

Sorting Out the Debate Over Customary International Law

ERNEST A. YOUNG*

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INTRODUCTION

Is customary international law federal law or state law? Are these the only choices? One of legal academia’s more heated spats in recent years has concerned the domestic status of customary international law, that is, international law that derives from the general practice of nations

rather than from formal treaties and other agreements.¹ The conventional wisdom has been that such law is (or is equivalent to) federal common law for purposes of creating federal subject matter jurisdiction and preempting state law. Curtis Bradley and Jack Goldsmith shook up the international law community in 1997, however, by arguing that this received view—which they call the “modern position”—is unconstitutional and illegitimate.² Their initial salvo prompted angry responses from prominent figures in international law.³ Invoking the Supreme Court’s famous statement in *The Paquete Habana* that “[i]nternational law is part of our law,”⁴ the international lawyers insisted that the modern position is consistent with well-settled understandings and warned of dire consequences should it be abandoned.⁵

Customary international law has been around for a long time, but its status in American law has become controversial only recently.⁶ Part of

1. Customary international law is often abbreviated “CIL” in the literature. I have generally avoided this usage on the theory that the world has plenty of acronyms already, but it crops up in quoted material throughout this Article.

2. See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) [hereinafter Bradley & Goldsmith, *Critique of the Modern Position*]. Professors Bradley & Goldsmith elaborated on their initial critique in Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319 (1997) [hereinafter Bradley & Goldsmith, *Human Rights Litigation*].

3. See, e.g., Harold Hongju Koh, *Is International Law Really State Law?* 111 HARV. L. REV. 1824 (1998) [hereinafter Koh, *State Law?*]; Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 (1997); see also Ryan Goodman & Derek P. Jinks, *Filartiga’s Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463 (1997); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393 (1997). For the response of Professors Bradley & Goldsmith to Professor Koh, see Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260 (1998) [hereinafter Bradley & Goldsmith, *Federal Courts*].

4. 175 U.S. 677, 700 (1900).

5. See, e.g., Neuman, *supra* note 3, at 390 (“Presumptive incorporation of customary international law is within the understanding of judicial power inherited from England and maintained since the beginning of the Republic.”); Koh, *State Law?*, *supra* note 3, at 1838 (insisting that “the capacity of the federal courts to incorporate customary international law into federal law . . . is absolutely critical to maintaining the coherence of federal law in areas of international concern”). For purposes of convenience I often group the modern position’s defenders together as “internationalists.” This is not meant to suggest that there are not important differences of view within this group (just as there are within the group of “revisionists”). I have tried to take note of those differences wherever they are material to the argument.

6. The current fracas seems largely to have been prompted by the Bradley and Goldsmith article in 1997, see Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 2, but many elements of their critique had been articulated earlier by Phillip Trimble and Arthur Weisburd. See Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665 (1986); A. M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20

the explanation is that customary law's status became a puzzle only after the Supreme Court's decision in *Erie Railroad Co. v. Tompkins*;⁷ prior to that time, customary international law had the status of "general" law under *Swift v. Tyson*.⁸ In light of *Erie*'s apparent rejection of a "general" law regime, Professors Bradley and Goldsmith have argued, "federal courts [must] identify the sovereign source for every rule of decision. Because the appropriate 'sovereigns' under the U.S. Constitution are the federal government and the states, *all* law applied by federal courts must be either federal law or state law."⁹ Hence the dispute about which box customary international law fits into.

Although the potential for debate on this question arose with *Erie*, the issue became salient in the latter part of the last century as a result of three further developments: First, international law's concerns have shifted to emphasize not only the relations among states, but also the relationship between states and their citizens.¹⁰ This shift has substantially increased the potential for conflict between international law and state law, thus requiring a determination of international law's preemptive force.¹¹ Second, the expansion of international law's concerns has encouraged a wave of "transnational public law" litigation in American federal courts.¹² These cases—which generally involve violations of internationally-recognized human rights—have both increased the salience of customary international law and, more particularly, required judges to determine whether or not such disputes "arise under" federal law for purposes of subject matter jurisdiction.¹³ Finally, it is probably fair to say that the Supreme Court's recent "federalist revival" in domestic law—exemplified by cases like *United*

YALE J. INT'L L. 1 (1995) [hereinafter Weisburd, *State Courts*]; Arthur M. Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205 (1988) [hereinafter Weisburd, *Executive Branch*]; see also *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 798-823 (D.C. Cir. 1984) (Bork, J., concurring). For pre-1997 work looking the other way, see Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295, 322-26 [hereinafter Brilmayer, *Preemptive Power*]; Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984) [hereinafter Henkin, *International Law*].

