states.

4. It appears that the doctrine or rule of reexamination on the merits has since been abandoned in France. *See* Nadelmann, *Recognition of Foreign Money Judgments in France*, 5 AM. J. COMP. L. 248, 251 (1956); Nadelmann, *French Courts Recognize Foreign Money-Judgments: One Down and More to Go*, 13 AM. J. COMP. L. 72 (1964).

In an ideal federal nation it might seem obvious that the coordination of the several laws inside the nation with the laws of other nations should be governed by national law, not by the laws of the component states. The component states of our Union have no international voice and no international responsibility. If they or their officials violate the standards of public international law, it is the nation, the United States, which is called to account in the international arena. The need that as to international relations this country be a nation in the fullest sense—that is, the need for control by national law—was perceived by the founders of our government. Numerous provisions of the Constitution grant powers in these matters to the three branches of the federal government, and other provisions deny power to the states over specified matters.

As to hostile relations, Congress is given broad powers in the prevention, initiation, and conduct of war. In providing for the common defense it may raise armies and navies, declare war, and grant letters of marque and reprisal. The states are denied power in this field. In amicable foreign relations, too, the national government has wide powers. The Congress can regulate foreign commerce; the President with the consent of the Senate can make treaties and appoint diplomatic representatives; and the federal courts have jurisdiction over typically foreign controversies, such as cases in admiralty and controversies between local citizens and foreigners. Again, the States are denied power over foreign relations, and they may not enter into any treaty or compact with a foreign power without the consent of Congress. In protecting and policing international intercourse, Congress is given power to define and punish piracy and felonies on the high seas and other offenses against the law of nations.

The structure of our government, nevertheless, is one of delegation of some powers to the nation by the people through the Constitution, with all other powers reserved to the states or to the people. The tenth amendment makes this explicit:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or the people.

Under this structure where does power over private international law rest? The terms of the Constitution, with its division of power between the nation and the states, are of basic importance. Yet the Constitution must not be considered merely with the dictionary in hand. It is essential to keep in mind the values of reserving local self-government to the states. It is no less essential to give attention to the needs of the nation

and of the international order in matters of national and international concern, with which the national government and its agencies can deal most effectively. Especially is it so in these days when peaceable international relations are vastly easier and speedier than interstate relations were but a few years ago, and when hostile international relations include the power of mutual destruction.

Our particular question is made sharper by the following classification of legal problems arising out of the difference and variety of governmental and legal units:

I. Interstate Relations within the United States.
   A. Public interstate law
   B. Private interstate law
II. International Relations.
   A. Public international law
   B. Private international law

Public interstate law is federal law. "Controversies between two or more States" are subject to adjudication by the Supreme Court of the United States, and the law applied in settling the controversies, as over such matters as state boundaries and the division of the waters of interstate rivers, is federal law. In reversing a decision which applied state law, Justice Brandeis was explicit: "For whether the water of an interstate stream must be apportioned between the two States is a question of federal common law upon which neither the statutes nor the decisions of either State can be conclusive."[5] The states may settle controversies between themselves by agreement but any such "Agreement or Compact" is subject to the consent of Congress.

Private interstate law is, in part, subject to the directions or limitations of federal law, as illustrated by the full faith and credit clause and the due process clause of the Constitution. In its largest part, however, private interstate law is state law.

Public international law is not subject to the control of the federal government, much less that of the states. For example, several controversies which in their private aspect had been decided with finality by the Supreme Court for purposes of municipal law were later taken before international tribunals on the ground that public international law had been violated. In about half of these cases the decision of the international tribunal was against the United States. The nature of public international law and its relation to municipal law are considered below, and the questions will not be anticipated here.

5. Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938).

The several possible authoritative sources of private international law will be considered in this order: public international law, state law, and federal law. Under federal law the several major components are: the Constitution; international agreements; legislative law (statutes and joint resolutions); judge-made law, with federal common law distinguished from federal courts' law; and executive law. Finally, the more basic matters, the fundamental sources of the principles of private international law, no matter what may be the formal or authoritative sources in this country, will be treated.

1. THE AUTHORITATIVE SOURCES

A. Public International Law

Since the beginning of our republic it has been said that public international law is part of the law of the United States.[6] The Law of Nations was familiar to the framers of the Constitution and knowledge of it formed an important part of their legal and philosophical attitudes. These international legal principles played an important role in influencing the structure of our government and in shaping the thinking of the men who were to lead it.[7] But, is public international law an authoritative source of private international law rules in the United States? To answer this question it is important to distinguish sharply the role of public international law as an authoritative source which compels the result in a private legal dispute before a municipal tribunal and public international law as a body of legal principles which are considered and drawn upon in formulating the rules of municipal law operative in domestic judicial decisions. The commingling of these two different concepts, the law of the nation and the law of nations, occurs in many books on "international law." Such a commingling is understandable, since both bodies of law are important for the international practitioner.[8] An illustration of their combined importance is the *Restatement*

6. *See, e.g.*, Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111, 116 (1784). The traditional citation for this proposition is found in The Paquete Habana, 175 U.S. 677, 700 (1900).

7. For a thorough and sensitive analysis of the influence of the "Law of Nations" on the framers of the Constitution, see Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26 (1952).

8. A casebook which sought throughout to keep the difference clear is DICKINSON, CASES ON INTERNATIONAL LAW (1950). It divides most of its chapters into two parts, headed respectively, "The International Forum" and "The National Forum." More recently, the excellent casebook STEINER & VAGTS, TRANSNATIONAL LEGAL PROBLEMS (1968) is almost entirely devoted to distinguishing these two systems and to demonstrating their interaction.

(Second) of the Foreign Relations Law of the United States[9] which, while dealing with both, at several places makes explicit the difference.

This part of our discussion begins by demonstrating that public international law is not an authoritative source of private international law rules in United States courts.[10] It then considers briefly the extent to which public international law principles do nevertheless exert a strong effect upon the outcome of private international cases.

Courts in the United States do not treat public international law as controlling in private international cases. Neither the customary "Law of Nations," nor the more explicit international agreements are treated as binding, except to the extent that their positive norms have been included as part of national law by executive, legislative or judicial action. The law applied in "purely private" international law cases—those involving choice of law, recognition of foreign judgments, the "international" law merchant, and law maritime—has, since the earliest days of the nation, been subject to variation based upon domestic interests and domestic power. International principles of comity and territorial sovereignty have been relevant but not controlling. A comparative examination of national rules does not reveal a measure of uniformity among national laws to permit the identification of a "general principle of law" sufficiently recognized to achieve the status of a public international rule.[11] Even if such a rule could be identified, American courts would not treat it as binding. Justice Holmes, writing in a maritime case, stated this position forcefully:

> 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 . . . . [F]rom the necessary point of view of the sovereign and its organs whatever is enforced by it as law is enforced as the expression of its will.[12]

The decline of the vested rights theory in private international cases, as well as in purely domestic ones, helps to make it even clearer that there is

9. *See, e.g.*, §§ 2, 63, 151 (1965).

10. A different situation pertains, of course, in international tribunals. There, the norms of private international law dealing with judicial jurisdiction and primary choice of law have public international law as their authoritative source. *See* Stevenson, *The Relationship of Private International Law to Public International Law*, 52 COLUM. L. REV. 561, 567-74 (1952).

11. *Id.* at 577-78.

12. The Western Maid, 257 U.S. 419, 432-33 (1922); Compare the view of the future of international law in municipal courts expressed in 1939 by the late Sir Hersch Lauterpacht: "The final development, when it comes to pass, will prescribe for municipal courts the supremacy of the law of nations over the law of the land—a consumation which will go much beyond the doctrine of adoption as now operative. . . ." *Quoted in* Feinberg, *Hersch Lauterpacht—Jurist and Thinker*, 3 ISRAEL L. REV. 333, 335 (1968).

no external compulsion of international custom upon United States courts to enforce foreign-created rights or to give judicial recognition to established principles of general international private law where domestic rules are in conflict.[13]

Treaties to which the United States is a party clearly serve as an authoritative source of private international law,[14] but this is so because they are effective as national law. The authoritative nature of treaty law derives not from its status as a binding international legal obligation, but from its existence as national "legislation" under the supremacy clause of the Constitution. Consequently, Congress may limit or abolish the internal effect of a treaty by means of the normal legislative process.[15] It may refuse to implement non-self-executing treaties even though an international obligation to do so clearly exists.[16] In any conflict between the Constitution and an international agreement, the Constitution is authoritative for domestic purposes.[17]

One area in which public international law might be treated as authoritative in private matters concerns the activities of multinational corporations. These corporations engage in activities crossing several national boundaries. They influence and, in some instances, control, the economies of many countries and their legal problems raise complex transnational questions not necessarily amenable to adequate solution under the laws of a particular nation.[18] The managers of such a corporation give close attention to many international considerations, including those which are economic, social, political and legal in character.[19] The corporation may have agreements, too, with its peers or with its subordinates in different countries under which controversies are dealt with by special arbitration tribunals and are kept out of national courts.[20] George W. Ball has suggested the recognition of an

13. *See* Nussbaum, *Rise and Decline of the Law-of-Nations Doctrine in the Conflict of Laws*, 42 COLUM. L. REV. 189, 206 (1942).

14. *See* text accompanying notes 63-113 *infra*.

15. *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 145 (1965), *citing* The Head Money Cases, 112 U.S. 580 (1884); Whitney v. Robertson, 124 U.S. 190 (1888).

16. *See* THE CONSTITUTION OF THE UNITED STATES (1964) 468-69 (N. Small & L. Jayson ed. 1964).

17. Reid v. Covert, 354 U.S. 1 (1957). *See* Geofroy v. Riggs, 133 U.S. 258, 267 (1890).

18. *See* Ball, *The Promise of the Multinational Corporation*, FORTUNE 80 (June 1, 1967). An interesting discussion of some of these legal problems is found in Miller, *The Corporation as a Private Government in the World Community*, 46 VA. L. REV. 1539 (1960).

19. *See* Rose, *The Rewarding Struggles of Multinationalism*, FORTUNE 100 (Sept. 15, 1968); Rolfe, *Updating Adam Smith*, INTERPLAY 15 (Nov., 1968).

20. *See* LaLive, *Contracts Between a State or a State Agency and a Foreign Company*, 13 INT'L & COMP. L.Q. 987 (1964).

"international companies law" as a means of avoiding "the stifling restrictions imposed on commerce by the archaic limits of nation states."[21] But multinational corporations are not yet governed by a supranational law, corresponding to the law merchant or the law of admiralty in earlier days. Such a corporation must still look to the law of a particular nation for its creation and its activities are subject to national laws. In the future, there may be methods under which such a corporation can be created by an international agency, even as specialized instrumentalities are created by the United Nations and are recognized by national courts.[22] Or the corporation may be chartered by several States.[23] But that is for the kind of future to which we all look.

If international law were to be treated as authoritative in any matters involving private parties before American courts it would appear to be most natural in cases concerning the person or acts of a foreign sovereign or his representative.[24] But the three branches of the federal government, together, have made it clear that rules pertaining to both sovereign immunity and the internal effect to be given to acts of a foreign state find their authority in national, not international law. Since 1943, the Supreme Court has repeatedly held that questions of sovereign immunity are to be dealt with in the light of national law and policy, not under international legal principles derived from the custom of nations. Absolute deference is given to State Department suggestions that immunity be granted or denied.[25] Where the State Department has taken no position, judicial determinations find their authority in federal common law, developed against a background of principles contained in State Department suggestions and the general statement of policy contained in the Tate Letter of 1952.[26] Earlier cases which impliedly treated international law as authoritative have been reinterpreted as

21. TIME 95 (Nov. 24, 1967).

22. *See, e.g.*, Lutcher S.A. Celulose e Papel v. Inter-American Development Bank, 382 F.2d 454 (D.C. Cir. 1967); Vigoureux v. Comite des Obligataires Danube-Save-Adriatique, Tribunal Civil de la Seine (1951), INT'L L. REP. 1, 41 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVE 463 (1952) (*reprinted in translation in* KATZ & BREWSTER, INTERNATIONAL TRANSACTIONS AND RELATIONS 297 (1960).

23. *See* Foley, *Incorporation, Multiple Incorporation and the Conflict of Laws*, 42 HARV. L. REV. 516 (1929). Proposals for international multi-state chartering on a regional basis bave been under consideration in the European Economic Community for some time. *See* Thompson, *The Project for a Commercial Company of European Type*, 10 INT'L & COMP. L.Q. 851 (1961).

24. *See* Stevenson, *supra* note 10, at 578-85.

25. These developments are examined in more detail in the subsection on "Political Questions" *infra*.

26. Letter from Acting Legal Adviser, Jack B. Tate, to Dep't of Justice, May 19, 1952, in 26 DEP'T STATE BULL. 984 (1952).

expressions of controlling national policy.[27] In a case allowing a counterclaim filed by a private domestic defendant against a foreign sovereign plaintiff, Justice Frankfurter wrote:

> The freedom of a foreign sovereign from being haled into court as a defendant . . . has since become a part of the fabric of our law. It has become such solely through adjudications of this Court. . . . It rests on considerations of policy given legal sanction by this Court.[28]

The clearest rejection of public international law as authoritative in American domestic courts is found in the litigation culminating in the Supreme Court's decision in *Banco Nacional de Cuba v. Sabbatino*[29] and in the subsequent legislation responsive to it.[30] The case turned upon the effect to be given to the confiscation in Cuba of a shipment of sugar belonging to American citizens when the proceeds from the sale of that sugar were brought to the United States and were claimed both by its former owners and the Cuban government. The Supreme Court rejected the opinion of the two lower courts which held that the normal rule prohibiting judicial examination of the act of a foreign state done within its own borders was inapplicable when that act violates international law.[31] The Court recognized the relevance of international norms for the final solution of the litigation, but emphatically rejected public international law as an authoritative source for either the act-of-state doctrine or for the substantive law to be applied in the United States courts to determine the validity of the expropriation:

> Although it is, of course, true that United States courts apply international law as a part of our own in appropriate circumstances, [cases cited] the public law of nations can hardly dictate to a country which is in theory wronged how to treat that wrong within its domestic borders.[32]

The Court reasoned that the lack of clarity in international legal standards concerning expropriation would make any attempt to apply them by a municipal forum inappropriate in view of the difficulty which such a determination might raise for the executive branch in its conduct of foreign relations. Lack of clarity in the law, however, is no reason for refusal to adjudicate a case where that body of law is authoritative. The authority here was clearly national, not international, in nature. Aware

27. *See, e.g.*, Republic of Mexico v. Hoffman, 324 U.S. 30, 34 (1945).

28. National City Bank v. Republic of China, 348 U.S. 356, 358-59 (1955).

29. 376 U.S. 398 (1964).

30. Foreign Assistance Act § 301(d)(4), ch.1, pt. III, 78 Stat. 1013, *as amended*, 22 U.S.C. § 2370(e)(2) (Supp. I 1965).

31. Banco Nacional de Cuba v. Sabbatino, 193 F. Supp. 375 (S.D.N.Y. 1961), *aff'd*, 307 F.2d 845 (2d Cir. 1962), *rev'd*, 376 U.S. 398 (1964).

32. 376 U.S. at 423 (1964).

of this, the Court took care to point out that although there might in fact be an ascertainable international norm, it was not required to apply it.[33]

The *Sabbatino* decision raised a furor of criticism, much of it based upon the Court's failure to treat international law as authoritative in deciding the principal substantive issue, or at least to apply its principles as part of municipal law. This reaction resulted in an amendment to the Foreign Assistance Act of 1962—variously called the Sabbatino, the Hickenlooper, or the "Rule of Law" Amendment—requiring both state and federal courts to adjudicate cases involving foreign confiscations under "principles of international law" when an international legal violation was alleged.[34] But the amendment did not direct the courts to examine public international law sources to find authority for its decisions. Rather, it incorporated by reference a definition of international law applicable to foreign property seizures which included a requirement of "speedy compensation . . . in convertible foreign exchange, equivalent to the value thereof,"[35] thus legislatively predetermining the very point on which the international controversy concerning the requirement of compensation turns.[36]

After a remand of the *Sabbatino* case in which the district court applied the amendment to the pending litigation,[37] the Second Circuit affirmed on appeal.[38] In the opinion, however, the appellate court raised, but did not answer, the question "whether Congress can thus specify how our United States courts must decide questions of international law . . . ."[39] This question by the court is not accurately formulated. The legislative history of the amendment makes it clear that Congress did intend to make its own view of international law authoritative.[40] The

33. *Id.* at 428-32 n.26.

34. *See* note 30, *supra.*

35. 22 U.S.C. § 2370(e)(1) (1964).

36. *See, e.g.,* Exchange of Correspondence between the Secretary of State of the United States and the Foreign Minister of Mexico, 3 HACKWORTH, DIGEST OF INTERNATIONAL LAW 655-61 (1942).

37. Banco Nacional de Cuba v. Farr, 243 F. Supp. 957 (S.D.N.Y.) (the receiver Sabbatino had been removed from the litigation, 272 F. Supp. 836 (S.D.N.Y. 1965) (mem.), *aff'd*, 383 F.2d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968).

38. Banco Nacional de Cuba v. Farr, 383 F.2d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968).

39. 383 F.2d at 185.

40. *See generally Hearings on S. 1367 Before the Senate Comm. on Foreign Relations on the Foreign Assistance Act,* 89th Cong., 1st Sess. (1965); *Hearings on H.R. 7750 Before the House Comm. on Foreign Affairs on the Foreign Assistance Act,* 89th Cong., 1st Sess. (1965); Letter from Senator Hickenlooper to the Washington Post, July 27, 1964, in 110 CONG. REC. 19546 (1964). At least as much, if not more, emphasis is given in these documents to the supposed beneficial effects of the amendment as a means of discouraging expropriation of American-owned property by foreign.

question is not whether Congress may specify international legal standards, but rather, whether Congress may establish a legislatively decreed policy for this nation which shall be applied regardless of its possible conflict with existing standards of international law. The answer is clear that it may. This settled proposition was recognized by Judge Bryan in an early case under the Sabbatino Amendment:

> The legislative history of the Hickenlooper Amendment and its extensions is replete with statements reaffirming what is plain on the face of the legislation, i.e. that international law, *at least from the parochial point of view of the United States*, requires full compensation for seizures of American-owned property. . . . This court would accordingly be bound to apply the provisions of the Hickenlooper Amendment even if they were found to be inconsistent with the views of other nations on international law, though that is not so here.[41]

Thus, for our purposes, it may be concluded that public international law, to the extent that it represents a body of positive norms intended to control the conduct of the international community, is not an authoritative source of law in private international cases. It may be, and often is, rejected, even in those cases in which it would seem to be most appropriately applied.

To say that public international law is not "authoritative" in private international cases is not to say that it is irrelevant. The principles and values represented by the rules of public international law are among the most powerful of the "fundamental sources" of law with which the second part of this paper will deal. Additionally, the international legal system, representing as it does the values and "felt needs" of the community of nations, does exert a strong, though informal, influence over the content of private international law rules in the United States courts. An early judicial recognition of this influence is found in the statement of Justice Marshall in *The Charming Betsy*: "[A]n Act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains. . . ."[42] This maxim which has been restated again and again to the present day, represents a positive

nations as to the desirability of increasing recognition of international legal principles in United States courts. The goal of protecting American investors could hardly have any chance of achievement unless the principles of compensation "recommended" by Congress were adopted by American courts. It appears to be somewhat unrealistic to assume that the adoption of the amendment was not due, in large part, to the assumption by the members of Congress that the statute required a judicial finding of an "international law" violation if "speedy compensation" had not been paid to the American property owner. *Compare* Bleicher, *The Sabbatino Amendment in Court: Bitter Fruit*, 20 STAN. L. REV. 858 (1968).

41. Banco Nacional de Cuba v. First Nat'l City Bank, 270 F. Supp. 1004, 1008 (S.D.N.Y. 1967) (emphasis added).

42. 6 U.S. (2 Cranch) 64, 118 (1804).

influence of international law on the outcome of private international law cases.

There are many modern instances illustrating the influence of international considerations in private cases. The Supreme Court in *Hilton v. Guyot* refused to enforce a foreign judgment upon the grounds that "the rule of reciprocity has worked itself firmly into the structure of international jurisprudence."[43] In *Lauritzen v. Larsen* the Court rejected a literal application of the Jones Act to a maritime tort on board a Danish ship in New York harbor in favor of general principles of maritime jurisprudence based, as it said, upon international law. The limiting effect of international considerations was paramount in the Court's reasoning:

> [I]n dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction.[44]

In cases involving extra-territorial application of American antitrust laws, American courts have had to consider the effect of decisions and decrees to avoid conflict with international jurisdictional requirements which might result in infringement upon the sovereignty of a foreign nation.[45] In at least one case, a proposed decree was revised after complaint by a foreign government concerning its effect upon a company which was its national.[46]

International legal concepts also affect the domestic interpretation and implementation of international agreements. It is a maxim of treaty interpretation that an act of Congress apparently in conflict with a treaty will be interpreted, whenever possible, so as to avoid the violation of an international legal obligation.[47] For the same reason, American courts

43. 159 U.S. 113, 227 (1895).

44. 345 U.S. 571, 582 (1953).

45. *See, e.g.*, United States v. Imperial Chemical Indus., 105 F. Supp. 215, 220-31 (S.D.N.Y. 1952). The success of Judge Ryan's "diplomacy" in that case which ordered the conveyance of certain British patents owned by ICI may be measured by the comment of Sir Raymond Evershed when the validity of the order was questioned in a British court. "If . . . the learned judge intended to say (as it seems to me that he did) that it was not an intrusion on the authority of a foreign sovereign to make directions addressed to that foreign sovereign, or to its courts, or to nationals of that foreign power, effective to remove (as he says) 'harmful effects on the trade of the United States,' I am bound to say that, as at present advised, I find myself unable to agree with it." British Nylon Spinners, Ltd. v. Imperial Chemical Indus., Ltd., [1952] 2 All E.R. 780, 782; [1952] 2 T.L.R. 669, 671.

46. United States v. General Elec. Co., 115 F. Supp. 835 (D.N.J. 1953). The Dutch note protesting the original decree is reproduced in EBB, INTERNATIONAL BUSINESS 571-73 (1964).

47. *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 145, Comment (b) (1965).

give "great weight" to executive advice concerning the nature of the international obligations which a treaty imposes.[48] The nature of sovereignty as an international legal concept together with the rights and duties owed by one sovereign to another have been the keystone of federal common law and federal executive law relating to sovereign and diplomatic immunity and the act of state doctrine.[49] International legal concepts concerning the rights and duties of states were at the heart of Justice Sutherland's analysis in the *Curtiss-Wright* case[50] of executive and national power over foreign affairs. A most convincing evidence of the influence of public international law within the United States is the fact that both the Office of the Legal Advisor to the Department of State and the Office of the Attorney General regularly render opinions to the executive branch concerning United States international legal obligations.[51]

But private international cases may not be decided without reference to the standards of conduct prevalent in the world community. To the extent that these standards operate as practical limitations upon the freedom of courts and upon the legislative and the executive branches in deciding disputes involving transnational matters, public international legal norms have a great and often decisive effect in American jurisprudence. The means by which this influence is exerted are described by Professor Myers McDougal in his essay, *The Impact of International Law Upon National Law: A Policy-Oriented Perspective:*

> The influence of inclusively prescribed policies depends not so much upon internal arrangements as upon the impact of external variables in the world power process—including potential reciprocities and threatened retaliations—which drive a decision maker toward conformity or nonconformity. . . . The insistent pressures of the world power process impose certain sources and content of authority, sustained by effective sanctions upon internal decision-makers if they are to maximize the values of the national community with which they identify.[52]

B. State Law

Under the structure of the government of the United States the states are the residuary keepers of all governmental powers not delegated

48. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 152 (1965).

49. *See* text beginning at note 226 *infra.*

50. United States v. Curtiss Wright Export Corp., 299 U.S. 304 (1936). *See* text accompanying note 174 *infra.*

51. For an extensive discussion of the duties of the Attorney General in this regard, see DEENER, THE UNITED STATES ATTORNEYS GENERAL AND INTERNATIONAL LAW (1957).

52. MCDOUGAL, STUDIES IN WORLD PUBLIC ORDER 209 (1960).

to the nation or prohibited to the states. So the control over private international law remains in the states unless it is vested in the nation, subject to whatever limitations on the states may be imposed under the Constitution or international law.

There are more positive grounds than mere governmental structure for the conclusion that state law is ordinarily the controlling law. The states have long applied their conflict of laws rules to international cases without hindrance or question. In the current remaking of conflict of laws principles two of the leading cases are state cases involving international issues. The opinions reflected the international character of the decisions, but gave no intimation that this factor affected the authoritative sources of the result.[53] The National Conference of Commissioners on Uniform State Laws, assuming that state law governs the enforcement of the judgments of the tribunals of foreign nations, drafted a uniform law on the subject and recommended it to the states for adoption.[54] Similarly, the Uniform Commercial Code, now adopted in forty-nine of the fifty states, has a choice of law provision which is identical in terms for interstate and international cases.[55] The treatises on conflict of laws for the most part do not discuss the problem and apparently assume that ordinarily the state courts will fashion and apply conflict of laws rules for interstate and international cases as well.[56]

What is even more important than silence or assumption is the admirable attitude of the state courts in these matters, free as they are of parochialism or nationalism. Three instances illustrate the concern of the state courts for achieving fairness in international cases equal to that sought in interstate cases. In 1952 the Supreme Court of California struck down a provision of the California Alien Land Law on the ground it was in violation of the United States Constitution.[57] In another case a district court of appeals of the same state had before it a question of the distribution of the personal estate of a local domiciliary of foreign

53. Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99 (1954).

54. Uniform Foreign Money-Judgment Recognition Act, approved by the National Conference of Commissioners on Uniform State Laws and the American Bar Association in 1962. 9B UNIFORM LAWS ANNOTATED 64 (1966).

55. UNIFORM COMMERCIAL CODE § 1-105.

56. Professor Albert Ehrenzweig would distinguish international conflict of laws sharply from intranational conflicts. *See* EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS § 6 (1962); EHRENZWEIG, PRIVATE INTERNATIONAL LAW (1967). A helpful recent discussion of the question in the issue of a law review dedicated to Professor Ehrenzweig is Scoles, *Interstate and International Distinctions in Conflict of Laws in the United States*. 54 CALIF. L. REV. 1599 (1966).

57. Sei Fujii v. State, 38 Cal. 2d 718, 242 P.2d 617 (1952).

nationality. The decedent left surviving him in his native country two polygamous wives, both lawful there. The court recognized the polygamous marriages as valid in this country for the purpose in question, and the two wives were awarded equal shares of the estate.[58] In New York the highest court explicitly refused to apply the reciprocity principle laid down in the *Hilton* case and enforced a Quebec judgment, even though the Province of Quebec would not have enforced a New York judgment.[59] As a study a generation ago showed, the state courts have transferred the principles developed in interstate cases to private international law cases:

> [I]n a world of nationalism and tariff barriers, there is afforded the inspiring spectacle of foreign countries being granted all the privileges of sister states in a branch of law that has grown up with the relations of confederated states in view.[60]

C. Federal Law

Article VI of the Constitution lists as "the supreme Law of the Land" three kinds of national law: "[1] This Constitution, [2] the Law of the United States which shall be made in Pursuance thereof; and [3] all Treaties made, or which shall be made, under the Authority of the United States." The second category listed above, "the Law of the United States which shall be made in Pursuance thereof," is more comprehensive than may appear at first glance. The Constitution creates three branches of government. Under the document and according to the principle of separation of powers, each branch possesses the inherent powers appropriate to it. So articles I, II, and III begin with language vesting in the several branches respectively a full measure of national power: article I, "All legislative Powers herein granted shall be vested in a Congress of the United States;" article II, "The executive Power shall be vested in a President of the United States;" article III, "The judicial Power of the United States shall be vested in one supreme Court, and in

58. *In re* Dalip Singh Bir's Estate, 83 Cal. App. 2d 256, 188 P.2d 499 (1948).

59. Johnston v. Compagnie Generale Transatlantique, 242 N.Y. 381, 152 N.E. 121 (1926). Professor Reese has shown that American courts generally do enforce judgments rendered in other countries. *See* Reese, *The Status in this Country of Judgments Rendered Abroad,* 50 COLUM. L. REV. 783 (1950). A recent article on the recognition of the adjudications by foreign nations' tribunals suggests that the favorable attitude of American courts has as a basis the policy of "fostering the elements of stability and unity essential in an international order in which many aspects of life are not confined to any single jurisdiction," but that the "international recognition practice need not be a simple echo of a federal system's treatment of sister state judgments." von Mehren & Trautman, *Recognition of Foreign Adjudications: A Survey and a Suggested Approach,* 81 HARV. L. REV. 1601, 1604, 1607 (1968).

60. Du Bois, *The Significance in Conflict of Laws of the Distinction between Interstate and International Transactions,* 17 MINN. L. REV. 361, 380 (1932).

such inferior Courts as the Congress may from time to time ordain and establish." Since each of the three branches of government may make national law, it is necessary to consider their respective law-making powers separately. The three kinds of national laws expressly mentioned in the supremacy clause—the Constitution, treaties, and federal statutes—will be treated first. Then three others which are implicit in the Constitution will be considered—federal courts' law, federal common law, and federal executive law.

1. The Constitution of the United States.—The Constitution has a double aspect. Since it is the foundation document of our government, in a sense every question concerning the extent of governmental powers goes back to it for answer. In another aspect it contains a variety of enabling and restrictive provisions. The latter aspect is of particular concern here.

Numerous provisions of the Constitution, as pointed out above, give to the central government wide powers over relations with foreign nations. Some explicit provisions, as the full faith and credit clause and the privileges and immunities clause, deal with phases of intranational conflicts only. Yet the broad guarantees of fairness through the due process of law and the equal protection of the laws clauses extend to aliens, in private international law cases, as well as to aliens within the country.[61] For example, a gross mistake in the choice of the applicable law in an international case may be upset under the due process clause.[62] Yet it is unlikely that the Constitution will now be invoked as a basis of federal control over private international law matters generally.

2. International Agreements.—In its external affairs, the nation is a unit "vested with all the powers of government necessary to maintain an effective control of international relations."[63] Thus, the government is unitary, not federal, in its foreign relations powers. A necessary concomitant of this plenary national power in external affairs is the power to carry out those international duties which the national government may accept—to enforce within its territory those obligations which it has undertaken by the exercise of its inherent external power.[64] Consequently, the supremacy clause of the Constitution unequivocally

61. "Finally, it is urged that the Federal Constitution does not require the States to recognize and protect rights derived from the laws of foreign countries—that as to them the full faith and credit clause has no application. . . . They rest upon the Fourteenth Amendment. Its protection extends to aliens." Home Ins. Co. v. Dick, 281 U.S. 397, 410-11 (1930) (Brandeis, J.).

62. *Id.*

63. Burnet v. Brooks, 288 U.S. 378, 396 (1933).

64. *See, e.g.*, THE FEDERALIST No. 80, at 112-14 (2 Bourne ed. 1901) (Hamilton).

makes treaties, entered into under the authority of the United States or federal legislation passed to implement them, the authoritative source of law for the matters with which they deal. Equally, under the general foreign affairs powers, validly concluded international agreements between the executive branch of government and foreign nations have the force of supreme national law.

The first proposition was settled in 1796 in *Ware v. Hylton* when the Supreme Court, with sweeping language, struck down an otherwise valid state statute which had cancelled debts owed by Virginians to British nationals during the Revolution, because it conflicted with the provisions of the Jay Treaty of 1783. The Court wrote:

> A treaty cannot be the supreme law of the land, that is, of all the United States, if any act of a state legislature can stand in its way. . . . It is the declared will of the people of the United States that every treaty made, by the authority of the United States, shall be superior to the Constitution and laws of any individual state; and their will alone is to decide.[65]

By contrast, the authoritative status of executive agreements was not finally settled until 1936 in *Belmont v. United States*. Upholding the validity of the Litvinov Assignment as part of the executive agreement in which the United States recognized the Soviet government, the Supreme Court ruled that the United States had the right to claim a deposit in a New York bank belonging to a Russian corporation which had been nationalized by the Soviets following the Russian Revolution. The Court refused even to consider whether the public policy of New York prohibited the recognition in that state of the validity of the Soviet seizure. After emphatically upholding the executive's power to enter such agreements without the advice and consent of the Senate, the Court stated:

> Plainly, the external powers of the United States are to be exercised without regard to state laws or policies. . . . And while this rule in respect of treaties is established by the express language of cl. 2, art. VI, of the Constitution, the same rule would result in the case of all international compacts and agreements from the very fact that complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states. . . . In respect of all our foreign relations generally, state lines disappear. As to such purposes the State of New York does not exist."[66]

The principal controversy concerning the treaty power has not arisen in connection with the effect of valid international agreements as binding internal law, but rather, in connection with its scope. For the purposes of the present article, this question can be stated: To what

65. 3 U.S. (3 Dall.) 199, 236-37 (1796).
66. 301 U.S. 324, 331 (1936).

extent may international agreements be used to create private international law within the United States?

The Constitution is intentionally not explicit concerning the scope of the treaty power.[67] But implicit in the creation of a new nation was the intent to create an entity whose right and power in international relations was "equal to the right and power of the other members of the international family" under principles of international law.[68] The mere creation of an international entity does not automatically make it similar in international matters to all other nations in the world community.[69] But the federal nature of the United States is not, in itself, a limitation upon the power of its national government to affect internal legal changes by treaty in order to carry out the requirements of its external affairs.

The landmark case of *Missouri v. Holland*[70] settled this question. In that case, the validity of an act of Congress implementing a treaty with Great Britain for the protection of birds migrating between the United States and Canada depended upon the validity of the treaty as a proper exercise of national authority. Recognizing that prior lower court cases had held a similar statute not connected with a treaty to be unconstitutional as beyond the scope of federal authority,[71] Justice Holmes nonetheless found the subject matter clearly within the scope of the federal treaty-making power:

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67. One explanation was given by Madison: "The object of treaties is the regulation of intercourse with foreign nations and is external. I do not think it possible to enumerate all the cases in which such external regulations would be necessary. . . . The definition might and probably would be defective. . . . It is most safe, therefore, to leave it to be exercised so contingencies may arise." 3 ELLIOTS DEBATES 514 (2d ed. 1836-66).

68. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936).

69. "With respect to the outer limits of the treaty power, the extent of the treaty power of the United States would be the same as that of another nation only if that other nation had within its constitution precisely the same limitations on its government as those contained in the Constitution of the United States. . . . This is not to say that, overall, the treaty power of the United States is less extensive than that of other nations; in some respects it is more extensive. It is merely to say that as the subjects of treaties vary, the power of the United States validly to enter into them varies, and that this peculiar juxtaposition of subject and power is not exactly matched by any other nation." E. BYRD, JR., TREATIES AND EXECUTIVE AGREEMENTS IN THE UNITED STATES 126 (1960) (footnotes omitted).

70. 252 U.S. 416 (1920).

71. Holmes cited United States v. Shauver, 214 F. 154 (E.D. Ark. 1914) and United States v. McCullagh, 221 F. 288 (D. Kan. 1915). Professor Louis Henkin points out that Holmes might have felt it necessary to rest the opinion on the treaty power because a majority of the Court would not have accepted a broadening interpretation of the commerce clause. Today, congressional regulation of migrating birds would clearly be permitted by the commerce clause alone without the additional factor of an international treaty. *See* Henkin, *The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations*, 107 U. PA. L. REV. 903, 914 n.24 (1959).

> It is obvious that there may be matters of the sharpest exigency for the national well-being that an act of Congress could not deal with but that a treaty followed by such an act could. . . . The only question is whether it [the treaty] is forbidden by some invisible radiation from the general terms of the Tenth Amendment. . . . No doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power. . . . Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. . . . It is not sufficient to rely upon the States. The reliance is vain, and were it otherwise, *the question is whether the United States is forbidden to act*.[72]

The power of the national government to enter into international agreements is coextensive with the foreign affairs interests of the United States. The most thorough definition of its nature is found in *Geofroy v. Riggs*:

> The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory without its consent. . . . But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is *properly the subject of negotiations with a foreign country*.[73]

Nearly forty years later, Chief Justice Hughes put it most sharply in a dispute between the state of New York and the government of Italy concerning the right to take by escheat the estate of a resident alien: "The treaty-making power is broad enough to cover all subjects that properly pertain to our foreign relations . . . and any conflicting law of the State must yield."[74]

These definitions, in addition to the specific limitations imposed by the existence of constitutionally-created rights, contain an implicit limitation as well—any matter which does *not* properly pertain to our foreign relations is not a proper subject for the treaty-making power. More directly stated: Wholly domestic matters are not subject to regulation by international agreement. But this form of distinction between "foreign interests" and "domestic matters" is not in itself particularly helpful in determining the scope of the treaty power. As one writer puts it:

> [W]ords at the level of abstraction of "international concern" and "domestic jurisdiction" are more labels for describing the consequences of decision than explanatory factors accounting for decision, and . . . such words do not refer to

72. 252 U.S. at 433-35 (emphasis added).

73. 133 U.S. 258, 267 (1890) (emphasis added).

74. Santovicenzo v. Egan, 284 U.S. 30, 40 (1931).

"irreducible spheres of rights" or to "impenetrable barriers" precluding a moving and variable line between inclusive and exclusive competence.[75]

Most treaties which affect internal private-law relationships have been so clearly concerned with traditional foreign relations that modern courts and commentators usually assume without discussion that they represent a legitimate exercise of the treaty power; yet they have a profound impact upon domestic law. By far the largest category of private law treaties are those affecting personal and property rights of alien individuals or corporations.[76] These treaties have created national law which overrides otherwise applicable state law in matters concerning validity of debts due to foreigners,[77] title to land,[78] escheat and inheritance,[79] statutes of limitations,[80] local taxation,[81] administration of alien estates,[82] prohibitions against employment of foreign labor,[83] and the right to engage in specific business or professional occupations.[84] One illustration will suffice. The New York State Workmen's Compensation Board reduced by one-half the commuted value of a death benefit to be paid to a decedent workman's widow and minor daughter, both residents and nationals of Italy, on the grounds that the New York law permitted such action in the case of non-resident aliens. The appellate division reversed this determination, because it was in conflict with the national-treatment clause of the Treaty of Friendship, Commerce and Navigation between the United States and Italy. The court held that the existence of discrimination in violation of the treaty was to be determined under national law, not by the state board.