7. 304 U.S. 64 (1938).

8. 41 U.S. (16 Pet.) 1 (1842).

9. Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 2, at 852. Based on their reading of *Erie*, Professors Bradley and Goldsmith reject the idea that "notwithstanding *Erie*, federal courts can apply CIL 'as neither state nor federal law.'" *Id.* at 853 (quoting Weisburd, *State Courts*, *supra* note 6, at 49).

10. See, e.g., Paul B. Stephan, *The New International Law—Legitimacy, Accountability, Authority, and Freedom in the New Global Order*, 70 U. COLO. L. REV. 1555 (1999).

11. See Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 2, at 818-19.

12. See Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991) [hereinafter Koh, *Transnational Public Law Litigation*].

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

*States v. Lopez*¹⁴ and *Printz v. United States*¹⁵—has sparked increased interest in issues of federalism generally, including the interaction between federalism and international affairs.¹⁶

These developments prompted revisionist scholars like Professors Bradley and Goldsmith to reject the notion that customary international law is federal common law. The modern position, they argued, violated not only the holding of *Erie* but also the values of separation of powers, federalism, and democracy that the Court had sought to protect. Most revisionists thus took the position “that CIL should not be a source of law for courts in the United States unless the appropriate sovereign—the federal political branches or the appropriate state entity—makes it so.”¹⁷ Not surprisingly, international lawyers have not exactly flocked to this banner.

This essay attempts to take stock of this debate and to offer an intermediate solution. The impetus for such a solution emerges from the fact that both the revisionists and the international lawyers can offer situations in which their position *must* be correct. Professors Bradley and Goldsmith, for instance, emphasize the extent to which modern customary international law has come to regulate not only the relationship of states to one another but also the relationship between states and their citizens. This development raises the potential for customary international law-based challenges to any number of practices that fall within the realm of authority traditionally reserved to the states. If, for example, there is a customary international norm against various aspects of the death penalty,¹⁸ then that norm would preempt state death penalty regimes if—as the modern position holds—customary norms are in fact *federal* in stature.¹⁹

14. 514 U.S. 549 (1995).

15. 521 U.S. 898 (1997).

16. See, e.g., Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 399-400 (1998) [hereinafter Bradley, *Treaty Power*] (arguing that the Court’s renewed commitment to federalism in domestic law requires re-examining the scope of the treaty power); Martin S. Flaherty, *Are We to Be a Nation? Federal Power vs. “States’ Rights” in Foreign Affairs*, 70 U. COLO. L. REV. 1277 (1999) (rejecting the notion that foreign affairs law should safeguard state autonomy); Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223 (1999) (arguing that federalism concerns can safely enter into foreign affairs law now that the Cold War has ended) [hereinafter Spiro, *Foreign Relations Federalism*].

17. Bradley & Goldsmith, *Federal Courts*, *supra* note 3, at 2260; see also Trimble, *supra* note 6, at 672.

18. See, e.g., Joan Fitzpatrick, *The Relevance of Customary International Norms to the Death Penalty in the United States*, 25 GA. J. INT’L & COMP. LAW 165, 166-67 (1995) (identifying several aspects of capital punishment attacked under international law).

19. See Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 2, at 845. In fact, many international lawyers have argued for just such a result. See Brilmayer, *Preemptive Power*, *supra* note 6, at 322-26.

It is hard to imagine the courts taking such an argument for preemption seriously under current law.²⁰ The international lawyers, however, point to other situations in which the need to federalize customary international law intuitively seems much more compelling. Gerald Neuman, for example, has “offered consular immunity as an uncomplicated example to illustrate the need for federal common law in domestic litigation.”²¹ Harold Koh has made a similar argument about the immunities of visiting heads of state.²² When foreign diplomats and dignitaries are sued on state law claims in the United States, strong arguments can be made that individual states should not have the power to determine whether those officials will be afforded the immunity traditionally provided under international law. Diplomatic incidents arising out of such suits, after all, may injure the interests of the nation as a whole.