The provision of the Treaty . . . contains subject matter proper for negotiation between sovereign governments and, as the Treaty is self-executing, it operates

75. McDougal, *The Impact of International Law upon National Law: A Policy-Oriented Perspective,* STUDIES IN WORLD PUBLIC ORDER 178 (M. McDougal ed. 1960).

76. Most treaties to which the United States is a party concern "public" international legal rights rather than private ones. Today the United States abides by over 1430 treaties and other agreements and belongs to nearly 80 international organizations. Warren, World Order Under Law, address to the Geneva World Conference on World Peace Through Law, July 9-14, 1967. By 1960, the United States had entered 130 bilateral commercial agreements, aimed primarily at private rights. WILSON, UNITED STATES COMMERCIAL TREATIES AND INTERNATIONAL LAW 1 (1960).

77. Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796).

78. Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 379 (1813).

79. Kolovrat v. Oregon, 366 U.S. 187 (1961); Hauenstein v. Lynham, 100 U.S. 483 (1879); Chirac v. Chirac, 15 U.S. (2 Wheat.) 124 (1817).

80. Hopkirk v. Bell, 7 U.S. (3 Cranch) 272 (1806).

81. Neilsen v. Johnson, 279 U.S. 47 (1929).

82. Santovincenzo v. Egan, 284 U.S. 30 (1931).

83. Baker v. City of Portland, 2 F. Cas. 472 (No. 777) (D. Orc. 1879).

84. Asa Kura v. City of Seattle, 265 U.S. 332 (1924).

> without the need of any legislation. Hence, it must be applied and given authoritative effect by the courts of this State.[85]

On appeal, the New York Court of Appeals rejected the contention that state law was authoritative in the case as a valid exercise of state police powers.[86]

Agreements dealing with clear transnational public interests, together with their implementing legislation, also serve as a source of national law applicable to matters with which they deal. For example, the Warsaw Convention fixes choice of law and jurisdictional rules for tort claims arising under its provisions.[87] Also, treaties dealing with cession of land,[88] riparian rights,[89] and migratory birds[90] have been held to override state law. Another excellent illustration is the General Agreement on Tariffs and Trade[91] (GATT) as applied in a recent California case. The City of San Francisco opened bids on electrical generating equipment under bid forms which provided that "all materials, supplies and equipment covered by this contract proposal shall be manufactured in the United States" in accord with the requirements of the California Buy American Statute. The low bid offered equipment which contained components manufactured in Canada, Japan, and Switzerland. When the city accepted this bid, the next lowest bidder brought a mandamus action to compel the city to accept its equipment which was wholly American-made. The court

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85. Iannone v. Radory Constr. Corp., 285 App. Div. 751, 141 N.Y.S.2d 311, 315 (1955). *Compare* Lukich v. Department of Labor & Indus., 176 Wash. 221, 29 P.2d 388 (1934).

86. Iannone v. Radory Constr. Corp., 1 N.Y.2d 671, 133 N.E.2d 708, 150 N.Y.S.2d 199 (1956).

87. 49 Stat. 3000 (1936), T.S. No. 876.

88. Henderson v. Poindexter's Lessee, 25 U.S. (12 Wheat.) 337 (1827). The power of the national government to affect private rights in land by treaty of cession was exercised most recently in the treaty between the United States and Mexico settling the long-standing controversy concerning the ownership of the Chamizal, a 437 acre tract of land which had been left on the American side of the Rio Grande when the course of that river was changed by repeated avulsions and continuing accretion during the 19th century. Article 4 of the treaty provided that lands would pass "in absolute ownership, free of any private titles or encumbrances of any kind." [1963] 15 U.S.T. 22, T.I.A.S. No. 5515. The transaction involved the moving and rebuilding of the river channel, the relocation of some 3,725 persons living in the disputed area, and the acquisition of private land titles by the United States government before the treaty could be executed. *See* Gregory, *The Chamizal Settlement*, 1 SOUTHWESTERN STUDIES No. 2, at 47 (1963). Senator John Tower announced that he would refuse to vote for the treaty because it amounted to a "dismemberment" of the State of Texas without its approval. The Attorney General of Texas stated that such approval was unnecessary and refused to file suit to test the constitutionality of the treaty. *Id.* at 45.

89. *See* Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox Co., 291 U.S. 138 (1934).

90. Missouri v. Holland, 252 U.S. 416 (1920).

91. 61 Stat. A3 (pts. 5 & 6) (1947), T.I.A.S. No. 1700, *as amended.*

refused to issue the mandatory injunction on the ground that two of the three countries of origin were parties with the United States to the GATT and that, therefore, the California statute and the bid forms violated the most favored nation clause in article II of the Agreement.[92]

Considerably more difficulty has arisen in identifying national power as the ultimate authority in treaties dealing with proposed internal legal changes as part of a developing "uniform international private law."[93] The source of this difficulty lay in the tradition that matters of private law and, particularly, conflict of law rules were determinable under state law and policy, except to the extent that the due process and full faith and credit clauses placed outer limits upon state activity. These questions were not traditionally thought of as pertaining to foreign relations. Consequently, it was strenuously argued that these problems were of purely domestic concern and, thus, lay outside the scope of the treaty power.[94] Initially the United States refused even to send delegates to international conferences called to draft agreements concerning private international law. When the American government finally did participate in such a conference, held on its own soil, it pleaded its inability to accede to agreements of this kind because of the federal structure of its government.[95] In the Sixth International Conference of American States at Havana in 1928, the United States abstained from voting on the draft of the Bustamente Code on the grounds that "in view of the Constitution of the United States of America, the relations among the States, members of the Union, and the powers and functions of the Federal Government, it finds it very difficult to do so."[96]

The legal aspects of this position appear to have been founded upon an implicit acceptance of the subject matter traditionally encompassed by the term "foreign relations" as defining the scope of the treaty power.[97] But this narrow view fails to take into account the broader test

92. Baldwin-Lima-Hamilton v. Superior Court, 208 Cal. App. 2d 803, 25 Cal. Rptr. 798 (1962).

93. For a thorough and concise history of United States activities in this field, see Nadelmann, *The United States Joins the Hague Conference on Private International Law*, 30 LAW & CONTEMP. PROB. (1965).

94. *See* Nadelmann, *Ignored State Interests: The Federal Government and International Efforts to Unify Rules of Private Law*, 102 U. PA. L. REV. 323, 323-29 (1954). *See also* Henkin, *The Constitution, Treaties and International Human Rights*, 116 U. PA. L. REV. 1012, 1012-24 (1968).

95. Nadelmann, *supra* note 94, at 323-31.

96. Declaration of the United States of America in THE INTERNATIONAL CONFERENCE OF AMERICAN STATES 1889-1928, at 371 (Scott ed. 1931).

97. The classic statement of this position was made by Charles Evans Hughes before the American Society of International Law, April 26, 1929. "But if we attempted to use the treaty power to deal with matters which did not pertain to our external relations but to control matters which

explicitly set forth by Justice Holmes in *Missouri v. Holland*—that the exercise of the treaty power is proper where "an important national interest can be protected only by national action in concert with that of another power."[98] Under this test, only two questions are relevant: (1) Does the affected interest concern the national government?; and (2) Can this national interest be protected by international agreement? In connection with private international law treaties, the answer to both questions is clearly "yes".

Writing almost ten years ago, Professor Louis Henkin pointed out that the greatly expanded scope of national power over purely domestic matters, indicative of a broader national interest in legal areas once thought reserved to the states, had made it possible to pass national legislation concerning almost all matters which might formerly have been governed only by a treaty plus implementing legislation.[99] Today, recognition of expanding national needs in the domestic field have broadened those categories of law which fall within the federal realm of authority. It is doubtful today that a court would find that questions relating to international unification of law in selected areas, or in connection with general attempts to define conflicts rules, were subjects which did not represent an important national interest. The practical impossibility of effective operation within this field without the use of international agreements is patent.[100] If the national government should decide that it is politically feasible and practically desirable to conclude agreements in this general subject-matter area, it seems clear that it has the legal power to do so.

In 1964 the United States at last officially recognized its interest in matters concerning the international unification of private law by joining the Hague Conference of Private International Law.[101] Since that time, it

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normally and appropriately were within the local jurisdictions of the States, then I again say there might be ground for implying a limitation upon the treaty-making power that it is intended for the purpose of having treaties made relating to foreign affairs and not to make laws for the people of the United States in their internal concerns through the exercise of the asserted treaty-making power." *Proceedings*, AM. SOC'Y INT'L L. 1929, 196. *Compare* Hughes' opinion in Santovincenzo v. Egen, 284 U.S. 30 (1931). There were, of course, important political grounds for American reluctance as well. By asserting limitations upon its power to enter treaties dealing with private law, the United States had a ready excuse for not participating in agreements to which it had substantive objections. *See* Potter, *Inhibition Upon the Treaty-Making Power of the United States*, 28 AM. J. INT'L L. 456, 461-62 (1934).

98. *See* text accompanying note 70, *supra*.

99. Henkin, *The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations*, 107 U. PA. L. REV. 903 (1959).

100. *Compare* Nadelmann, *supra* note 94, at 359-60.

101. *See* Nadelmann, *supra* note 93, at 291. This action was taken pursuant to enabling

has discussed such unification and has actively participated in the drafting of international conventions designed to bring order out of diversity in this important field. But the State Department, quite wisely, feels that it should proceed with caution in dealing with matters normally exclusively within the ambit of state authority, regardless of the existence at the federal level of the legal power to act.[102] The traumatic political experience surrounding the proposed Bricker Amendment,[103] designed to seriously restrict the freedom of the executive branch in international affairs, has left its scars. It is this element of caution which has led the executive to seek the inclusion of a "federal-state" clause in some proposed conventions, providing that if a party is a federal state then the effect of the agreement in question upon its political subdivisions will be limited to those which specifically accept its applicability.[104] One such provision is found in the Draft Convention on Recognition of Foreign Divorces and Legal Separations.[105] Another is the Rome Institute Draft International Convention Providing a Uniform Law on the Form of Wills.[106]

The second draft convention above provides an interesting illustration of some of the legal problems encountered in regulating private international matters by multilateral treaty. The Convention, as its title implies, contains as an annex a Uniform Law concerning the form of "international" wills.[107] Each party to the Convention promises to introduce the Uniform Law into its domestic law within six months of the effective date of the Convention.[108] The federal-state clause in the Convention provides, in substance, that the federal states which are parties to the Convention shall have the same obligations as other

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legislation, H.R.J. Res. 778 (Dec. 30, 1963), 77 Stat. 775, 22 U.S.C. § 269g (1964).

More recently, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards was transmitted by the President to the Senate with the recommendation that the Senate give its advice and consent to accession. VII INT'L LEG. MATER. 1042 (1968).

102. *See* Reese, *The Hague Draft Convention on the Recognition of Foreign Divorces,* 14 AM. J. COMP. L. 692, 695-96 (1966).

103. S.J. Res. 130, 82d Cong., 2d Sess. (1953); S.J. Res. 1, 83d Cong., 1st Sess. (1953); S.J. Res. 1, 84th Cong., 1st Sess. (1955).

104. Reese, *supra* note 102, at 695-96. The United States has ratified the Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters. This Convention does not include a "federal-state" clause but does contain some special provisions relevant to "federal-state" problems. *See, e.g.,* arts. 5, 18, in text of Convention, 13 AM. J. COMP. L. 620, 623 (1964). This Convention is not yet in force. *See* 61 AM. J. INT'L L. 1019 (1967).

105. Reproduced in 14 AM. J. COMP. L. 697 (1966).

106. Reproduced in 2 INT'L L. 251 (1968).

107. *Id.* at 255.

108. Art. I, Rome Institute Draft International Convention Providing a Uniform Law on the Form of Wills.

signatories, to the extent that the articles of the Convention and its Annex "come within the legislative jurisdiction of the federal authority. . . ." Clause (b) of this article requires that where the provisions of the Convention or of its Annex:

> come within the legislative jurisdiction of constituent states . . . which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favorable recommendation to the notice of the appropriate authorities of constituent states . . . at the earliest possible moment.[109]

Clearly, the United States has the power to agree with other nations that it will recommend to its constituent states the passage of the uniform legislation. It is believed that, in addition to this treaty power, it has also the power to enact such uniform legislation as national law, because of the national interest in uniformity in private international law matters. This interest in uniformity is common to both the states and the nation. The several uniform laws already promulgated by the states have as their principal justification the need for uniform national treatment of matters with which they deal. The strength of this interest, even in purely domestic matters, has been demonstrated by Judge Henry Friendly in a case which held that a federal common law of sales governed a contract between the United States and a private contractor. Drawing the applicable federal rule from the Uniform Commercial Code, Judge Friendly wrote:

> When the states have gone so far in achieving the desirable goal of a uniform law governing commercial transactions, it would be a distinct disservice to insist on a different one for the segment of commerce, important but still small in relation to the total, consisting of transactions within the United States.[110]

The impossibility of maintaining that desired uniformity is illustrated by the diversity of interpretations under existing "uniform" state legislation.[111] This difficulty is substantially increased where international uniformity is the goal. The problem is illustrated by the provisions of article 4 of the Draft Law of International Wills: "(1) The will shall be signed by the testator *in the presence of the witnesses* and of the person qualified to receive it, and (2) the signature of the testator shall be placed *at the end* of the will."[112] The two italicized phrases have

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109. The clause appears in an unnumbered article marked "(for possible insertion)". *Supra* note 106 at 254-55.

110. United States v. Wegematic Corp., 360 F.2d 674, 676 (1966).

111. *See* Braucher, *Federal Enactment of the Uniform Commercial Code*, 16 LAW & CONTEMP. PROB. 100, 103-04 (1951); Schnader, *Why the Commercial Code Should be "Uniform"*, 69 COM. L. J. 117, 118 (1964).

112. 2 INT'L L. 251, 255 (1968) (emphasis added).

been the subject of many and varied interpretations in cases arising under the laws of the several states of the United States. It would be clearly inappropriate to subject these phrases, contained in what is intended to be an internationally uniform arrangement, to varying state interpretations. To add the diversities of these state interpretations to the already difficult problem of maintaining international uniformity under different legal systems would, it is submitted, make international measures in these areas unworkable. It has for some time been argued that this national interest in uniformity would justify the enactment of the Uniform Commercial Code as federal legislation.[113] Where there is an international interest in uniformity, recognized by the national government in an international treaty, it should be clear that power exists to give effect to that interest by national legislation. Thus, the whole subject of international unification of private law is properly within the federal legislative power.

3. Federal Statutes.—In considering the reach of federal statutes in private international law, three types of statutes and questions may be delineated. The first is a federal statute expressly directed to private international law matters. The second concerns the reach into the international law area of federal statutes not expressly directed thereto. The third involves the choice between a federal statute and foreign law and the enforcement of the applicable law.

In the first type, a federal statute which enacts a private international law rule for matters within the powers of Congress is controlling. The Congress, however, has exercised this power sparingly. One instance is the Carriage of Goods by Sea Act which put in statutory form the provisions of an international convention concerning bills of lading which had been ratified by the Senate with some reservations.[114] Another illustration is the statute which makes valid a provision for the arbitration of future disputes under contracts in foreign, as well as interstate, commerce.[115] The interpretation of these statutes is a matter of federal law.[116]

Within the second type are statutes enacted under the interstate and foreign commerce power which ordinarily do not specify the range of the commerce they are intended to reach. The scope of operation of these statutes in the international area is a matter of federal law to be

113. *See generally* Braucher, *supra* note 111.
114. Carriage of Goods By Sea Act, 46 U.S.C. §§ 1300-15 (1964).
115. 9 U.S.C. § 2 (1964).
116. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).

determined ultimately by the Supreme Court of the United States. The cases reveal at least three methods or stages of development.

The first stage is illustrated by two cases, one an action between two American corporations for damages resulting from a violation of the Sherman Anti-Trust Law,[117] the other an action by a railroad trainman under the Federal Employers' Liability Act.[118] In each case the method and language employed by the Supreme Court were derived from the vested rights theory of choice of law; that is, the law of the place of the act governs. This old principle of conflict of laws has been rejected by many state courts and by the American Law Institute in *Restatement (Second) Conflict of Laws,* and it has been disparaged in opinions of the Supreme Court itself.[119] Almost certainly this method will not be decisive in future cases.

The second stage is one of literal interpretation and application of the statute in the international area. This approach is illustrated by the *Timken* case,[120] in which the government charged that an arrangement of an American company with its own foreign subsidiaries was a violation of the Sherman Law. The majority of the court, rejecting the view that foreign trade conditions should be taken into account in determining the effect of the statute, held that the statute was violated. The dissenting opinions of Justices Frankfurter and Jackson urged that, in the light of the conditions of international trade, the arrangements attacked were not unreasonable and were not condemned by the statute:

> When as a matter of cold fact the legal, financial, and governmental policies deny opportunities for exportation from this country and importation into it, arrangements that afford such opportunities to American enterprise may not fall under the ban of a fair construction of the Sherman Act because comparable arrangements regarding domestic commerce come within its condemnation.[121]

The third and present stage is the determination of the reach of the federal statute in the light of its purpose and of the international conditions to which it might extend. In one case the Supreme Court applied the Lanham Trade-Mark Act to an American national and

117. American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909).

118. New York Cent. R.R. v. Chisholm, 268 U.S. 29 (1925).

119. "In determining which contact is the most significant in a particular transaction, courts can seldom find a complete solution in the mechanical formulae of the conflicts of laws. Determination requires the exercise of an informed judgment in the balancing of all interests of the states with the most significant contacts in order best to accommodate the equities among the parties to the policies of those states." Vanston Comm. v. Green, 329 U.S. 156, 161-62 (1946) (Black, J.). *See also* Richards v. United States, 369 U.S. 1, 12-13 (1962) (Warren, C.J.); Hoopeston Canning Co. v. Cullen, 318 U.S. 313 (1943) (Black, J.).