If we accept customary international law in such situations, are we committed to also accept preemption of state policy in areas like the death penalty? I think not. In this essay, I advance an intermediate solution based on treating customary international law as “general” law—a third category of law, neither state nor federal in nature. This “general” law would not preempt contrary state policies, hence avoiding the problems inherent in the death penalty example. But it would remain available for both state and federal courts to apply in appropriate cases as determined by traditional principles of the conflict of laws. In a tort suit against a foreign head of state, for example, it seems likely that the nation’s foreign affairs interests in adhering to customary immunity rules might well trump the state’s interest in applying its own immunity rules to the dispute. Where ordinary conflicts principles do not adequately protect the nation’s foreign policy interests, it may be necessary to formulate constraints on state choice of law as a matter of federal common law.²³

This proposal is not new or original in two senses. First, it amounts simply to a revival of the status that customary international law enjoyed before the advent of the modern position. Under *Swift v.*

20. See Brilmayer, *Preemptive Power*, *supra* note 6, at 326 (conceding this reality “[g]iven the Court’s current mood”).

21. Neuman, *supra* note 3, at 391. Consular immunity is generally regulated by treaty nowadays, but customary law continues to govern the rights of a significant number of non-signatories. *See id.*

22. *See* Koh, *State Law?*, *supra* note 3, at 1829.

23. *See, e.g.,* *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (articulating a federal common law rule that prevents federal or state courts from applying customary international law to hold invalid the acts of foreign governments within their own territory).

Tyson,²⁴ the federal courts for nearly 100 years applied “general” law to commercial disputes that came before them in diversity cases. This general commercial law—sometimes called the “law merchant—was “a subset of the law of nations”; as such, *Swift* involved an “application of private international law.”²⁵ This law was applied by state courts as well; neither state courts nor federal courts, however, were subject to appellate review by the other or bound by the other’s interpretations of this body of law.²⁶ All courts applying the general commercial law, however, recognized the importance of uniformity and strove to harmonize their decisions with the decisions of other jurisdictions.²⁷

Second, my proposal is basically what Arthur Weisburd proposed six years ago in an important but somewhat overlooked article.²⁸ After criticizing the modern position on many of the same grounds raised by Professors Bradley and Goldsmith, Professor Weisburd “offer[ed] a new analysis of the place of customary international law in the American judicial system that analogizes customary international law to the law of a foreign sovereign and applies it accordingly.”²⁹ Although Weisburd disavowed the Swiftian label of “general law,” the central element of his proposal was that international law should be neither state nor federal, but rather a third sort of law available to be chosen by both federal and state courts according to appropriate conflicts principles.³⁰

Swift’s regime of general law passed away, of course, in the wake of the Court’s ruling in *Erie*. That decision thus raises two central questions for my proposal: First, does the holding of *Erie* foreclose continued recourse to customary international law as a species of “general” law? This question ultimately depends on whether one views *Erie* as a holding about the nature of *law* (that is, a holding that “general” law cannot exist) or as a limit on the power of *courts* (in other words, a holding that courts cannot apply “general” law without authorization). Second, even if *Erie* does not foreclose the idea of “general” law, does the breakdown of the *Swift* regime that led to *Erie* indicate that “general” law is unsustainable? Here, the central concern is whether such a regime offers insufficient guarantees of uniformity,

24. 41 U.S. (16 Pet.) 1 (1842).

25. Michael Conant, *The Commerce Clause, the Supremacy Clause and the Law Merchant: Swift v. Tyson and the Unity of Commercial Law*, 15 J. MAR. L. & COM. 153, 153, 154 (1984); see also Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1279-85 (1996) [hereinafter Clark, *Federal Common Law*].

26. See Clark, *Federal Common Law*, *supra* note 25, at 1283-87.

27. See, e.g., William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1576 (1984).

28. Weisburd, *State Courts*, *supra* note 6.

29. *Id.* at 3.

30. See *id.* at 49.

especially in the sensitive realm of foreign affairs.³¹

My argument in this essay proceeds in four parts. Part I develops the current conventional wisdom—the “modern position” that customary international law is federal common law—and traces some of its implications in practice. I also note briefly a parallel debate about the status and legitimacy of customary law on the international plane and some implications of that debate for the domestic question. Part II then turns to the revisionist critique offered by Professors Bradley and Goldsmith and others. My principal focus is on the implications of *Erie* for customary international law, as well as the internationalists’ attempts to either distinguish *Erie* or reconcile it to the modern position. My conclusion is that this cannot be done.

Rejecting the modern position, however, does not necessarily tell us what should replace it. In Part III I reject the solution offered by Professors Bradley and Goldsmith, which would throw customary international law out of court absent a deliberate act by either a state or federal sovereign designed to incorporate such norms. I instead propose that customary international norms should retain the status of “general law”; such law would remain potentially applicable by domestic courts when called for by traditional principles of the conflict of laws. Part IV addresses three broad objections to this proposal: that it is inconsistent with *Erie* itself; that it would inadequately guarantee uniform application and interpretation of customary international law by domestic courts; and that my willingness to contemplate the development of federal choice of law principles in some cases is tantamount to a re-imposition of the modern position. None of these objections, I conclude, is insurmountable.

I. CUSTOMARY INTERNATIONAL LAW AS FEDERAL COMMON LAW

Customary international law “results from a general and consistent practice of states followed by them from a sense of legal obligation.”³² This sort of law is generally thought to have two components: the state

31. Even if one were to conclude that treating customary international law as general law did not adequately protect national interests in uniformity, that would not justify the modern position in itself. Felt necessity alone does not create constitutional power. Cf. Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1249 (1994) (suggesting that one should “hold fast to the Constitution though the heavens may fall”). Still, it is comforting to conclude—as I do—that the heavens will *not* fall if we reject the modern position.

32. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) [hereinafter RESTATEMENT (THIRD)]; see also STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 38(1)(b) (defining international custom “as evidence of a general practice accepted as law”).

practice itself, which must be assessed in terms of its generality, duration, and consistency;³³ and *opinio juris*, that is, the psychological belief of states engaged in the relevant practice that their action is required by international law.³⁴ Because states frequently do not explain *why* they take or refrain from taking particular actions, *opinio juris* has most often been inferred from practice.³⁵ Evidence of state practice is itself derived from a wide variety of sources, including

diplomatic correspondence, policy statements, press releases, the opinions of official legal advisers, official manuals on legal questions, e.g., manuals of military law, executive decisions and practices, orders to naval forces etc., comments by governments on drafts produced by the International Law Commission, state legislation, international and national judicial decisions, recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of international organs, and resolutions relating to legal questions in the United Nations General Assembly.³⁶

As I discuss further below, there is considerable controversy about the relative merits and weights of these different sources.³⁷

Unlike treaties, which bind only their parties, customary norms are presumed to be universally binding on all the world.³⁸ Customary international law thus takes on particular importance in areas where important nations—such as the United States—have not agreed to be

33. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 5-6 (4th ed. 1990); J. STARKE, *INTRODUCTION TO INTERNATIONAL LAW* 34-38 (9th ed. 1984).

34. See BROWNLIE, *supra* note 33, at 7; STARKE, *supra* note 33, at 36-38; see also J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 462 (2000) ("Without this normative belief, custom is mere habit or convenience, but not law."). The literature sometimes identifies subsets of customary norms with special characteristics: *jus cogens* or "peremptory" norms, which "number among the most fundamental duties of states" and supersede all contradictory rules, and obligations *erga omnes*, which "are considered owed to all members of the international community" but do not preempt other rules of customary law. Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT'L L. 1, 24-25 (2001).

35. See Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTRL. Y.B. INT'L L. 82, 88 (1992) ("What international courts and tribunals mainly did in fact was to trace the subjective element by way of discerning certain recurrent patterns within the raw material of State practice and interpreting those patterns as resulting from juridical considerations.").