120. Timken Roller Bearing Co. v. United States, 341 U.S. 593, 605-06 (1951).

121. *Id.*

resident and to his sales in Mexico of inferior watches under a well-known American trademark, because the trade practices "radiate unlawful consequences here" even though they "were initiated or consummated outside the territorial limits of the United States."[122] In a second case, the Jones Act was denied application to a maritime injury suffered on a Danish ship in Havana harbor by a Danish seaman who had signed ship's articles in New York by which he agreed to be bound by Danish law. Justice Jackson stated:

> . . . in the absence of more definite directions than are contained in the Jones Act it would be applied by the courts to foreign events, foreign ships and foreign seaman only in accordance with the usual doctrine and practices of maritime law.
> . . . Maritime law, like our municipal law, has attempted to avoid or resolve conflicts between competing laws by ascertaining and valuing points of contact between the transactions and the states or governments whose competing laws are involved.[123]

A third case involved the possible extension of the National Labor Relations Act to ships owned by a foreign subsidiary of an American corporation and which flew the flag of Honduras, carried foreign crews, and had other contacts with the nation of the flag. The parties to the case agreed that Congress had the constitutional power to apply the Act to foreign crews, at least while they were in American waters. The Court, however, rejected the contention that the Act should be read literally and, therefore, applied to the situation. It did so, as Mr. Justice Clark's opinion put it, because of "the well-established rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship . . . . [and] the possibility of international discord . . . . [and] retaliatory action from other nations as well as Honduras".[124]

In the third type of situation concerning the reach of federal statutes in private international law are numerous cases involving either American regulatory statutes, such as the Sherman Act, where the primary question was the effect of the American law, or else tort laws for the protection of employees when the foreign law was so much less liberal that alternative relief under the foreign nation's law was not sought by the complainant. If the case does involve the choice between a federal law and the law of a foreign nation, and if relief is sought through the choice and application of the foreign law, the applicable rules are determined by federal law. The question of choice of the federal statute is only another form of inquiry as to the reach of the statute which, as

122. Steele v. Bulova Watch Co., 344 U.S. 280 (1952).
123. Lauritzen v. Larsen, 345 U.S. 571, 581-82 (1953).
124. McCulloch v. Sociedad National de Marineros de Honduras, 372 U.S. 10, 21 (1963).

pointed out above, is surely a matter of federal law. This whole set of conflicts problems in both choice and application of law should be governed by one law, federal law. It was so held in a case in admiralty in which a Panamanian seaman sought relief under the Panama Labor Code and in which a defense was the Panamanian statute of limitations. Circuit Judge (now Mr. Justice) Harlan spoke for a unanimous court in giving relief under the Panamanian law and in holding that its statute of limitations was not a bar. In doing so he held also that state limitation periods had no application.[125]

4. *Federal Courts Law.*—There is a body of federal courts law of which the Federal Rules of Civil Procedure are an example. Such a body of law, applicable in the federal courts and not elsewhere, is very different from a true federal common law which is national law, binding on the state courts and the federal courts alike. Unfortunately, there was a body of federal courts law which for nearly a century masqueraded as "federal common law." This old pretender must be sketched and pushed aside before the true federal common law is considered.

The misnamed law was set on its way in 1842 by *Swift v. Tyson.*[126] There a Maine indorsee of a bill of exchange brought an action against the New York acceptor, who refused to pay because of fraud in the procurement of the bill. The decisive question was whether past consideration given by the indorsee was value for the purpose of cutting off the equity of defense of the acceptor. If the action had been brought in a state court, say in Maine or New York, it would have been essential to determine first which state's law should be chosen and applied on the subject of value; however, the action was brought in a federal court in New York. The Supreme Court, speaking through Justice Story, ignored the choice of law problem, and therefore, the local laws of Maine and New York, and decided for itself that past consideration was "value". Justice Story laid down the principle that a federal court in a diversity of citizenship case would itself determine "questions of general commercial law," saying:

> The law respecting negotiable instruments may be truly declared in the languages of Cicero, adopted by Lord Mansfield in *Luke v. Lyde* . . . to be in a great measure, not the law of a single country only, but of the commercial world.[127]

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125. Bournias v. Atlantic Maritime Co., 220 F.2d 152 (2d Cir. 1955).

126. 41 U.S. 1 (1842); See, *Note on Swift v. Tyson, Its Antecedents and Rise, and the Intimations of Its Fall,* HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1953), at 614-621.

127. *Id.* at 18.

Erie Railroad Co. v. Tompkins[128] squarely overruled *Swift v. Tyson* and held "[t]here is no federal [courts] general common law." The overruling of *Swift v. Tyson* by the *Erie* case was quickly extended to conflict of laws in interstate cases, and consequently it was held that "the federal courts in diversity of citizenship cases are governed by the conflict of laws rules of the courts of the states in which they sit."[129] The reasons given for the rejection of a federal courts common law apply with full force to private international law cases, so there should be no separate private international law for the federal courts.

An unfortunate incidence of the *Erie* case is that its sweeping language in rejecting the misnamed federal common law may tend to keep the courts from recognizing the existence of the true federal common law. This was so in an action against insurance companies which involved an expropriatory and annulling decree of the Cuban government and the measure of conversion of Cuban pesos into American dollars. The court ignored the international elements and, relying on intranational cases, said: "In diversity cases, a Federal court must follow and apply the conflict of laws rules of the state in which it sits."[130]

5. *Federal Common Law.* — The opening words of Article III, the judicial article of the Constitution, deserve repetition. "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Do these words, coupled with the principle of separation of powers, vest in the federal courts power to create a federal common law, with that law itself subject to modification by the Congress? For common lawyers the answer is plainly, "yes." The common law of England was made by the English courts. This common law was brought by the English colonists with them as part of their heritage. When the colonies declared their separation from Great Britain they, in their new form of states, adopted reception acts which made the common law a part of the laws of the several states.[131] The law so received was not

128. 304 U.S. 64 (1938).

129. Griffin v. McCoach, 313 U.S. 498, 503 (1941), *citing* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).

130. Pan-American Life Ins. Co. v. Blanco, 362 F.2d 167 (5th Cir. 1966).

131. An example is the reception provision in the Constitution of the State of New York: "Such parts of the common law, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony, on the nineteenth day of April, one thousand seven hundred and seventy five . . . and such acts of the legislature as are now in force, shall be and continue the law of this state, subject to such alterations as the legislature shall make concerning the same. But all such parts of the common law . . . as are repugnant to this constitution, are hereby abrogated." N.Y. CONST. art. 1, § 14. The reception of English law is considered in KIMBALL,

merely a body of rules, but also included the common law judicial process itself, a vital element of which is the appropriate development of law by the courts.

It may be objected that the Constitution does not explicitly grant this power to the courts. Yet beyond doubt there is a true federal common law which is as much a part of the law of the land as is a statute of Congress. Justice Brandeis stated that there is such a law and applied it in a case involving the apportionment of the waters of an interstate river.[132] That case was decided the same day as the *Erie* case in which the same justice wrote the opinion overthrowing the misnamed federal common law of *Swift v. Tyson*. The necessity for federal judge-made law was stated by Justice Jackson with his usual foree:

> Were we bereft of the common law, our federal system would be impotent. This follows from the recognized futility of attempting all-complete statutory codes, and is apparent from the terms of the Constitution itself.

He went on to explain the basis and the substantial sources of federal common law:

> Federal common law implements the federal Constitution and statutes and is conditioned by them. Within these limits federal courts are free to apply the traditional common law technique of decision and to draw upon all the sources of the common law in cases such as the present.[133]

The grants of numerous specific powers over international matters to the three branches of the federal government and the imposition of corresponding limitations on the states do not exhaust the range of the powers of government. Here, the whole is greater, much greater, than the sum of the parts. There are inherent powers in the United States as a nation incident to its position in international relations. One illustration will suffice. *United States v. Curtiss Wright Export Corp.* involved the constitutionality of a joint resolution of Congress which made unlawful the sale of munitions of war to warring countries if the President found that the prohibition of sale would contribute to the re-establishment of peace. The validity of the resolution was attacked on the ground that it was an unlawful delegation of law-making power by the Congress to the executive. The Supreme Court upheld the resolution on the explicit

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HISTORICAL INTRODUCTION TO THE LEGAL SYSTEM ch. 6, § 1 (1966); SMITH, CASES AND MATERIALS ON THE DEVELOPMENT OF LEGAL INSTITUTIONS ch. 9 (1965).

132. *See* notc 4 *supra*. Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938).

133. D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447, 470 (1942). The subject is convincingly discussed in 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 United States Courts' Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1042 *et seq.*

ground that "the differences between the powers of the federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs are fundamental." The opinion of the Court pointed out that power in the international area does not depend upon express language of the Constitution, but is inherent in the national government as the representative of a nation among nations:

> It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution . . . . As a member of the family of nations, the right and power of the United States in that field are equal to the right and power of the other members of the international family.[134]

The courts of the United States, in which is vested "the judicial power of the United States," have all powers in international matters appropriate to the national judicial function.

As to what matters of private international law, is it appropriate that the national judicial function be exercised by establishing a national law, in the absence of directions from other branches of the government? The answer turns on the strength of national concern in the particular matter measured against the values of state powers reserved under the tenth amendment. All matters within the nation are, in some sense, of national concern. No state lives unto itself alone, and strength within the states is the foundation of the strength of the nation. Yet something more than this all-pervading national interest is essential before national concern is a basis of national power.

In the area of private international law there are special considerations which may call for a broadened range of national power and national action. International relations are inherently of national concern, not primarily of state concern. The numerous treaties which deal with private rights[135] and the increasing international efforts to unify the private laws of the nations and the rules of private international law[136] are evidence in point. In determining which arm of the national government should take the initiative in establishing and shaping national law, it may be kept in mind that private international law is a subject especially suited to law-making by courts rather than by legislatures. Even in countries dominated by codes, private international

134. 299 U.S. 304 (1936).

135. The broad range of these treaties is made clear in WILSON, UNITED STATES COMMERCIAL TREATIES AND INTERNATIONAL LAW (1960).

136. In 1963 a joint resolution of Congress authorized the President "to accept membersbip for the Government of the United States in (1) the Hague Conference of Private International Law and (2) the International (Rome) Institute for the Unification of Private Law, and to appoint the United States delegates and their alternates. . . ." 77 Stat. 775 (1963).

law is left to the courts for development. Similarly, Congress has wide law-making powers over interstate conflict of laws under several clauses of the Constitution, yet it has been content to leave most of this subject to the courts.

There are, however, considerations opposed to national action which for an indeterminate time may keep most of private international law from being taken over as national law. A basic reason already mentioned is that the state courts have dealt wisely with the area, without parochialism or nationalism.[137] Another reason is the reluctance of the Supreme Court to expand its field of responsibility. For years the Court has sought to narrow its jurisdiction so as to confine its work within limits bearable by a single panel of nine men. The Court will scarcely welcome the task of developing the whole corpus of private international law. A third reason is the unhappiness of the justices over past efforts of the Supreme Court to deal with conflict of laws. For a time the due process clause was used by some members of the Court in a way which threatened to impose on the states the now discredited vested rights theory of choice of law.[138] The Court has moved very slowly in exercising the power it possesses even over interstate conflict of laws.[139] A companion reason is the rapidly developing character of the subject of conflict of laws and the unwillingness of the justices to fetter this development by imposing a particular set of rules in either private interstate or private international matters. What we may expect is a slow expansion of federal judicial law in those areas of private international law which are of high federal concern. As Mr. Justice Harlan put it in the *Sabbatino* case: "Principles formulated by federal judicial law have been thought by this Court to be necessary to protect uniquely federal

137. The effect of the fairness and wisdom of the state courts in preserving state authority in this field has its analogy in the reverse effect in areas where state action is faulty or lacking. "Mr. Justice Frankfurter often warned that proof of a wrong was not alone enough to justify judicial, still less, constitutional intervention. Ideally he was correct. . . . But government is more pragmatic than ideal. . . . If one arm of government cannot or will not solve an insistent problem, the pressure falls upon another. I suspect that a careful study would reveal that the Supreme Court today is most 'activist' in the areas of the law where political processes have been inadequate, because the problem was neglected by politicians." Cox, *The Role of the Supreme Court in American Society*, 50 MARQ. L. REV. 575, 592 (1967).

138. New York Life Ins. Co. v. Dodge, 246 U.S. 357 (1918); Mutual Life Ins. Co. v. Liebing, 259 U.S. 209 (1922).

139. Mr. Justice Jackson wrote: "Indeed, I think it difficult to point to any field in which the Court has more completely demonstrated or more candidly confessed the lack of guiding standards of a legal character than in trying to determine what choice of law is required by the Constitution." Jackson, *Full Faith and Credit The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1; 16 (1945).

interests."[140] Several areas of unique or high federal concern are suggested below as now being appropriate for federal judicial law.

(a) *Activities of The Federal Government and Its Agencies.*— When the federal government or an agency assumes obligations, federal law may determine its liabilities and its rights against those with whom it deals. An illustration within the United States is the *Clearfield Trust Company* case in which an action was brought by the United States to recover the amount of a check drawn on the Treasury of the United States. After the payee's name was forged, the defendant bank received the check in due course and collected the amount of it from the Treasurer. The Supreme Court, speaking through Mr. Justice Douglas, held the right of the United States to recover from the bank was governed by federal common law.

> The rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law . . . . In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards.[141]

Some years earlier there had been a parallel case involving an international transaction in which a check drawn on the treasury of the United States was sent by a government agency to Yugoslavia, where the payee's name was forged. The check came into the possession of the Yugoslavian branch of the Guaranty Trust Company, which later presented and collected the check in Washington. The government brought an action to collect from the bank the amount of the payment made on the forged indorsement. Under the law of the District of Columbia, where the check was drawn and payable, a forged indorsement was ineffective. Under the law of Yugoslavia, the holder in due course acquired good title to the instrument and the right to collect and retain the proceeds. The Supreme Court of the United States held that the law of Yugoslavia applied and denied recovery. Although the Court was not entirely clear on the source of the rule of conflict of laws which it used, Mr. Justice Brandeis, writing three years before he overthrew *Swift v. Tyson*, said:

> . . . under settled principles of conflict of laws, adopted by both federal and state courts, the validity of a transfer of a chattel brought into a country by the consent of the owner is governed by its law; and that rule applies to negotiable instruments.[142]

It is submitted that the liabilities of the United States on its commercial instruments are governed by federal conflict of laws in the international area, as they are governed by federal local law within the nation.

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140. 376 U.S. 398, 426 (1964).

141. Clearfield Trust Co. v. United States, 318 U.S. 363 (1943).

142. United States v. Guaranty Trust Co., 293 U.S. 340, 345-46 (1934).

(b) *International Hostile Action.*—The Constitution vests in the federal government the whole power to provide for "the common defense" against overt hostile action. The power of the federal government in seizing enemy property may override state law, as for example, when the Supreme Court struck down a state statute which embodied the share of a corporation in the share certificate abroad.[143] The Constitution explicitly denies to the states the power of indirect hostile action through the grant of letters of marque and reprisal and the imposition of duties on exports and imports,[144] perhaps the only forms of indirect hostile action thought of when the Constitution was drafted. In this century there have developed many forms of unfriendly action short of war — even open hostilities without the declaration of war, as in Korea and Viet Nam. Economic warfare is carried on not through the outmoded form of naval blockade, but by blocking the transmission of funds and goods and by expropriation of property. All these unfriendly actions when done on the part of this country appear to be clearly within the power of the federal government alone.

Yet in recent years, several states have on their own part taken unfriendly action against residents of totalitarian countries in the transfer of decedents' property abroad. One type of state statute, protective in character, forbids the transmission of property when the foreign beneficiary would not be entitled under the foreign law to receive and keep the property; a second type, reciprocal in nature, denies the right of the foreign beneficiary to take, and may even escheat the property to the state, when the foreign country forbids the transmission of property to this country in a corresponding situation. These are actions which the foreign nation would naturally resent. At first the Supreme Court moved hesitantly in this area, but at last decisively. *Clark v. Allen,* decided in 1947, involved a California reciprocity statute in its denial of the rights of claimants in Nazi Germany. The Attorney General of the United States attacked the statute as an invasion by the state into the field of foreign affairs reserved to the federal government. The Supreme Court, speaking through Mr. Justice Douglas, upheld the statute, saying:

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143. Great Northern Ry. v. Sutherland, 273 U.S. 182 (1927).

144. On the prohibition of grant of letters of marque and reprisal by the States, *The Federalist Papers* stated: "This [prohibition] is fully justified by the advantage of uniformity in all points which relate to foreign powers; and of immediate responsibility to the nation in all those for whose conduct the nation itself is to be responsible." THE FEDERALIST No. 44, at 277 (H. Lodge ed. 1888) (Madison). *See also* THE FEDERALIST No. 3 (Jay).

> Rights of succession to property are determined by local law . . . What California has done will have some incidental or indirect effect in foreign countries. But that is true of many state laws which none would claim cross the forbidden line.[145]

The early 1960's saw two related, but inconclusive, cases. In one the Court struck down a reciprocal provision of an Oregon statute as in violation of a treaty and, thus, did not reach the matter of state intrusion into a national area.[146] The other case involved a New York statute forbidding the transmission of funds when it appeared improbable that the distributee would enjoy beneficial use. The majority dismissed the appeal for want of a substantial federal question; but Mr. Justice Douglas, with Mr. Justice Black, dissented in an opinion which emphasized the national interest.[147]

Zschernig v. Miller[148] brought before the Court a thoroughgoing Oregon statute, which, in application to heirs in East Germany, denied their right to inherit property and called for eseheat to the state unless there was a reciprocal right to take property and to receive funds, and unless the foreign heirs would receive the proceeds of the Oregon estate "without confiscation." Seven members of the Court united in striking down the application of the statute, though not all did so for the same reason. Mr. Justice Douglas, while attempting to distinguish *Clark v. Allen*, placed the decision on the ground of forbidden state intrusion into foreign affairs, saying: "[t]he Oregon law does, indeed, illustrate the dangers which are involved if each State, speaking through its probate courts, is permitted to establish its own foreign policy." Mr. Justice Stewart, with whom Mr. Justice Brennan concurred, joined in the opinion of the Court, but would go further because: "[a]ll three [of the state statutory requirements] launch the State upon a prohibited voyage into a domain of exclusively federal competence." The case twenty years earlier, *Clark v. Allen*, can be distinguished, but not on substantial grounds. It is submitted that the Court's action in the *Zschernig* case would have been more fortunate had it been placed squarely on the ground stated in Mr. Justice Stewart's opinion: "[w]e deal here with the basic allocation of power between the State and the Nation . . . To the extent that *Clark v. Allen* . . . is inconsistent with these views, I would overrule that decision."

The hostile action may not be by our nation but against it. In the troubled twentieth century there has been widespread expropriation by

145. 331 U.S. 503, 517 (1947).
146. Kolovrat v. Oregon, 366 U.S. 187 (1961).
147. Ioannou v. New York, 371 U.S. 30 (1962).
148. 389 U.S. 429 (1968).

nations of the property of foreigners. More fundamental are the communist and fascist revolutions which have been openly hostile to our system with its continuing and more successful revolution.[149] The totalitarian regimes have often expressed their opposition to this country and its system by expropriation, cancellation of contracts, exchange control, and other expedients of economic warfare. The United States has at times countered such actions by the freezing of assets and by making treaties which surrender American claims with a measure of reimbursement from alien assets in this country.[150] Our nation has, however, in various ways sought to end the cold war. Surely the effect to be given in this country to hostile action should be governed by federal law, not by state law. Federal control is based not only on the power to provide for the common defense, but on the powers given to the nation in matters of money and currencies.

(c) *Admiralty and Maritime Laws.*—The Constitution does not explicitly give legislative power over admiralty and maritime matters to the federal government, yet it is settled that the power exists. A most vexing question is where the line is to be drawn between federal power and state power.[151] Wherever the line may be drawn for matters within the territory of the United States, it is clear that the concern of the nation, rather than of the states, is paramount over controversies arising on the high seas and in foreign waters. Private international law problems in admiralty ordinarily arise out of such controversies, and the resolution of these problems should be determined by federal law. The Supreme Court does not appear to have spoken directly on the subject. The Court of Appeals for the Second Circuit has dealt with it in a recent case involving personal injuries suffered by a foreign seaman on a foreign vessel in New York harbor.[152] The injured man sought relief under both a federal statute and "the federal common law of admiralty." The judges, though divided in result, were clearly agreed that the applicable law for both the statutory and the federal common law causes of action should be determined according to the criteria set out by Justice Jackson in *Lauritzen v. Larsen*,[153] a case which involved the reach of a federal

149. *Cf.* A. BERLE, THE 20TH CENTURY CAPITALIST REVOLUTION (1954).