36. BROWNLIE, *supra* note 33, at 5 (footnotes omitted).

37. See *infra* text accompanying notes 106-119.

38. See, e.g., Hiram E. Chodosh, *An Interpretive Theory of International Law: The Distinction Between Treaty and Customary Law*, 28 VAND. J. TRANSNAT'L L. 973, 977 (1995); ANTHONY A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 4 (1971).

bound by treaties articulating the norm in question.³⁹ It is true that “in principle a state that indicates its dissent from a practice while the law is still in the process of development is not bound by that rule even after it matures.”⁴⁰ Nonetheless, a nation must take active steps to avoid becoming bound by an evolving customary norm. “[H]istorically,” according to the authors of the *Restatement*, “such dissent and consequent exemption from a principle that became general customary law has been rare.”⁴¹

With these basics in place we can assess the place of customary international law in our domestic legal system. In Section A, I set out the current conventional wisdom among American internationalist scholars—that is, the “modern position” that customary law has the status of federal common law and therefore creates federal question jurisdiction and preempts contrary state law. Section B lays out a few examples of how this position plays out domestically in the contexts of international human rights, environmental norms, and diplomatic immunities. Section C then steps back briefly to note continuing controversy about the force and legitimacy of customary norms on the *international* plane and considers how those concerns might affect the domestic debate.

A. *The Modern Position*

Almost all participants in current debates over customary international law appear to agree that, prior to the Supreme Court’s decision in *Erie Railroad Co. v. Tompkins*,⁴² that law had the status of “general” law.⁴³ Customary norms, in other words, were neither state

39. See Simma & Alston, *supra* note 35, at 87 (suggesting that arguments for broad use of customary international law represent “a concerted effort by American judges and activist human rights lawyers to compensate for the abstinence of the United States *vis-à-vis* ratification of international human rights treaties”).

40. RESTATEMENT (THIRD), *supra* note 32, § 102 cmt. d. As I discuss further in text accompanying notes 120-122, some have argued that this “persistent objector” rule is inconsistent with the basic notion of customary international law.

41. RESTATEMENT (THIRD), *supra* note 32, § 102, cmt. d; see also BROWNLIE, *supra* note 33, at 10 (“Evidence of objection must be clear and there is probably a presumption of acceptance which is to be rebutted.”).

42. 304 U.S. 64 (1938).

43. See, e.g., Koh, *State Law?*, *supra* note 3, at 1830-31; Neuman, *supra* note 3, at 373-74; Henkin, *International Law*, *supra* note 6, at 1557-58; Brilmayer, *Preemptive Power*, *supra* note 6, at 302; Goodman & Jinks, *supra* note 3, at 470; Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 2, at 822-23; Trimble, *supra* note 6, at 714 n.178; Weisburd, *State Courts*, *supra* note 6, at 30. Beth Stephens has argued that “[t]he law of nations . . . played a somewhat different role in the federal system than other areas of common law,” see Stephens, *supra* note 3, at 411, although she seems to accept the basic proposition that customary international law was part of the general common law discussed in *Swift v. Tyson*. See *id.* at 410, 425. I consider

nor federal and could therefore neither preempt state law nor create federal question or Supreme Court appellate jurisdiction. *Erie*, however, seemed to foreclose this sort of status when it held that “[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. . . . There is no federal general common law.”⁴⁴ By apparently eliminating the category into which customary international law had previously been thought to fall, *Erie* set the stage for modern debates over the status of that law.⁴⁵

Erie’s rejection of the “general federal common law” did not foreclose the possibility of federal common law altogether. As Judge Henry Friendly famously explained, *Erie*’s rejection of “the spurious uniformity of *Swift v. Tyson* . . . cleared the way for the truly uniform federal common law on issues of national concern.”⁴⁶ This law is often thought to encompass such subjects as admiralty, interstate boundary disputes, the commercial relations of the United States government, and foreign affairs.⁴⁷ The “modern position” attacked by Professors Bradley and Goldsmith is that customary international law now forms part of Judge Friendly’s “new federal common law.”⁴⁸ As the *Restatement (Third) of Foreign Relations Law* put it, “the modern view is that customary international law in the United States is federal law and its determination by the federal courts is binding on the State courts.”⁴⁹

Proponents of the modern position differ as to how customary norms relate to other sorts of federal law. Gerald Neuman, for example, is

Professor Stephens’ argument *infra* at text accompanying notes 438-469. The “almost” in the text is necessitated by Jordan J. Paust, *Customary International Law and Human Rights Treaties are Law of the United States*, 20 MICH. J. INT’L L. 301 (1999). Professor Paust claims that references to *Erie* and *Swift*, as well as to “‘common law,’ ‘law merchant,’ or ‘maritime’ and admiralty’ cases” are “flawed,” “misleading,” and “seriously misplaced.” *Id.* at 308-09. Given the consensus cited above on customary international law’s relation to the “general common law” regime in the nineteenth century, one might think that Professor Paust’s accusatory rhetoric is “seriously misplaced.” I discuss Paust’s views at note 143.

44. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938); see, e.g., Goodman & Jinks, *supra* note 3, at 472 (observing that “[a]fter *Erie*, CIL is clearly not part of the general common law”).

45. See, e.g., Goodman & Jinks, *supra* note 3, at 470 (“*Erie* implicitly classifies all law applied in federal court as either state or federal law.”). I shall argue later on that this understanding of *Erie* is not, in fact, correct. See *infra* Section IV.A.

46. Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 384 (1964); see also *United States v. Standard Oil Co.*, 332 U.S. 301, 308 (1947) (noting that “there remains what may be termed, for want of a better label, an area of ‘federal common law’ . . . untouched by the *Erie* decision”).

47. See, e.g., *Texas Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981); Clark, *Federal Common Law*, *supra* note 25, at 1264-65.

48. See Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 2, at 816 (defining the “modern position” as “[t]he proposition that customary international law (‘CIL’) is part of this country’s post-*Erie* federal common law”); Goodman & Jinks, *supra* note 3, at 472 (same).

49. RESTATEMENT (THIRD), *supra* note 32, § 111 Reporters’ Note 3.

“content to label the incorporated rules as rules of federal common law.”⁵⁰ Louis Henkin, on the other hand, has suggested that “to call international law federal common law is misleading” because “customary international law is not made and developed by the federal courts independently and in the exercise of their own law-making judgment.”⁵¹ Professor Henkin concludes that customary law “is *like* federal common law in that both have the status of federal law for purposes of supremacy to state law.”⁵²

A more important set of disagreements among internationalists has to do with the relative status of customary international law *vis à vis* federal statutes, executive acts, and even federal constitutional norms. Although most agree that new federal statutes trump prior rules of customary international law⁵³—for domestic purposes, at least⁵⁴—there is considerable dispute concerning the interaction of a “new” norm of customary law with an older federal statute. The reporter’s notes to the *Restatement (Third)* explain that

Since international customary law and an international agreement have equal authority in international law, and both are law of the United States, arguably later customary law should be given effect as law of the United States, even in the face of an earlier law or agreement, just as a later international agreement of the United States is given effect in the face of an earlier law or agreement.⁵⁵

50. Neuman, *supra* note 3, at 376 n.31; accord Koh, *State Law?*, *supra* note 3, at 1835 n.61 (“I believe that customary international law *is* federal common law (not simply ‘like federal common law’).”).

51. Henkin, *International Law*, *supra* note 6, at 1561. Professor Henkin’s observation echoes the criticism set out in Section II.D, *infra*, although he would no doubt reject my conclusion.

52. Henkin, *International Law*, *supra* note 6, at 1561.

53. See Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 2, at 842 (collecting sources); Neuman, *supra* note 3, at 376. *But see* FRANCISCO FORREST MARTIN, CHALLENGING HUMAN RIGHTS VIOLATIONS: USING INTERNATIONAL LAW IN U.S. COURTS 53-54 (2001) (challenging this rule).

54. Such a statute would still render the United States a lawbreaker on the international plane. See, e.g., RESTATEMENT (THIRD), *supra* note 32, § 115(1)(b).

55. RESTATEMENT (THIRD), *supra* note 32, § 115 Reporters’ Note 4 (citations omitted). Professor Henkin, for example, strongly suggests that customary law should trump federal statutes or treaties where the former is later-in-time. See Henkin, *International Law*, *supra* note 6, at 1563-67. This was the position taken by the first draft of the current *Restatement*, for which Professor Henkin served as reporter. See RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 135 Reporter’s Notes 1, 6 (Tentative Draft No. 1, 1980). The final version retreated on this point by stating that the issue had not been “authoritatively determined.” RESTATEMENT (THIRD), *supra* note 32, § 115 cmt. d. Even this language, however, seems to “envison some situations in which a norm of customary international law would supercede an act of Congress.” Trimble, *supra* note 6, at 678 n.52.