150. "The freezing of Cuban assets exemplifies the capacity of the political branches [of the national government] to assure, through a variety of techniques . . . that the national interest is protected against a country which is thought to be improperly denying the rights of United States citizens." Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 412 (1964) (Harlan, J.).

151. The problem and its difficulties are set out with vividness in G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 43 (1957).

152. Tsakonites v. Transpacific Carrier Corp., 368 F.2d 426 (2d Cir. 1966).

153. 345 U.S. 571 (1953).

statute. In an earlier case involving an injury suffered on the high seas, Circuit Judge (now Mr. Justice) Harlan was explicit that "the federal choice-of-law rule applies here."[154] Other areas in which the national interest is of obvious paramount importance in the international area are aviation and atomic energy.[155]

(d) *The Money Power.*—During the Revolutionary War and under the Articles of Confederation, the economy of the nation was plagued by the variety and unsettled character of the circulating media of exchange. Thus, the Constitution gives to the Congress wide power over money and denies specific powers to the states in this regard. Since these early days monetary troubles have occurred both locally and world-wide. The great depression of the 1930's and the Second World War led the federal government, first, to devalue the American dollar, and then to join by treaty in an effort to stabilize the currencies and to facilitate both the protection of national currencies and international exchange through the International Monetary Fund.[156] They have led as well to federal regulation of international activities of American banks.[157] The continuing national interest and activity in international monetary problems make manifest that these are not matters properly within the control of the states. The resolution of international legal problems as to the circulating media of exchange should, it is believed, be made by federal law. Two aspects will be mentioned.

Exchange control is a device used for the protection of a nation's currency and economy, or, as with Nazi Germany, as an instrument for building up a hostile war machine. The Bretton Woods Agreement, creating the International Monetary Fund, is effective as a treaty.[158] The whole subject of exchange control is, therefore, so intertwined with monetary policy and international relations that manifestly it should be governed by national law.[159] Judgments for money in an American court are required by federal statute to be in dollars.[160] The wide fluctuations in the value of currencies since the outbreak of the First World War has

154. Siegelman v. Cunard White Star, Ltd., 221 F.2d 189 (2d Cir. 1955).

155. The swift development of the pre-eminence of federal aviation law is described in D. BILLYOU, AIR LAW chs. I & II (2d ed. 1964).

156. *See* A. NUSSBAUM, A HISTORY OF THE DOLLAR (rev. ed. 1957).

157. *See* Danl, *International Operations of U.S. Banks: Growth and Public Policy Implications,* 32 LAW & CONTEMP. PROB.. 100 (1967).

158. *See* Kolovrat v. Oregon, 366 U.S. 187 (1961).

159. *Cf.* Perutz v. Bohemian Discount Bank, 304 N.Y. 533, 110 N.E.2d 6 (1953).

160. "The money of account of the United States shall be expressed in dollars . . . and all proceedings in the courts shall be kept and had in conformity to this regulation." 31 U.S.C. § 371 (1964) (derived from Act of April 2, 1792, ch. 16, § 20, 1 Stat. 250).

made it necessary to determine the time as of which a debt which is expressed in a foreign currency and is sued on in an American court will be converted into dollars for purposes of the judgment. The Supreme Court, in dealing with such cases after the First World War, appears to have been guided by the now discredited vested rights theory.[161] The Court of Appeals of New York has dealt with the same problems on a different basis.[162] Without regard to the comparative merits of the two lines of cases, it is submitted this is a proper matter for federal law.

(e) *Judgments and Arbitral Awards.*—In the *Hilton* case outlined above,[163] the majority of the Supreme Court invokcd the rcciprocity principle as a ground for refusing to enforce a judgment for money given in France in favor of a Frenchman against an American. Both the majority and the minority members of the Court stressed the international aspects of the case, and in their language seemed to assume that the subject is one for federal law. Speaking for the majority, Justice Gray said: "[i]n the absence of statute or treaty, it appcars to us equally unwarrantable to assume that *the comity of the United States* requires anything more."[164] Chief Justice Fuller in dissent wrote: "[A]nd it is for *the government*, and not for *its* courts, to adopt the principle of retortion, if deemed under any circumstances desirable or necessary."[165] The question whether federal law or state law should govern the matter was later explicitly raised in the Court of Appeals of New York. Judge Pound referred to the argument that "questions of international relations and the comity of nations are to be determined by the Supreme Court of the United States so the *Hilton* case was controlling." He rejected the argument and employed state law, because "the question is one of private rather than public international law."[166]

There is the closely related matter of the enforcement of a provision for arbitration abroad and the consequent validity of the arbitration award. The Court of Appeals of New York held such a provision to be valid as to arbitration in Moscow under a contract between an American corporation and the Amtorg Trading Corporation, a New York corporation which was an agency of the Soviet Government for carrying on trade in this country.[167] The court so held despite the objection that

161. Deutsche Bank v. Humphrey, 272 U.S. 517 (1926).

162. Hoppe v. Russo-Asiatic Bank, 235 N.Y. 37, 138 N.E. 497 (1923).

163. *See* note 2 *supra*.

164. 159 U.S. at 228 (emphasis added).

165. *Id.* at 234 (emphasis added).

166. Johnston v. Compagnie Generale Transatlantique, 242 N.Y. 381, 387, 152 N.E. 121, 123 (1926).

167. Amtorg Trading Corp. v. Cambden Fibre Mills, Inc., 304 N.Y. 519, 109 N.E.2d 606 (1952).

the arbitrator which was designated, the U.S.S.R. Chamber of Commerce Foreign Trade Arbitration Commission, was subject to the supervision of the People's Commissariat for Foreign Trade and was controlled by the Soviet Union, as was the Amtorg itself. The decision is a fortunate one, but it does not answer this question: should the validity of an arbitration provision of a type common in international contracts of a communist country turn on the several laws of the fifty states or on federal law? The national concern is the more obvious because the case involves a trading method employed in most of Eastern Europe.

The judgment of a court and, in a communist country, the rendition of an award by a commission are individualized official actions and in this sense are like "an act of State," which, as seen below, is governed by federal law. In addition, the grounds urged or used for refusing effect to a foreign judgment or to a provision for foreign arbitration involve criticism of foreign methods of law enforcement. To employ the reciprocity principle is to refuse to look to the fair result in the particular case and deliberately to do injustice to this foreign plaintiff, simply because an American plaintiff in a wholly different case would have a similar injustice done to him. To refuse to give effect to the stated provision for arbitration would be to impugn a basic element in the foreign trade of the Soviet Union. Such actions critical of the institutions of foreign nations should be done only when sanctioned by our national law.[168]

6. *Federal Executive Law.*—In addition to this "vertical" conflict between state and federal law, there is the question of the "horizontal" allocation of power within the national governmental structure, resulting from the tripartite nature of our government. This question is of particular importance in the field of foreign affairs. This section deals with the President as law-maker and with his authority to determine the outcome of a broad range of private international cases by the exercise of executive power.

This Presidential law-making power is the result of an implicit "necessary and proper" clause read into the constitutional grant of general executive power. The authority of the federal executive, therefore, to make law in certain categories of private international cases does not depend upon an express grant of power in the Constitution.

168. Among the policies supporting recognition of foreign adjudication discussed in a recent closely analytical article is "an interest in fostering stability and unity in an international order in which many aspects of life are not confined to any single jurisdiction." Von Mehren & Trautman, *Recognition of Foreign Adjudications: A Survey and a Suggested Approach*, 81 HARV. L. REV. 1601, 1603-04 (1968).

Those few instances in which the document makes direct reference to Presidential power in foreign affairs deal solely with his power to create external relationships—to receive or appoint ambassadors and to make treaties.[169] All other executive powers derive from the general grant of authority in the first sentence of Article II.[170] In this sense, the executive power in foreign affairs is an inherent power, given content by the operation of two major forces—the historic nature of the executive office as the sole representative of a country in the international arena, and the vast scope of executive responsibility increased daily by the growing complexity of the social and economic interrelationships of modern international society.

Under the law of nations, the executive speaks for his country. His word must be accepted as the true voice of his nation. Thomas Jefferson, writing four years after the adoption of the Constitution, made this explicit:

> As the President is the only channel of communication between the United States and foreign nations, it is from him alone that foreign nations or their agents are to learn what is or has been the will of the nation, and whatever he communicates as such they have a right and are bound to consider as the expression of the nation, and no foreign agent can be allowed to question it.[171]

Burdened with this international responsibility, the executive must have whatever domestic power he needs, consonant with the constitutional principles upon which the government is based, to effectively support his activities in the foreign relations field. The courts in the United States have come to recognize, to a broad extent, the existence of power sufficient to carry out the external duties which the "sovereign"-executive must perform.

The twentieth century has seen a tremendous increase in the law-making power of the executive branch. This increasing power is a function of the compenetration of human affairs on a world-wide scale, described at the beginning of this article, and of the inadequacy of the other branches of government to deal with the resulting problems. Only the executive is able to gather the information and to make the often instantaneous value judgments required by the modern conduct of foreign relations. Neither the judiciary nor the legislature is equipped to make these instant political decisions, to feel and respond to the nuances of international relations, to engage in the give and take of bargaining or

169. U.S. CONST. art. II, §§ 2 & 3.

170. "The executive Power shall be vested in a President of The United States of America." U.S. CONST. art. II, § 1.

171. Letter from Jefferson to Genet, Nov. 22, 1793, *quoted in* E. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1957 at 178 (1957).

negotiation with friendly or unfriendly powers. The legislature, an essentially deliberative body, is made up of representatives of local constituencies. The political ties of its members are to the state or district, not to the nation as a whole. The judiciary is primarily concerned with the achievement of justice between the parties in the cases which it decides. Thus, only the executive is adequately equipped to operate effectively in the complex field of international politics.

The responsibilities of the executive breed corresponding power. The interaction of this power with the dynamic forces of international affairs creates an inertia which draws from the other two branches of government powers which they might retain, but which are relinquished in the interests of effective international dealings.

Yet the framers of the Constitution clearly intended that the power over foreign affairs was to be shared by all three branches of the government and that the principle of separation of powers was to apply to foreign, as well as domestic, affairs.[172] Thus, the legislature and the judiciary are jealous of their powers, and properly so. But, as Professor Edward Corwin has pointed out, the limited number of explicit references in the Constitution to power capable of affecting foreign relations is "an invitation to struggle for the privilege of directing American foreign policy."[173] This struggle, together with the external and internal forces operating upon the nation in its international dealings, has resulted in a creative tension which has brought forth a reallocation of law-making power and this reallocation has had a major impact upon private international law in the United States.

In the following pages the swift recognition and development of executive law-making power in recent years will be considered at some length. The specific areas of power to be dealt with are: power delegated by Congress; power to conclude executive agreements; power to influence the interpretation of treaties; and power exercised in those matters designated "political questions."

(a) *Congressional Delegation.*—Congress often delegates to the President law-making power which would otherwise belong to the legislature in matters affecting international relations, just as it delegates power in internal matters. But legislative definition of the scope of that delegation does not necessarily define the scope of the power which the executive will ultimately exercise. Power delegated to the executive is

172. "The separation of powers is not an insulation of powers." Dickenson, *The Law of Nations as National Law: "Political Questions,"* 104 U. PA. L. REV. 451, 457 (1956); E. CORWIN, *supra* note 171, at 177.

173. E. CORWIN, *supra* note 171, at 171.

always exercised *in combination* with that inherent executive power discussed above. Thus in those international matters where authority has been delegated, the whole of executive power brought to bear will always be potentially greater than the limits described in the original act of delegation. The leading case establishing this proposition is *United States v. Curtiss-Wright Export Corp.*,[174] decided in 1936 and discussed above in the section on federal common law. In that case Curtiss-Wright contended that the joint resolution was unconstitutional because it represented an abdication by Congress of its essential functions in favor of the executive. The principal thrust of defendant's argument was that Congress had not clearly designated the limits of the President's decision-making power and had thus left legislative determinations to the executive's "unfettered discretion." The Court implicitly accepted the truth of this allegation and assumed that such a broad delegation of law-making power would be unconstitutional if only domestic affairs were concerned. But the Court held that the presidential proclamation was constitutionally valid as an exercise of the *combination* of delegated power and inherent executive power in the foreign affairs field. Justice Sutherland, after discussing the primacy of the national government in international affairs, wrote:

> It is important to bear in mind that we are here dealing *not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations*—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps, serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.[175]

The implications of this language are made even clearer when it is noted that only one year before, the Supreme Court had emasculated the National Industrial Recovery Act as representing too broad a delegation of power to regulate domestic economic activity.[176]

There is little doubt that, given the continued vitality of the separation of powers concept of the Constitution, Congress can, when delegat-

174. 299 U.S. 304 (1936).

175. *Id.* at 319-20 (emphasis added).

176. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935).

ing authority to the President in the foreign affairs field, circumscribe that power to whatever extent it feels necessary when that authority is constitutionally within its power to give or withhold. In this sense, the President's authority finds its source in legislation, but in practice, congressional delegation in international matters has become increasingly sweeping in scope and the inherent powers of the executive consequently have greater and greater effect in private matters involving international elements.

Power over foreign economic activities has increasingly shifted from the legislative to the executive, in large part because of increased law-making authority delegated by Congress in matters relating to foreign commerce. These powers have been broadly exercised by the executive. Much of this law-making authority is exercised by administrative agencies, combining judicial and legislative, as well as executive, functions. A consideration of their activities is not within the scope of this paper. But outside the more traditional confines of administrative law, the President exercises powers of broad scope which are nearly plenary. Pertinent illustrations are found in matters concerning tariffs and the control of foreign travel by United States citizens.

Under the Trading with the Enemy Act,[177] the President may regulate or prohibit trade with designated "enemy" countries.[178] Under the Export Control Act,[179] the President has the power to deny export privileges to United States nationals upon a determination that such export would be "detrimental to the national security and welfare of the United States."[180] He may also "blacklist" foreign nationals who divert goods to unauthorized receivers.[181] Furthermore, the President's determinations, made by the Office of Export Control, are not subject to the provisions of the Administrative Procedure Act[182] and are not subject to judicial review.[183] The President is empowered by statute to designate

177. 40 Stat. 411 (1917), *as amended*, 50 U.S.C. APP. § 1 *et seq.* (1964).

178. The President's authority is "subdelegated" to the Department of the Treasury. A principal regulation is The Foreign Assets Control Regulations, 31 C.F.R. pt. 500 (1968). These regulations impose criminal penalties for violation.

179. 63 Stat. 7 (1949), *as amended*, 50 U.S.C. APP. § 2021 *et. seq.* (1964), *as amended*, 79 Stat. 209 (1965).

180. 63 Stat. 7 (1949), *as amended*, 50 U.S.C. APP. § 2021 *et seq.* (1964), *as amended*, 79 Stat. 209 § 3(a) (1965).

181. 15 C.F.R. § 381.10 (1968). These regulations are administered by the Department of Commerce.

182. 63 Stat. 7 (1949), *as amended*, 50 U.S.C. APP. § 2021 *et. seq.* (1964), *as amended*, 79 Stat. 209 § 7 (1965).

183. 15 C.F.R. § 382.13(d) (1968).

those international organizations which shall be immune from suit and which of their representatives shall have diplomatic immunity and, therefore, has the power to determine the permissibility of private litigation.[184]

A most pointed recognition of the plenary nature of the President's power in foreign affairs under a broad delegation of Congressional authority is found in *Chicago and Southern Air Lines, Inc. v. Waterman Steamship Corp.*[185] Two domestic airlines sought judicial review of a determination of the Civil Aeronautics Board concerning the allocation of foreign air-routes. The Civil Aeronautics Act provided for judicial review of the Board's findings, but made determinations concerning foreign air transportation subject to the approval of the President. The Supreme Court held, in a five to four decision, that once the order had been approved by the President, it could not be reviewed judicially, even though this approval was given before the decision was made public or communicated to the participants. The case turned on the special nature of Presidential expertise. Mr. Justice Jackson wrote:

> It would be intolerable that the courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry . . . We therefore agree that whatever of this order emanates from the President is not susceptible of review by the Judicial Department.[186]

The Court concluded that the orders would not have been subject to review before Presidential approval, because they were not then "mature." As Justice Douglas effectively pointed out in dissent, the Court's decision made Presidential approval in these cases final without reference to any statutory standards which Congress might have prescribed, thus giving the President absolute power over the outcome of cases involving foreign air routes.[187]

(b) *Executive Agreements.*—The authoritative nature of international executive agreements as supreme national law overriding

184. 22 U.S.C. § 288 (1964).
185. 333 U.S. 103, 111 (1948).
186. *Id.* at 111.
187. *Id.* at 117-18.

state law has been alluded to above. The discussion below indicates briefly the range of power over private international matters which the President can exercise through his power to conclude agreements with foreign governments.

The *Restatement of Foreign Relations Law* lists three sources of power to conclude executive agreements: pre-existing treaties; pre-existing congressional authorization; and the "President's constitutional authority," including, of course, his general power over foreign affairs.[188] Important for our purposes is the fact that the President's power to enter these agreements contributes substantially to his power to make domestic law.

The law-making power of the President acting alone pursuant to his constitutional authority to make agreements is dramatically demonstrated by the *Belmont* case, discussed earlier.[189] But, even when the President enters into an executive agreement ostensibly pursuant to authority granted by a coordinate branch of the national government, his power to create substantive rules applicable in private international cases may actually be substantially greater than the authority delegated as a result of the combination of delegated power and the inherent power of the executive as international spokesman for the nation. Executive activities under two international agreements which affect private domestic rights are illustrative.

The first is the Warsaw Convention on International Flights, entered by the United States with the advice and consent of the Senate in 1929.[190] The Warsaw Convention has been described as "the only widespread substantive achievement in the unification of private law by international agreement."[191] A key provision of the Convention limited recovery by persons injured while engaged in international air-travel to $8,291 in gold francs.[192] In 1955, in response to general dissatisfaction in the United States with the amount of this limitation, the President called for a conference of the Convention parties and finally signed, in 1956, a protocol raising the limit to $16,000. This protocol was not submitted to the Senate for advice and consent until three years later, and it was finally withdrawn when no Senate action was taken. In 1964 the protocol

188. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 119-21 (1965).

189. *See* text accompanying note 66. *See also* United States v. Pink, 315 U.S. 203 (1942); *see* Maier note 245, *infra*.

190. 49 Stat. 3000 (1936), T.S. No. 876.

191. Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 533 (1967).

192. 49 Stat. 3000 art. 22 (1936).

was resubmitted to the Senate, this time with the recommendation that advice and consent be given only together with implementing legislation requiring American flag carriers to carry trip insurance in the amount of $50,000 per passenger. When this suggestion was rejected, the President proposed a voluntary waiver by American carriers of the Warsaw limits up to $100,000. This the carriers refused.

At this point, the full force of executive power was demonstrated. The Department of State issued a formal denunciation of the Convention, to take effect six months following the notice *unless* reasonable international support for a $100,000 liability limit was demonstrated at a pending conference of the Convention in Montreal *and unless* principal world carriers agreed to a provisional limit of $75,000 until a higher one could be put into effect. The day before the denunciation was to become effective, the State Department announced that forty American and foreign carriers had come to terms and the denunciation was withdrawn with a $75,000 liability substituted for the Convention provision as to these carriers.[193] This agreement was not and will not be submitted to the Senate. It is ostensibly only an agreement between airline companies whose nations are Convention parties, not an executive agreement between the nations themselves. But in view of the fact that most foreign airlines are government-owned, this distinction appears to make little real difference.