Other scholars take the somewhat more moderate position that the President lacks power to violate customary international law, at least in the absence of explicit congressional authorization.⁵⁶ But some scholars even go so far as to say that some customary rules should trump *constitutional* law.⁵⁷

Professor Neuman has dismissed these more expansive statements as “speculative variants on the modern position offered by particular scholars.”⁵⁸ I accept this limitation of the modern position’s scope in this essay for the practical reason that a critique of that position should focus on its most plausible version. It is important to recognize, however, that one reason for hostility to customary international law outside the international law community is the extraordinary claims that have been made about its force by international law scholars. Defenders of the modern position would be on firmer ground if supposedly authoritative statements of American foreign affairs law—such as the *Restatement*—were less equivocal in disavowing some of the more extreme claims often made about customary international law.

All proponents of the modern position *do* seem to agree on at least two implications of the claim that customary international law “is” or “is like” federal common law: First, customary international law is “supreme” in its relation to state law.⁵⁹ It is this aspect of the modern

56. See, e.g., Michael J. Glennon, *Raising The Paquete Habana: Is Violation of Customary International Law by the Executive Unconstitutional?* 80 NW. U. L. REV. 321 (1985); Jordan J. Paust, *The President Is Bound by International Law*, 81 AM. J. INT’L L. 377 (1987).

57. See Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071 (1985). This position has a kinship with the more widely embraced argument that *treaties* trump constitutional law, particularly in the area of federalism constraints on congressional action. Compare, e.g., Peter S. Menell, *Economic Implications of State Sovereign Immunity from Infringement of Federal Intellectual Property Rights*, 33 LOY. L.A. L. REV. 1399, 1460-61 (2000) (suggesting that intellectual property treaties empower Congress to override the states’ constitutional immunity from suit in intellectual property cases), with Mitchell N. Berman, R. Anthony Reese & Ernest A. Young, *State Accountability for Violations of Intellectual Property Rights: How to “Fix” Florida Prepaid (And How Not To)*, 79 TEX. L. REV. 1037, 1188-94 (2001) (rejecting this argument). For valuable contributions on this issue in the present symposium, see Carlos Manuel Vázquez, *Treaties and the Eleventh Amendment*, 42 VA. J. INT’L L. 713 (2002); Susan Bandes, *Treaties, Sovereign Immunity, and “The Plan of the Convention”*, 42 VA. J. INT’L L. 743 (2002). Whatever the relative status of treaties and customary law vis-à-vis one another, neither has the pedigree required for a constitutional amendment under Art. V. The argument that either a treaty or customary law trumps constitutional requirements thus depends on similar assumptions about the superiority of international law to domestic constitutional law.

58. Neuman, *supra* note 3, at 380-81.

59. See, e.g., Henkin, *International Law*, *supra* note 6, at 1561 (stating that customary international law has “the status of federal law for purposes of supremacy to state law”); Neuman, *supra* note 3, at 383 (acknowledging that “the modern position entails the conclusion that, in the face of congressional silence, customary international law will be supreme over the laws of the States”).

position that raises the most serious constitutional objections, implicating the Supremacy Clause's quite specific requirements for the pedigree of supreme federal law⁶⁰ as well as basic questions of state regulatory autonomy.⁶¹ The modern position's second aspect, however, has been viewed as legally inextricable from the first: If customary law is federal common law, then it creates federal question or "arising under" jurisdiction in federal district court as well as appellate jurisdiction in the Supreme Court on review of state court decisions. The federal or non-federal status of customary law thus has important implications for the ability of private parties to use federal courts to enforce customary norms as well as for the Supreme Court's ability to maintain uniform interpretations of those norms.

B. Some Examples

In assessing the merits of the modern position, it will help to have some concrete examples in mind. Current debates have focused on contemporary human rights litigation under the Alien Tort Claims Act (ATCA).⁶² Customary international law is less frequently employed as a basis for challenging domestic practices of state governments, either by preemption of those practices altogether or by providing an international law defense to state prosecution or private tort claims. Finally—and much less controversially—customary norms are sometimes used in the interpretation of legislative enactments. While customary norms may also have domestic relevance in other ways, these examples will suffice for present purposes.

1. ATCA Litigation

The Alien Tort Claims Act, originally enacted as part of the Judiciary Act of 1789, grants the federal district courts jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."⁶³ Although this provision remained obscure for almost two centuries, it has recently become an important instrument for the enforcement of international human

60. See, e.g., Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1332-34 (2001) [hereinafter Clark, *Separation of Powers*].