The private-law results of this executive power-play are substantial. By executive agreement within the broad general structure of the Warsaw Convention, private rights of individuals were increased more than nine-fold with a correlative decrease in protection for the air-carriers, which, at least in so far as American flag companies are concerned, are private corporations. More important, this result was achieved not only without the participation of the legislative branch of the government, but in the face of substantial sentiment in opposition. By the use of executive power to enter agreements and to withdraw from them, "it came about almost overnight, and without normal and constitutional legislative processes, [that] the character of a major international treaty changed completely."[194]

A second illustration of the dynamic exercise of executive power to enter international agreements is found in the history of United States participation in the General Agreement on Tariffs and Trade.[195] In 1945,

193. For a more complete history of this controversy, *see generally* Lowenfeld & Mendelsohn, *supra* note 191; Note, *Presidential Amendment and Termination of Treaties: The Case of the Warsaw Convention*, 34 U. CHI. L. REV. 580 (1967).

194. Lowenfeld & Mendelsohn, *supra* note 191, at 601.

195. 61 Stat. A3 pts. 5 & 6 (1947), T.I.A.S. No. 1700, *as amended*, and T.I.A.S. No. 6139.

Congress passed an amendment to the Reciprocal Trade Agreements Act of 1934,[196] in which it authorized the President to enter into what Congress apparently intended to be *bilateral* trade agreements with foreign nations. Six months after the amendment, the executive called upon fifteen other nations to begin *multi-lateral* tariff negotiations. Out of these negotiations grew the General Agreement on Tariffs and Trade.[197]

During the early days of United States participation in GATT, there was considerable controversy concerning whether or not the 1945 amendment actually authorized the President to enter the agreement.[198] Important for our purposes, however, is the point that even if the President *had* exceeded the authority delegated to him by Congress, the question of the validity of these legal arguments has today become moot. By forceful exeeutive action and continuing United States participation in GATT, it has become economically and politically impossible for the United States to withdraw, even if the President had exceeded his original authority to enter upon the undertaking. Professor John H. Jackson of the University of Michigan makes the point that the use of the executive agreement process in this respect has had the effect of substantially broadening the power of the executive in foreign economic affairs.

> Even assuming that GATT is valid as a matter of United States domestic law, it is clear that the circumstances of its history have resulted in a considerable shift of power to the executive branch without the statutory framework which defines executive-legislative relations in connection with our participation in other international institutions . . . .[199]

The process by which executive law-making power has expanded by means of the power to enter executive agreements is described with insight by Professors Steiner and Vagts in their excellent new casebook, *Transnational Legal Problems:*

> The development of the executive agreement as a vital instrument of foreign policy is a prime illustration of a long-sanctioned practice which ripens into contemporary constitutional doctrine. The analogy to state practice which ripens into customary international law is evident.
>
> Ultimately the courts may play a role in marking the limits of the executive agreement, although many such agreements . . . are not likely to enter domestic litigation. In practice, it appears more likely that political factors and compromises will play a major role in determining the extent to which the agreement displaces the treaty. . . The bargaining and tacit accords between the Executive and the Congress over this issue resemble the resolution of questions of international law among

196. 48 Stat. 943 (1934), *as amended,* 59 Stat. 410 (1945).

197. *See* Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law,* 66 MICH. L. REV. 250, 257-59 (1967).

198. *Id.* at 253-74.

199. *Id.* at 274.

nations through accommodation and restraint rather than through binding third-party decisions.[200]

(c) Treaty Interpretation.—A "treaty" has dual effects, one on international relations, the other on the internal law of the land. As the sole spokesman for this country in its foreign relations, the President is the interpreter of the effect of treaties upon the international conduct of the United States. He may determine whether or not a treaty has been abrogated; he may state intended interpretations to foreign powers or before international tribunals; he may bargain for revision of treaty terms; he may assert violations by other nations. In all these aspects, the executive is supreme and exclusive.

The interpretation of treaties to determine their domestic effect is for the courts under Article III of the Constitution. They determine whether a treaty is self-executing or requires additional implementing legislation; whether it changes existing domestic law; what rights or duties it creates for private parties; whether it supersedes or is superseded by congressional legislation. But this seemingly neat division of powers between the executive and the judiciary is illusory. Where the subject matter of judicial inquiry is an agreement with a foreign nation, there always exists the potential for substantial effect upon United States international relations and, consequently, the possibility of encroachment upon the sphere of the executive branch by the court. Conversely, the very existence of executive responsibility in the international field forces the recognition by the judiciary of the relevance of executive pronouncements concerning the domestic effect of treaty provisions.

Questions of treaty interpretation bring into play that creative tension inherent in the concept of a government of separated powers. The executive branch is careful not to assert an authoritative law-making power on these issues. The judicial branch jealously guards its prerogative as the interpreter for internal purposes of this supreme law of the land. But the peculiar position of the executive as the sole representative of the United States in the international arena makes it imperative that its stated position be given "great weight"[201] by the judiciary, even in a "purely" private case requiring construction of treaty terms.

Such a case was *Kolovrat v. Oregon*.[202] A principal issue was whether an Oregon statute requiring reciprocal rights of inheritance as a

200. H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 477 (1968).

201. *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 152 (1965).

202. 366 U.S. 187 (1961).

prerequisite for intestate succession of personal property to aliens conflicted with a treaty between the United States and Yugoslavia. The Oregon Supreme Court held that the language of the treaty did not apply to Yugoslavian nationals not resident in the United States and that, therefore, the Yugoslavian claimants could not take the property. The United States Supreme Court reversed. Both the Department of Justice as amicus curiae, and the petitioners had submitted briefs which referred, in part, to diplomatic correspondence between the United States Department of State and the Yugoslavian Foreign Ministry, indicating that both parties interpreted the treaty, via its most-favored-nation clause, to grant the broadest reciprocal rights of inheritance without regard to actual residence of the claimants.[203] After a review of the purposes of the treaty, gleaned from its other provisions, the Court turned to this correspondence:

> We have before us statements, in the form of diplomatic notes, exchanged between the responsible agencies of the United States and of Yugoslavia, to the effect that the 1881 Treaty, now and always, has been construed as providing for inheritance by both countries' nationals without regard to the location of the property to be passed or the domiciles of the nationals. And relevant diplomatic correspondence and instructions issued by our State Department show that the 1881 Treaty was one of a series of commercial agreements which were negotiated and concluded on the basis of the most expansive principles of reciprocity. The Government's purpose in entering into that series of treaties was in general to put the citizens of the United States and citizens of other treaty countries on a par with regard to trading, commerce and property rights.[204]

In one sense, the Court's reference to diplomatic correspondence in this case can be treated only as a search for additional evidence of the intent of the parties which gives specific content to the language of the agreement. The correspondence had resulted from a protest by the Yugoslavian Government against several state court decisions similar to the one which was appealed.[205] The State Department, while carefully pointing out that it could not bind the courts, had agreed that the Yugoslavian contentions produced "a reasonable construction consonant with the spirit of the Treaty as a whole."[206] But it is submitted that, even given the State Department's disclaimer of final authority over the courts in these matters, the Supreme Court was well aware that

203. Brief for Petitioner at Appendix D; Brief for the United States as Amicus Curiae at Appendix B, Kolovrat v. Oregon, 366 U.S. 187 (1961).

204. 366 U.S. at 194-95 (footnotes omitted).

205. Letter from the Ambassador of Yugoslavia to the United States Secretary of State, April 18, 1958, Brief for the United States as Amicus Curiae at 45, Kolovrat v. Oregon, 366 U.S. 187 (1961).

206. Letter from the United States Secretary of State to the Yugoslav Embassy, April 24, 1958, Brief for the United States as Amicus Curiae at 57, Kolovrat v. Oregon, 366 U.S. 187 (1961).

any decision other than the one which it reached would have resulted in considerable embarassment to the executive branch in the conduct of foreign relations.

This raises an important additional question concerning the role of the executive in domestic treaty interpretation. Suppose, in the *Kolovrat* case, that the United States had adopted a restrictive interpretation of the treaty's terms in its correspondence with Yugoslavia and that an international dispute was underway, perhaps headed for international adjudication. Would the United States Supreme Court make an independent determination of the meaning of the treaty's language for domestic purposes? Its most recent decision in the *Sabbatino* case[207] suggests that it would not. In that case the Court, in large part, based its refusal to review the validity under international law of the Cuban expropriation on the grounds that when the State Department was engaged in negotiations a judicial determination of such a question would create the possibility of an unavoidable conflict between the judicial and executive branches.

> Considerably more serious and far-reaching consequences would flow from a judicial finding that international law standards had been met if that determination flew in the face of a State Department proclamation to the contrary. When articulating principles of international law in its relations with other states, the Executive Branch speaks not only as an interpreter of generally accepted and traditional rules, as would the courts, but also as an advocate of standards it believes desirable for the community of nations and *protective of national concerns*.[208]

Although the factual situation in *Kolovrat* does not approach the international volatility of the expropriation cases, the Court's reasoning in *Sabbatino* seems equally compelling in treaty interpretation cases when the executive is acting as an advocate of a particular legal position in some international decision-making process. When such is the case, the clear implication of the *Sabbatino* rationale is that American courts should treat the State Department's interpretation as authoritative.[209] Where treaty matters are concerned, the Court's responsibilities under Article III would hardly permit a complete refusal to adjudicate when a clearly authoritative source of law—federal law—exists. Consequently, the only course open, consonant with permitting continued effective executive action in the foreign affairs field and with the required judicial function, would be to acccpt the State Department's interpretation as authoritative.

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207. 376 U.S. 398, 432-33 (1964) (emphasis added). The facts of the case are set out in text accompanying note 29.

208. *Id.*

209. A more extensive discussion of the Court's rationale in the Sabbatino case appears in the

(d) Political Questions.—There is a body of federal common law which delineates the shadowy borders between the proper spheres of activity of the three branches of the federal government. This body of principles, generally called "the political question doctrine," might well be designated "the common law of judicial restraint." The fundamental principle of the doctrine is that, to the greatest practical extent, the constitutional concept of separation of powers is to be given effect by the refusal of courts to adjudicate those cases involving the resolution of policy questions more properly left to either the legislative or the executive branch.

The federal common law discussed above was illustrated by cases in which courts have developed and applied national rules of substantive law in private international cases. Once the vertical choice of law was made and the substantive content of the rule determined, courts applied the federal common law doctrines in the same manner in which a court applies any private law norm. By contrast, the political question doctrine is negative in effect. It operates, and is intended to operate, to deny a plaintiff or defendant his day in court, or at least, to refuse a judicial application of private law to the settlement of his dispute. The doctrine is employed to designate, in appropriate instances, the federal executive, rather than the legislature or the courts, as the authoritative decision-maker, with the realization that the decision will be based upon political determinations and not merely upon considerations concerning the attainment of justice between the parties in the particular case. Implicit in the doctrine's application is the recognition that justice for *these* parties is a consideration secondary to the long-term political interests of the nation as a whole, the advancement of which is entrusted to the President in international relations.

In the foreign affairs field, political questions include determinations of: the existance of a state as an entity legally recognizable in American courts; the judicial status to be accorded to a foreign government claiming to be the international representative of an existing state; the legal status to be accorded to acts of a foreign government, including the immunity of foreign sovereigns or their representatives from judicial proceedings; and the effect to be given in domestic courts to foreign "acts-of-state" done by governments within their own territory.[210]

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sub-section on the Act-of-State Doctrine, *infra*.

210. For an excellent discussion of the law of political questions as it has been developed by the United States Supreme Court, see Dickenson, *supra* note 172.

(1) *Recognition.*—The President's exclusive power to recognize the existence of new foreign states or foreign governments rests in his power to receive ambassadors under article II, section 3.[211] That power may be fully exercised by the executive acting alone, and its legal consequences become fully operative either by proclamation of an executive agreement or merely by formal public announcement.[212]

The executive branch in the United States treats the power of recognition as a purely political matter whose exercise is subject to no legal standards, either domestic or international.[213] Courts in the United States respect the essentially political nature of this act and will withhold any decision which might interfere with the absolute nature of the executive's power in this field. In addition, courts readily give effect to the full implications of the executive's recognition policy. Thus, by refusing recognition, the executive branch can deny a foreign government access to American courts,[214] prevent the collection of monies admittedly belonging to a foreign state when claimed by a new but unrecognized government,[215] and deny to its acts the benefits of the act-of-state doctrine.[216]

A dramatic illustration of the private law effects of the executive's recognition power is found in *Republic of China v. Merchants Fire Assurance Corp. of New York.*[217] Defendant insurance company had issued a fire insurance policy to the Republic of China covering certain government property. A revolutionary government came into control of most of the Chinese mainland. This government brought suit on the policy for an earlier fire loss in the name of the Republic of China. The lower court (United States Court for China)[218] dismissed the suit on the grounds that the revolutionary government had not been recognized by the United States and therefore lacked capacity to sue. After this decision, but before the appeal, the United States recognized the new

211. United States v. Pink, 315 U.S. 203 (1942).

212. *See* 1 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 166-67 (1940).

213. *See* UNITED STATES POLICY ON NONRECOGNITION OF COMMUNIST CHINA, DEPT. OF STATE MEMORANDUM TO MISSIONS ABROAD, Aug. 11, 1958, in 39 DEPT. STATE BULL. 385 (1958).

214. The Rogdai, 278 F. 294 (N.D. Cal. 1920).

215. Russian Socialist Federated Soviet Republic v. Cibrario, 235 N.Y. 255, 139 N.E. 259 (1923). *Cf.* Bank of China v. Wells Fargo Bank & Union Trust Co., 104 F. Supp. 59 (N.D. Cal. 1952).

216. Latvian State Cargo & Passenger S.S. Line v. McGrath, 188 F.2d 1000 (D.C. Cir. 1951). *But cf.* M. Salimoff & Co. v. Standard Oil Co., 262 N.Y. 220, 186 N.E. 679 (1933).

217. 30 F.2d 278 (9th Cir. 1929).

218. For a description of this court, see 11 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 571 (1941).

government. The Court of Appeals reversed, permitting the newly-recognized government to continue the suit. After pointing out that the lower court's decision had been correct when it was rendered, the court wrote:

> On July 25, 1928, the Envoy Extraordinary and Minister Plenipotentiary to China, appointed by the President of the United States, and the Minister of Finance, appointed by the National Government of the Republic of China, entered into a treaty of commerce; and while this treaty has not as yet been ratified by the Senate, it contains a clear recognition by the Executive Department of this government of both the National Government of the Republic of China and of its accredited representative. This recognition by the Executive Department would seem to satisfy the requirements of the law; but, if this is not enough, we have been advised by a telegram from the Secretary of State that the Minister Plenipotentiary and Envoy Extraordinary of the National Government of China has been officially received by this Government, so that the recognition of the former is now settled beyond question.[219]

Perhaps the most striking effect ever given by a court to an executive act of recognition and the policies underlying it is found in *United States v. Pink*,[220] decided by the Supreme Court in 1942 under law created by the recognition of the Soviet Government by the President in 1933. An integral part of the recognition agreement was the Litvinov Assignment, in which the United States accepted an assignment of all Soviet claims to "nationalized" property located in the United States in return for a waiver of United States claims, or claims of its nationals, against the Soviet Union for property seized during and following the revolution. Pink, New York insurance commissioner, held funds originally belonging to a New York branch of the First Russian Insurance Company, which had been nationalized by the Soviets in 1918 and 1919. After Pink had paid off all the company's domestic creditors, the New York Court of Appeals ordered him to pay the remaining funds to foreign creditors and to a quorum of the company's former board of directors. When the United States brought suit, claiming the funds by virtue of the Litvinov Assignment, the Supreme Court upheld the Government's claim.

Some unfortunate language implying retroactive legal effects solely to the act of recognition[221] led many commentators to misplace the emphasis, as later developments show.[222] The importance of the decision is not that recognition alone can retroactively validate extraterritorial

219. 30 F.2d at 278.

220. 315 U.S. 203 (1942).

221. *Id.* at 223.

222. *See, e.g.*, Borchard, *Extraterritorial Confiscations*, 36 AM. J. INT'L L. 275 (1942); Jessup, *The Litvinov Assignment and the Pink Case*, 36 AM. J. INT'L L. 282 (1942).

seizures, but rather its indication that the power of the executive to recognize foreign governments carries with it the power to make binding executive agreements whose provisions have the force of national law.[223] Consequently, even though the foreign creditors would otherwise have had a legal claim to the funds under the law of New York, the President's exclusive power to recognize carried with it the power to establish a policy which his political assessment of the requirements of foreign affairs showed to be in the national interest, without regard to the question of private justice in the particular case. The Court wrote:

> If the President had the power to determine the policy which was to govern the question of recognition, then the Fifth Amendment does not stand in the way of giving full force and effect to the Litvinov Assignment. . . . [T]he Federal Government is not barred by the Fifth Amendment from securing for itself and our nationals priority against such [foreign] creditors. And it matters not that the procedure adopted by the Federal Government is globular and involves a regrouping of assets. . . . The powers of the President in the conduct of foreign relations included the power, without the consent of the Senate, to determine the public policy of the United States with respect to the Russian nationalization decrees. . . . That authority is not limited to a determination of the government to be recognized. It includes the power to determine the policy which is to govern the question of recognition. *Objections to the underlying policy as well as objections to recognition are to be addressed to the political department and not to the courts.*[224]

The *Pink* decision had the effect of taking American assets belonging to the Russian insurance company away from its foreign creditors and using them to pay, in part, the losses of Americans whose property had been confiscated by the Soviet Union. In this aspect, it may be only an aberration, brought about by the Court's realization of the close cooperation necessary between the Soviet Union and the United States in the midst of World War II.[225] But the fact that the Court permitted this private injustice emphasizes the importance of executive power over political questions in the international field. Where a vital national interest may be served by giving effect to executive policy under the constitutional power to recognize, considerations of private justice in individual cases give way to politically determined results.

(2) *Sovereign Immunity.*—The same fundamental policy discussed above with respect to recognition is presented sharply in the sovereign immunity cases. The effects of the "creative tension" between the political and judicial departments of government, resulting in preeminence of the executive as a private lawmaker, is nowhere more

223. *See generally* note, *United States v. Pink—A Reappraisal,* 48 COLUM. L. REV. 890 (1948).

224. 315 U.S. at 228-29 (emphasis added).

225. *See* Frankfurter, J. concurring opinion, *id.* at 234, 238-42.

effectively illustrated than in the line of cases concerning the doctrine of sovereign immunity. Today, decisions of the State Department are the ultimate authority in determining the permissibility of suits against foreign sovereigns. In carrying out its role, the executive branch acts both as a fact finder in search of recognizable sovereignty and as a quasi-legislator, establishing legal rules regarding immunity to be applied to the future. As to the first aspect, the executive communicates its finding of sovereignty to the courts, which give it conclusive effect. In the second, the courts accept State Department pronouncements as a rule of law to be interpreted and applied in cases where no executive suggestion has been communicated.

In American law, the nature of the sovereign immunity doctrine as a "purely" political question has only recently been conclusively established. Until the middle of this century, there was thought to exist a body of "common law" on sovereign immunity drawn from the law of nations, which courts were free to apply where no executive suggestion of immunity had been filed. Even where an executive suggestion had been made, it was not clear that courts were required to give it effect, although they traditionally did so. This confusion stemmed, in large part, from varying interpretations of the opinion of Justice Marshall in the leading American case on the immunity of foreign sovereigns, *The Schooner Exchange v. McFaddon*.[226] In that case, a libel against a French warship was dismissed on a finding that, under the law of nations, a "public armed ship" entered the port of a friendly sovereign under an "implied license" from that government, which included a recognition of the principle that the international equality of sovereigns established a presumption that one would not hail another into its courts to answer private complaints. Chief Justice Marshall expressly refused to pass on the question of whether conclusive effect should be given to the suggestion of immunity which the executive had filed in the case, although the point was argued.[227] At most, Marshall treated the executive as the authoritative finder of the ultimate fact of sovereignty, the determination of which automatically brought into play those considerations of international comity upon which his decision was based.

Doubt concerning the authoritative nature of executive action in sovereign immunity cases was emphasized by the Supreme Court in *Berizzi Brothers Co. v. Steamship Pesaro*,[228] decided in 1926. In that

226. 11 U.S. (7 Cranch) 116 (1812).
227. *Id.* at 146.
228. 271 U.S. 562 (1926).

case, the Supreme Court gave effect to a plea of sovereign immunity for a government-owned merchant ship in the face of a State Department suggestion to the district court that immunity need not be granted.[229] The Court explicitly stated that the granted immunity was based upon the nature of the sovereign under the requirements of the law of nations.[230] Implicit in the decision was the assumption that the executive department could not render legally inoperative the ultimate fact of sovereignty by filing a contrary suggestion with the court.

Seventeen years later, the Court made it clear, however, that the political question principle was controlling in sovereign immunity cases. In *Ex parte Peru*, the Court gave conclusive effect to an executive "recognition and allowance" of immunity to a government-owned Peruvian merchant vessel. Chief Justice Stone wrote:

> [C]ourts may not so exercise their jurisdiction, by the seizure and detention of the property belonging to a friendly sovereign, as to embarass the executive arm of the Government in conducting foreign relations. . . .
>
> The certification and the request that the vessel be declared immune must be accepted by the courts as a conclusive determination by the political arm of the Government that the continued retention of the vessel interferes with the proper conduct of our foreign relations. Upon the submission of this certification to the district court, it became the court's duty, in conformity to established principles, to release the vessel and to proceed no further in the cause.[231]

Two years later, the Court went further. In *Republic of Mexico v. Hoffman*,[232] it denied that judicial common law was an authoritative source for decisions on sovereign immunity but recognized a kind of "executive common law," whose substantive content was derived from prior actions of the State Department in immunity cases. The *Hoffman* case concerned a libel in rem for collision damage against a government-owned Mexican merchant vessel operated under contract by a private Mexican corporation. The State Department filed a statement noting the claim of immunity and accepting the fact that the vessel was owned by the Mexican government, but taking no position on ultimate immunity from suit. The Court denied the immunity on the grounds that prior State Department practice had been to refuse a recommendation when the vessel in question was owned, but not actually possessed, by the foreign sovereign. The Court specifically disapproved the implications of the *Berizzi Brothers* opinion: "It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an

229. *See* The Pesaro, 277 F. 473, 479 n.3 (S.D.N.Y. 1921).
230. 271 U.S. at 574.
231. 318 U.S. 578, 588-89 (1943).
232. 324 U.S. 30 (1945).

immunity on new grounds which the government has not seen fit to recognize.[233]

This recognition of the executive branch as the ultimate lawmaker in sovereign immunity cases led to a "legislative enactment" by the State Department in the form of a letter from Acting Legal Advisor Jack B. Tate to the then Attorney General, setting forth the principles upon which the Department would henceforth recognize immunity claims.[234] The Department repudiated the rule of absolute immunity for sovereign acts and substituted a theory of restrictive immunity: "[T]he immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*)."[235] The executive disclaimed any power to control the courts, but the language quoted above from the *Hoffman* case made it quite clear that the rule of the Tate Letter would be treated as authoritative by the judiciary.

The Supreme Court accepted the general principles of the Tate Letter in *National City Bank v. Republic of China*,[236] where a permissive counterclaim against a foreign sovereign plaintiff was allowed when the State Department failed to suggest immunity. A more explicit application of this "executive legislation" is found in *Victory Transport, Inc. v. Comisaria General*.[237] In that case, involving a private suit against the Spanish Ministry of Commerce to compel arbitration under a provision in a charter contract, the Second Circuit, absent an executive suggestion, denied immunity. In doing so, it gave content to the Tate Letter rule by defining categories of public acts for which immunity would be granted and denying it in all other cases.[238]

The final demonstration of the pre-eminence of the executive as authoritative law-maker in sovereign immunity cases, however, lies in the fact that, while the courts consider themselves bound by expressions of executive policy, the State Department retains its freedom to decide immunity on a case by case basis. In at least three cases,[239] the

233. *Id.* at 35. For a criticism of this case on the grounds that it leaves too much law-making power to the executive, see Jessup, *Has the Supreme Court Abdicated One of Its Functions?*, 40 AM. J. INT'L L. 168 (1946).

234. Letter of Acting Legal Adviser, Jack B. Tate, to Dept. of Justice, May 19, 1952, in 26 Dept. STATE BULL. 984 (1952).

235. *Id.*

236. 348 U.S. 356 (1955).

237. 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965).

238. The five categories listed were (1) internal administrative acts, such as the expulsion of an alien; (2) legislative acts, such as nationalization; (3) acts concerning the armed forces; (4) acts concerning diplomatic activity; and (5) public loans. 336 F.2d at 360.

239. Rich v. Naviera Vacuba S.A., 295 F.2d 24 (4th Cir. 1961); New York & Cuba Mail S.S.

Department has taken note of overriding political considerations and has allowed a claim of immunity which, under the principles of the Tate letter as elucidated in *Victory Transport*, would otherwise have been denied.

Illustrative of this relationship between foreign policy and "the executive common law of sovereign immunity" is *Rich v. Naviera Vacuba, S.A.*[240] In that case, Cuban sailors had hijacked a merchant ship owned by a nationalized Cuban company and had brought it to the United States. The ship and its cargo were libeled by Mayan Lines, S.A., in execution of a consent judgment against the Republic of Cuba, which it had obtained in a Louisiana court, and by United Fruit Company, which claimed that the ship's cargo had been confiscated from its plant in Cuba. The commercial nature of the vessel and her cargo appears to be indisputable. Also, the Republic of Cuba had waived immunity from execution of the Louisiana consent judgment. Nonetheless, the State Department suggested immunity of the ship and its cargo from seizure and the court concluded:

> [t]he certificate and grant of immunity issued by the Department of State should be accepted . . . without further inquiry. We think that the doctrine of the separation of powers under our Constitution requires us to assume that all pertinent considerations have been taken into account by the Secretary of State in reaching his conclusion.[241]

These "pertinent considerations" had little to do with the policies expressed in the Tate Letter. The State Department, two days after the hijacking incident, had agreed with the Cuban government that it would release the ship in return for reciprocal action concerning an Eastern Airlines plane which had been hijacked and taken to Cuba the month before.[242] A political determination of this kind is exactly the sort which the political question doctrine is designed to preserve from judicial interference. It should be noted, however, that the Department's determination affected private rights substantially. In effect, the Department substituted the return of the plane to Eastern Airlines for recovery of an oustanding judgment by Mayan Lines and for recovery of the confiscated sugar by United Fruit.

Co. v. Republic of Korea, 132 F. Supp. 684 (S.D.N.Y. 1955); Chemical Natural Resources, Inc. v. Republic of Venezuela, 420 Pa. 134, 215 A.2d 864, *cert denied*, 385 U.S. 822 (1966).

240. 295 F.2d 24 (4th Cir. 1961).

241. *Id.* at 26.

242. Rich v. Naviera Vacuba S.A., 197 F. Supp. 710, 714-15 (E.D. Va. 1961); *see* 45 DEP'T STATE BULL. 407 (1961); Cardozo, *Judicial Deference to State Department Suggestions: Recognition of Prerogative or Abdication to Usurper?*, 48 CORNELL L. Q. 461, 464-67 (1963).

(3) *Act-of-State.*—The recently concluded litigation in the *Sabbatino*[243] controversy, together with its legislative aftermath,[244] provide perhaps the most striking illustration found in the annals of American constitutional history of the interplay between the separated powers of the branches of our federal government. Whatever the practical results of the outcome may be in terms of its actual effect upon private rights in cases involving foreign acts of state or upon the confiscation of American-owned property by foreign governments, the controversy focused a tremendous amount of scholarly, judicial, and legislative expertise upon vital questions concerning the constitutional structure of our government. In one way or another, the *Sabbatino* problem raised most of those questions concerning the authoritative sources of private international law with which we have dealt throughout this article. It is thus fitting to conclude this part of our treatment with an analysis dealing with that case and the doctrine on which it was based. It is treated under the heading "federal executive law" because it culminated in a judicial and legislative recognition of executive power in the field of private international law which was considerably more explicit than any theretofore available. As a preliminary, to demonstrate this result, it will be useful to outline the history of the act-of-state doctrine before dealing at some length with the *Sabbatino* case.

The act-of-state doctrine in American law is closely related to the principle of sovereign immunity.[245] Both stemmed, initially, from conceptions of absolute territorial sovereignty and the relationship between those conceptions and a power-oriented theory of jurisdiction which equated physical power over parties with a right to decide their disputes and lack of such power with a lack of jurisdiction. Thus, the adjudication of disputes concerning either the person or the acts of a foreign sovereign was conceived as the application of physical force against the sovereign personality. But the decision to apply force to a foreign sovereign is essentially political in nature. It is not to be made upon the accident of the presence of the sovereign, or of one claiming legal rights based upon the validity of the sovereign's acts, before a court whose even-handed justice could be enforced only by the exercise of its own sovereign's power. Thus, Chief Justice Marshall, in *The Schooner*

243. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). The facts of the case are set forth in text at note 15 *supra*.

244. 78 Stat. 1013, *as amended*, 22 U.S.C. § 2370(e)(2) (Supp. II 1965-66).

245. *See* Maier, *Sovereign Immunity and Act of State: Correlative or Conflicting Policies?*, 35 U. CIN. L. REV. 556 (1966).

Exchange, found an "implied license" for territorial penetration by the French public ship. If power was to be exercised against it, it was to be done by command of the political branch, not by the judiciary.[246] Similarly, the earliest American act-of-state case, *Hatch v. Baez*, used the vivid language of military attack, emphasizing that physical power to nullify the acts of a foreign sovereign is not be be applied upon judicial determination alone. Dismissing a suit against the former President of Santo Domingo, based on acts done in his official capacity, the court wrote:

> To make him amenable to a foreign jurisdictioh for such acts, would be a *direct assault upon the sovereignty and independence of his country*. The only remedy for such wrongs must be sought through the intervention of the government of the person injured. . . .[247]

Like the Supreme Court in *McFaddon*, the New York court found the applicable principle in public international law.

> The general rule, no doubt, is, that all persons and property within the territorial jurisdiction of a State are amenable to the jurisdiction of its courts. But the immunity of individuals from suits brought in foreign tribunals for acts done within their own States, in the exercise of the sovereignty thereof, is essential to preserve the peace and harmony of nations, and has the sanction of the most approved writers on international law.[248]

The rule of *Hatch v. Baez* was adopted by the United States Supreme Court in *Underhill v. Hernandez*,[249] a case of essentially similar facts.

Throughout its earlier history, the act-of-state doctrine was variously described as a doctrine of international law, a doctrine of conflicts of law, or as derived from the concept of separation of powers.[250] It was applied by the courts without recourse to executive intervention, perhaps because it was primarily applicable in suits between private parties which did not afford an incentive for the State Department to communicate its wishes directly to the court. Professor Eugene Mooney in his helpful book, *Foreign Seizures*, demonstrates effectively that, although the executive did not intervene directly in act-of-state cases, the courts were fully aware of the relationships between the doctrine and foreign political requirements. He contends, with ample supporting evidence, that it was always applied by the courts in a

246. Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 141 (1812).

247. 7 Hun 596, 599-600 (N.Y. App. Div. 1876) (emphasis added).

248. *Id.* at 600.

249. 168 U.S. 250 (1897).

250. *See* Zander, *The Act of State Doctrine*, 53 AM. J. INT'L L. 826 (1959); Hyde, *The Act of State Doctrine and the Rule of Law*, 53 AM. J. INT'L L. 635 (1959); Comment, *"Act of State" Immunity*, 57 YALE L.J. 108 (1947).

manner consonant with the then prevailing national policy of the United States, whether in giving full effect to Latin American revolutionary seizures as encouragement to throw off European domination, compatible with the theory of the Monroe Doctrine, or in protecting American nationals when they claimed title based upon Soviet seizures during the Russian revolution.[251]

The first instance of direct executive intervention in an act-of-state occurred in litigation involving attempts to recover property seized by the National Socialist Government of Germany. In *Bernstein v. van Heyghen Freres Societe Anonyme*,[252] Judge Learned Hand applied the act-of-state doctrine to refuse adjudication of the legal validity of a Nazi confiscation which had occurred before World War II. When in a succeeding case involving the same seizure, the State Department indicated to the court that the act-of-state doctrine need not be applied in cases involving Nazi confiscations and the court accepted the suggestion as conclusive, the so-called "Bernstein Exception" to the act-of-state doctrine was born.[253] This new rule, recognizing law-making power in the executive branch which could be exercised on a case-by-case basis, had a rational basis only if the source of the doctrine was the separation of powers concept, rather than a separate body of international or conflicts law. Although the "Exception" became the subject of some comment in legal literature,[254] there was no regular application of it by the executive other than in the cases mentioned.

The stage was set for the struggle between the three separated branches in the *Sabbatino* litigation. It began when the Federal Court for the Southern District of New York attempted to expand the judicial role in act-of-state cases by use of the traditional common law method.[255] Implicitly rejecting the view that the "Bernstein Exception" permitted judicial intervention in act-of-state cases only when express permission was granted by the executive branch, Judge Dimock treated the rule as purely one of "self-imposed restraint," which could be lifted in appropriate cases where, if the act of the foreign sovereign was alleged to violate international law, exercise of the judicial function would not embarrass the executive. Finding no such embarrassment in the light of State Department objections to the Cuban seizures, the court applied

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251. *See generally*, MOONEY, FOREIGN SEIZURES (1967), especially chapters 1-3.

252. Bernstein v. van Heyghen Freres Societe Anonyme, 163 F.2d 246 (2d Cir. 1947).

253. *See* Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375 (2d Cir. 1954) (per curiam).

254. *See, e.g.*, Zander, note 250 *supra*; Hyde note 250 *supra*.

255. Banco Nacional de Cuba v. Sabbatino, 193 F. Supp. 375 (S.D.N.Y. 1961).

principles derived from public international law to create, in effect, a federal common law rule denying effect to the Cuban confiscation. The Court of Appeals for the Second Circuit affirmed.[256]

The Supreme Court reversed, making it clear that executive power was authoritative in act-of-state cases. Its decision represented a value judgment that judicial determinations aimed at attaining justice in the individual case were not permitted where broader questions of foreign policy were involved. After pointing out that the authoritative source of the doctrine was neither the Constitution nor public international law, the Court wrote:

> The act of state doctrine does, however, have "constitutional" underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations. The doctrine as formulated in past decisions expressed the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere.[257]

This statement serves as a justification not only for the act-of-state doctrine, but for all those rules of judicial restraint designed to permit free exercise of executive power in the field of foreign affairs. Implicit in this justification was the Court's determination that the doctrine was one of national, not state, common law:

> [W] e are constrained to make it clear that an issue 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 must be treated exclusively as an aspect of federal law.[258]

The Supreme Court avoided the question of the validity of the "Bernstein Exception" on the grounds that, whatever might have been indicated by earlier executive statements in the case, the appearance of the executive branch as amicus curiae in support of the application of the act-of-state doctrine removed any doubt concerning executive policy.[259] But despite the Court's indication of possible doubt concerning the continued vitality of the "Bernstein Exception," the rationale upon which its decision was based would clearly include the possibility of executive waiver of the doctrine where this was politically useful. It is possible that the Court had domestic, rather than foreign, political difficulties in mind when it failed to endorse the "Bernstein Exception" per se. If this power

256. Banco Nacional de Cuba v. Sabbatino, 307 F.2d 845 (2d Cir. 1962).
257. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964).
258. *Id.* at 425.
259. *Id.* at 420.

were explicitly recognized, executive refusal to permit adjudication of the Cuban seizures could result in volatile public reaction against a branch of the government whose personnel depend upon the electorate for their positions. This last assumption is borne out by the struggle put up by the executive branch against the legislative imposition of a "reverse Bernstein" rule in the Hickenlooper Amendment.[260]

Congress, moved in part by a desire to advance the cause of international law by requiring adjudications under it, and in far larger measure, by a desire to strike back at the Castro government,[261] directed courts in the United States to decide international legal violations in property seizure cases without resort to the act-of-state doctrine.[262] It preserved the constitutionality of the legislation by providing that where the executive expressly directs the court to apply the act-of-state doctrine to the case at bar, the amendment is inapplicable. The shift put the executive in the even less tenable domestic political position of being forced positively to state, in effect, that foreign political considerations require that the seized property be left with the Castro government rather than be returned to its original American owner. More important, however, this "saving clause" amounted to a direct legislative recognition of executive power to determine the outcome of private international cases where foreign political considerations were paramount.

On remand to the district court, the Hickenlooper Amendment was applied to the *Sabbatino* case itself.[263] On appeal, the Second Circuit spoke to the question of the relationship between executive, legislative, and judicial power in the field of foreign affairs. The Court found no unconstitutional interference by the legislature with the judicial power, emphasizing that the legislative branch, as well as the executive, had competence in foreign political matters.

> As the Constitution did not require the exact result reached there [by the Supreme Court] the Court must have exercised its discretion, based on its own judgment of the situation, to choose among a number of constitutionally permissible alternative rules as to the applicability of the act of state doctrine. Therefore, the political

260. *See* letter from George W. Ball, Acting Secretary of State, to Senator William Fulbright, Chairman of the Senate Foreign Relations Comm., in 1965 *Hearings on the Foreign Assistance Program Before the Senate Comm. on Foreign Relations*, 89th Cong., 1st Sess. 728-29 (1965).

261. *See Senate Hearings*, note 260 *supra* at 731-34, 750-52, 759-60; *Hearings on the Foreign Assistance Act of 1965 Before the House Comm. on Foreign Affairs*, 89th Cong., 1st Sess. 1060, 1304, 1315-16, 1318-19; Letter from Senator Hickenlooper to The Washington Post, July 27, 1964, in 110 CONG. REC. 19546 (1964); Comment, *supra* note 24.

262. 78 Stat. 1013, *as amended*, 22 U.S.C. § 2370 (e)(2) (Supp. II 1965-66).

263. Banco Nacional de Cuba v. Farr, 243 F. Supp. 957 (S.D.N.Y. 1965).

> branches of our national government should be able to modify the Court's decision, choosing another constitutionally permissible alternative (cases cited), especially as the factor upon which the choice is based, the effect on our foreign relations, is admittedly more within the competence of the *political branches* of the Government than the competence of the Court.[264]

The court's analysis of the question of legislative interference with executive power again emphasized the parallel power of the legislature to decide political questions in matters of foreign affairs. The court pointed out that the Hickenlooper Amendment did not attempt to nullify executive power to determine the outcome of act-of-state cases, but only "reversed the presumptions" raised by failure of the executive to speak its will. Referring to recognition of broad executive powers in the *Curtiss-Wright* case, the court wrote:

> It is doubtful that the "plenary and exclusive" presidential power over foreign affairs is this encompassing. . . . Even if one accepts for the purpose of argument the view that the President holds all the residual power of the Government in the field of foreign relations, it is clear that there is ample constitutional authority for an assertion of congressional power. . . . Since Congress thus clearly possesses a constitutional interest in the problem involved in this case, it was entitled to make its will known by means of a statute.[265]

Despite the court's emphasis upon legislative competence in foreign political matters, the result of the *Sabbatino* litigation and the responsive legislation is a victory for the executive branch. Judicial law-making by common law techniques in act-of-state cases, and, by implication, in all other cases closely touching the questions of international political relations, is disapproved by the Supreme Court's opinion. Congressional reaction did not deny but, in fact, specifically recognized the executive branch as the final authority for determining private rights in these cases whenever it desired to exercise its power. The executive, while perhaps preferring a less politically hazardous means of achieving these results, can live with the provisions of the legislation.

This consideration of federal executive law-making power might well end with a restrained, but nonetheless important, caveat. Executive law-making power is a necessary concommitant of the executive's position as the international representative of this government. But such law-making is and must be influenced by broader policy decisions than those related to justice for private litigants in individual cases. Therefore, abdication to executive law-making power by the legislature or the judiciary should be done only with circumspection, based on the recognition that each time the executive branch is given authoritative

264. Banco Nacional de Cuba v. Farr, 383 F.2d 166, 181 (2d Cir. 1967), *cert. aenied*, 390 U.S. 957 (1968)(emphasis added).

265. *Id.* at 182.

decision-making power in private cases, traditional concepts of the "just result" are given secondary importance. The executive's job is a difficult one in foreign affairs. He is under tremendous pressure to act, with his eye and ear to all the political winds of the international scene. But easing the executive's task is only one of the goals of foreign relations law. The other two branches of government must be constantly aware that even in the field of foreign affairs, this is a government of separated powers and that executive law-making should be permitted only where clearly necessary to enable the executive branch to play its role effectively in international political matters.

D. CONCLUSION

Writing in this field is like taking the picture of a fast-moving object with a still camera. The blurred outlines indicate the speed of movement and the temporary nature of conclusions. But some tentative conclusions can be offered.

Identifying the authoritative sources of private international law in our federal system requires a consideration of the varying roles assigned to the law-making components of that system under our governmental structure. We have sketched above the various sources of law which are authoritative in private international law cases.

International law, decisive as it is in an international forum, is not itself a controlling source in the municipal forum, though its rules, together with the exigencies of international relations, do exert strong influence upon the outcome of private international cases. Federal law is the authoritative source of much private international law. The Constitution, without dealing with these matters in detail, lays a broad base of federal power in these matters. Treaties are increasingly important as sources of law affecting private rights. Few federal statutes are directed explicitly to this field, but the requirements of national policy in the international arena are often relevant in determining the applicability of federal statutes in private disputes involving an international element. Federal common law developed by the courts to implement federal policies has a substantial role. The law-making power of the national executive has grown substantially in recent times in those cases where national political determinations outweigh considerations of private justice in private international cases.

Despite these indications of increasing federal law-making power, the authoritative source for most of private international law is still state law. It is state statutes and case reports which a lawyer or a judge

consults as a guide to his decisions. State courts have carried well the burden of coordinating the private laws of the states with the laws of other countries. By accepting this responsibility, they have helped to make the international system work fairly and well.

This is as it should be. There is no conflict of interest between the governments of the states and that of the nation in private international cases. They have the common interest of providing effective resolution of private international disputes within that system of divided labor which our Constitution prescribes, while preventing interference with the need of the nation to function effectively in the international community. It is therefore appropriate that the authority to make private international law in the United States is shared by our government's political divisions.[266]

II. THE FUNDAMENTAL SOURCES OF PRIVATE INTERNATIONAL LAW

So far this article has limited itself to a question in our federal nation which is inherent in all federal nations, the authoritative sources of private international law. This limitation must not be allowed to conceal another question about "sources" which is more basic and more far reaching. What are the factors—ideals, policies, objectives, practicalities—which guide a law-making body in laying down and developing the principles of private international law? "Fundamental sources" is the name given to these factors.[267] In the remaking of conflict of laws now occurring the question is put insistently. For our present purposes it is enough to state the question, to distinguish it from the one to which the discussion is primarily directed, and to stress one factor too easily ignored or under-valued in a world of uncritical national loyalties.

"[T]he needs of the interstate and international systems" is the first factor relevant to the choice of the applicable rule of law in the choice of

266. In Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 195 (1824), Chief Justice Marshall stated: "The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; . . ." The passage from The Federalist, "If we are to be one nation in any respect, it clearly ought to be in respect to other nations," is the theme of the article Moore, *Federalism and Foreign Relations*, 1965 DUKE L. J. 248 (1965).

267. "Energizing Forces" is the term given them by Chief Justice Stone before he went on the bench — "those energizing forces which are producing the technical doctrines of the law." Stone, *The Future of Legal Education*, 10 A.B.A.J. 233, 234 (1924). If for the designation of sources there were borrowed the terms from Aristotle's famous classification of causes ("material," "formal," "efficient," "final"), "authoritative sources" would be "formal sources" and "fundamental sources" would be "efficient sources". A brief statement of one writer's views on the several policies in conflict of laws is given in Cheatham, *Problems and Methods in Conflict of Laws*, RECUEIL DES COURS, 242-52 (1960).

law principles stated by The American Law Institute.[268] The basic nature of the factor is recognized by distinguished authorities.

Judge Jessup before taking a seat on the International Court of Justice wrote:

> It would be the function of transnational law to reshuffle the cases and to deal out jurisdiction in the manner most conducive to the needs and conveniences of all members of the international community.[269]

Justice Jackson, speaking for the Supreme Court of the United States in a private international law case in admiralty, said:

> It [maritime law] has the force of law, not from extraterritorial reach of national laws, nor from Abdication of its sovereign powers by any nation, but from acceptance by common consent of civilized communities of rules designed to foster amicable and workable commercial relations.[270]

Professor Battifol has discussed two recent decisions of the highest court of France which illustrate so well the primacy of the international system policies that they deserve comment at some length.[271] The cases involved the validity of provisions for arbitration in contracts between French government-owned enterprises and foreign private parties. Under the Code of Civil Procedure of France an arbitration provision in a contract of such an enterprise is ineffective. Nevertheless, the *Cour de Cassation* upheld the validity of the provision in two international contracts: in one case in which the foreign private party relied on it to bar suit against it in a French court; in the other to enforce in a French court a foreign award made pursuant to the arbitration provision. In almost identical language the opinions in the cases put the question: "whether the rule, enacted for internal contracts, should be applied as well to international contracts *made to suit the needs of, and under conditions conforming to the usages of, maritime commerce*; . . . ."[272] The two cases agree that the rule of French internal law, here a provision of internal public law, should not be applied in the conflict of law cases.

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268. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6, comment *d* at 16 (Proposed Official Draft 1967).

269. P. JESSUP, TRANSNATIONAL LAW 71 (1956). In the same spirit is the basic idea of an earlier distinguished author: "Although thus no rule of international law and no postulate of comity prevents a country from introducing whatever rule of private international law it may see fit, justice demands that every country in making such rules should consider how they will affect social and economic intercourse between any persons, be they its own nationals or aliens. . . . Private International Law is not itself international, but it should certainly be drawn up in an international frame of mind." WOLFF, PRIVATE INTERNATIONAL LAW 15, 16 (2d ed. 1950).

270. Lauritzen v. Larsen, 345 U.S. 571, 581-82 (1952).

271. Batiffol, *Arbitration Clauses Concluded Between French Government-Owned Enterprises and Foreign Private Parties*, 7 COLUM. J. TRANSNAT'L L. 32 (1968).

272. *Id.* at 34 (emphasis added).

Professor Battifol shows that the decisions can be justified as a matter of French law because "[t]he nature of international commerce justifies special solutions to its problems" and "[t]he commercial and political rationale for the decisions here under discussion is quite clear. . . ."[273] In this aspect the decisions are explained as based on French law, modified to meet the needs of the situations which confront it. He concludes his discussion with an intriguing comment:

> The development of international commercial arbitration guarantees a special efficacy to international commercial contracts conceived apart from internal law. . . . Beyond the 'state,' contracts between private persons are creating a new social system—that of international relations.[274]

The decisions by the *Cour de Cassation* involved only the validity of arbitration procedures. Yet the ground and language of the decisions—"to suit the needs of, and under conditions conforming to the usages of maritime commerce"—have wide application and give broad support to decisions made "to suit the needs of" international relations.[275] It is all the more so, because the cases put the needs of the international system ahead of a specific provision restricting a governmental agency, which has a much stronger claim to the protection of local law than the ordinary litigant possesses.

There are threats to the wise consideration of this basic factor, the needs of the international system. It may be of use to pull them out into the open in order to see them for what they are. The threats here mentioned are: the name given the subject, "conflict of laws"; the vague and uncertain principles of sovereignty and public policy; the conception of analytical jurisprudence employed in the adjustment of different laws; and the absence of specific guarantees in the Constitution.

One threat is the name ordinarily employed for the whole subject in Anglo-American jurisprudence, "conflict of laws." This name carries the impliciation that there is a combat between two nations or two systems of law with each one doing what is usual in combat, pressing its claims to the utmost. Both the name and the implication are misleading and harmful. When a Frenchman brings an action against a German on an occurrence with elements in both countries, the Frenchman may well urge the use of German law because it is to his advantage, and German may urge French law, and the court in either country may apply the

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273. *Id.* at 35.

274. *Id.* at 45, 47.

275. The Supreme Court has used similar grounds and language in a torts case. Lauritzen v. Larsen, 345 U.S. 571 (1952). *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6, comment *d* at 16 (Proposed Official Draft 1967).

other nation's law. There is no true "conflict" of the laws. A more descriptive and useful term for the subject is "coordination of legal institutions." To believe that it is to a nation's advantage every time its local law is applied instead of the law of another nation is as erroneous and unfair in law as the old mercantilist theory was in economics.

A second threat is uncritical use of the concept of sovereignty and public policy. The fact of territorial sovereignty of nations does, indeed, help create the problems of private international law. Certainly, however, that fact by itself does not give the solution. The asserted deduction of a particular solution from the fact or conception itself can come only through first smuggling into it the answer desired. Another solving phrase, "public policy" (*ordre public*), deserves a similar comment: "Resort to the concept is beguilingly easy and does not demand the hard thinking which the careful formulation of narrower, more realistic, choice of law rules would require. The principal vice of the public policy concepts is that they provide a substitute for analysis."[276]

Another set of threats to the development of conflict of laws rules comes from particular conceptions of analytical jurisprudence which are urged by their supporters as the guides in the field. One set, concerning the nature of the law involved, was the old distinction between matters real and matters personal. That set of ideas has been discarded. Another set, concerning the nature of legal interests of the parties, is still much alive. This second set is dervied from our system of legal thought and expression, complicated as it is by diverse legal systems. When a complainant is entitled to recover, our accustomed form of thought and expression is to say that the plaintiff has a legal right and the defendant is under a legal duty. When an occurrence in one nation is sued on in another and the plaintiff is allowed to recover, how do we explain that the legal result under the laws in the state of occurrence is given effect in the forum state, which has an entirely different legal system? At one time emphasis was laid on the state and the time of the occurrence, and it was said that the right created under that system of law was enforced in the forum. This conception led to the excesses of the vested rights theory of choice of law. Contrariwise, decisive emphasis has come to be placed on the forum state where recovery is sought and given, and it is said that only the law of that state is applicable and determinative. Neither of these two sets of conceptions should control or affect the choice of law. The fact is that the forum, under its conflict of laws rules, employs the

276. Paulsen & Sovern, *"Public Policy" in the Conflict of Laws*, 56 COLUM. L. REV. 969, 1016 (1956).

local law of the foreign state, and only so much of that law as its guiding policies in conflict of laws require.[277]

There is yet another threat to the fair development of private international law which is peculiar to our federal nation. It comes from the fact that some provisions of the Constitution are applicable to intranational, and not to international, conflict of laws. The full faith and credit clause is the best illustration. The justification of a difference in treatment by reference to such constitutional provisions overlooks the decisive effect of the fundamental sources. The fundamental sources may call for identity of treatment even though the authoritative sources are different. Difference in the formal or authoritative source of expression, whether in the Constitution or in state law, may be of no consequence because of recognition of identity of result called for by the fundamental sources of both kinds of conflict of laws. The rule of full faith and credit to judgments between the states would be a wise rule even though not embodied in the Constitution, and some state cases have based their credit to sister state judgments on their own conflict of laws rules and not on the Constitution.[278] Similarly, in the international field the Uniform Act on the Enforcement of Foreign Nations Judgments calls for the protection of judgments of foreign nations under state law, even though those judgments are, of course, not within the protection of the Constitution itself. The American Law Institute makes the point explicit by referring to the provisions of the Constitution which are controlling in intranational conflict cases and stating that the same policies underlying these constitutional provisions should ordinarily guide the formation of the international conflicts rules.[279]

In a consideration of the effect of these threats it may be useful to go over a series of differences of increasing degree among nations and to consider whether each difference in turn should affect the result. This series will be discussed in an order of increasing degree of difference. The first difference lies in the contrast between the ordinary international case and an intranational case between the states of this nation. It has been submitted and, it is hoped, demonstrated that the mere fact the case is international in character should not, and under American law does not, bring a difference in result.

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277. *See* Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361, 376-77, 383-85 (1945).

278. *In re* Fischer's Estate, 118 N.J. Eq. 599 (1935).

279. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 10, comment *d* at 49 (Proposed Official Draft 1967): "A court in the United States, in any event, should be guided by the policies of fairness and equality embodied in these constitutional rules in deciding an international case to which these rules are not strictly applicable."

The second difference is not one between nations as contrasted with States of the Union, but between different legal systems, as for example, the civil law and the common law. Within our own nation there are different legal systems; in the Commonwealth of Puerto Rico and the State of Louisiana the law is in large measure civil law, and many of the Western States have a system of matrimonial property which originated in the civil law. These differences in the legal systems within our nation, though they may create greater difficulties in the coordination of laws, have never, so far as is known, been the ground for basically different principles of conflict of laws; that is, for rejecting in choice of law the use of the law of the state of greater interest or significant relationship. To give an early illustration, the Supreme Court of Missouri, a state with the system of separate marital property, protected the interest of a Louisiana woman in Missouri land which had been bought by her husband with the proceeds of Louisiana marital property.[280] There is a similar recent case, the opinion in which was written by a judge most conversant with conflict of laws.[281] In international conflict of laws the result is the same. In the *Hilton* case[282] even the majority of the court, who refused to enforce a French judgment because of lack of reciprocity, rejected as a ground of attack on the French judgment, the fact that the procedural systems of the two nations differed. In the leading New York case on the subject,[283] a judgment of a court of Quebec was enforced, though the Province is governed by civil law.

Differences in culture or social institution are a third reason which may be urged for harsher treatment to interests under foreign law. Here there is special need to keep in mind the admonition of Judge Cardozo that we are not so provincial as to say that every solution of a problem is wrong because we deal with it differently at home.[284] Differences in culture or social institutions are themselves no reason for ignoring foreign law and foreign institutions. An illustration of fairness and wisdom in dealing with a foreign legal institution is given by a California case mentioned earlier.[285] There a foreigner who died without a will left surviving him two polygamous wives in his native country where polygamy was lawful. Holding that the polygamous marriages would be recognized in the distribution of the property in the state, the court ordered equal distribution of the estate to the two wives.

280. Depas v. Mayo, 11 Mo. 314 (1848).
281. Traynor, C.J. in Rozan v. Rozan, 49 Cal. 2d 322, 317 P.2d 11 (1957).
282. *See* note 3 *supra*.
283. *See* note 10 *supra*.
284. Loucks v. Standard Oil of New York, 224 N.Y. 99, 120 N.E. 198 (1918).
285. *See* note 17 *supra*.

The last two kinds of differences discussed—differences in legal systems and differences in social institutions—do give special difficulties. Judges and lawyers are accustomed to think in the categories and terms of their local laws. Foreign institutions do not fit so neatly into categories and terms which enable lawyers and judges to deal fairly with them. But this task is nothing new to conflict of laws. In ordinary cases it is manifest that when conflict of laws borrows terms from local law, it may have to give its own meanings to them. The terms, "procedure" and "public policy", are illustrations which every lawyer knows. In other parts of the law the developments of the natural sciences are constantly creating new problems for which new categories and solutions are required. The fair and wise coordination of the legal institutions of the nations, now so close together, must not be hampered by the failure of lawyers to develop ideas and categories and results appropriate to the task. The old categories may be flexible enough to deal wisely with problems unforseen when the categories were first created, or new categories suitable to the novel problems may be developed by the continuing creativity of the common law.

> When we are brought face to face with legal relations unknown to our own law, we may well find that we have no rules of conflict appropriate to these unknown institutions. But we ought not therefore to refuse to recognize, or even in appropriate circumstances to give effect to, an institution or status unknown in our Western countries; rather, we should work out new rules applicable to the interplay of these strange institutions with our own. International private law is not merely a static group of fixed rules confined to the legal institutions of a definite number of Christian or Western States, but a dynamic entity which is constantly growing with the progressive integration of what is after all (and more obviously as time proceeds) a single world.[286]

The last difference among the nations is a most unfortunate one. It is a difference in the fairness and dependability of the foreign laws or the foreign actions. Conflict of laws is not so blind as to treat hostile and dishonest acts equally with the friendly and the honest. To treat unlike things alike is itself unfair. When Hitler was accumulating foreign assets to finance his imperialist plans, his decrees were denied effect in this country.[287] When foreign legal proceedings are conducted in a way which is not consonant with fairness to the parties, the resultant judgments should similarly be denied effect.

With the wise adjustment of public and private international relations as the objective, the principles of private international law

286. Kollewijn, *Conflicts of Western and Non-Western Law*, 4 INT'L L. 307, 325 (1951).

287. Central Hanover Bank & Trust Co. v. Siemens & Halske Aktiengesellschaft, 15 F. Supp. 927 (S.D.N.Y. 1936).

should be broad and flexible enough to deal with the enormous variety of situations which confront it in an age when science and technology have vastly increased the incidence and speed of international travel, but when local loyalties and animosities have not declined with comparable speed, if at all. It will take the best of vision and of will for men of law of each nation to deal intelligently and fairly with foreign economic and social institutions which are alien to their accustomed modes of thought and which do not fit neatly into the categories of their local laws. No less troubling are the differing political institutions which make and administer the law. There comes to mind at once not only the differences between the totalitarian and free enterprise nations, but also the diversities among the free enterprise nations and among the communist nations as well. Most troubling of all is the fact that the legal institutions of some nations are not trusted by others. The tasks of private international law in the years ahead will be increasingly important, as well as increasingly difficult. The guide to their solution is faithful attention to the fundamental source.[288]

288. "The substantial provisions of international conflict of laws" are briefly considered in E. CHEATHAM, E. GRISWOLD, W. REESE, M. ROSENBERG, CASES ON CONFLICT OF LAWS 692-97 (5th ed. 1964).