61. See, e.g., Weisburd, *State Courts*, *supra* note 6, at 8-11 (outlining the expansive potential for conflict between customary international law and state law).

62. See, e.g., Bradley & Goldsmith, *Human Rights Litigation*, *supra* note 2; Goodman & Jinks, *supra* note 3.

63. 28 U.S.C. § 1350. The original version is at Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77.

rights.⁶⁴ The Second Circuit's decision in *Filartiga v. Pena-Irala*,⁶⁵ which is generally credited with having "breathed new life" into the ATCA,⁶⁶ provides a paradigm case of such litigation.

Filartiga involved a suit by the family of a Paraguayan national against the Paraguayan Inspector General of Police. The Filartiga family sued Pena-Irala under the ATCA, alleging that their son had been kidnapped and tortured to death in violation of the law of nations. Like many ATCA cases, the *Filartiga* litigation was a suit by aliens against other aliens for acts that occurred wholly outside the United States; the suit was made possible only by the fortuity that Pena-Irala immigrated to the United States after the events in question.⁶⁷ Similar litigation may provide effective damages relief where foreign actors have assets located in the United States. In some cases, moreover, such litigation may achieve meaningful results even if no monetary recovery can be obtained.⁶⁸

When an alien sues another alien, the suit falls outside Article III's provision for federal jurisdiction based on diversity of citizenship.⁶⁹ The key jurisdictional issue in *Filartiga* was thus whether a suit for a violation of customary law "arises under" federal law for purposes of Article III. The Second Circuit held that it does, concluding that "[t]he constitutional basis for the Alien Tort Statute is the law of nations, which has always been part of the federal common law."⁷⁰ As a result, the ability of human rights litigation under the ATCA to proceed in federal court has been thought to depend on the modern position on customary law.⁷¹

64. See, e.g., Goodman & Jinks, *supra* note 3, at 465-66.

65. 630 F.2d 876 (2d Cir. 1980).

66. Anne-Marie Burley (now Slaughter), *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 461 (1989).

67. See *Filartiga*, 630 F.2d at 878-79; see also *In re Estate of Ferdinand Marcos*, 25 F.3d 1467, 1469 (9th Cir. 1994) (noting that suits were filed against the Marcos family in U.S. courts after the family fled to Hawaii in 1986).

68. In *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), for example, Bosnian-Serb leader Radovan Karadzic was served with process while visiting the United Nations in New York City. The opinions in the case do not indicate what assets might be available to satisfy an ultimate judgment in the plaintiff's favor. Nonetheless, the litigation may serve important functions of norm articulation and personal vindication even in the absence of a financial recovery. See, e.g., Koh, *Transnational Public Law Litigation*, *supra* note 12, at 2368 ("Although no *Filartiga*-type plaintiff has apparently collected full compensation for his injuries, many have expressed satisfaction simply to have won default judgments announcing that the defendant had transgressed universally recognized norms of international law.").

69. See U.S. CONST. art. III, § 2 (providing for diversity jurisdiction between "a State, or the Citizens thereof, and foreign States, Citizens or Subjects"); *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303, 304 (1809).

70. *Filartiga*, 630 F.2d at 885.

71. See, e.g., Bradley & Goldsmith, *Human Rights Litigation*, *supra* note 2, at 356-57;

Some scholars have suggested that “under [the ATCA], judicially cognizable CIL must be (1) universal; (2) definable; and (3) obligatory. This tripartite test effectively limits the range of actionable claims to a privileged subset of CIL—*jus cogens* (or ‘compelling law’) violations.”⁷² Successful claims have thus been limited to official torture, extrajudicial killing, prolonged arbitrary detention, genocide, and disappearances;⁷³ claims based on more controversial norms, such as expropriation of alien property, have not generally been accepted by federal courts.⁷⁴ These sorts of limitations tend to help insulate the modern position against charges that customary law is indeterminate; on the other hand, they also suggest that what federal courts actually do in ATCA cases is inconsistent with the modern position’s simple rule that customary international law simply *is* federal law.⁷⁵

Most *Filartiga*-type suits can now be brought under the Torture Victim Protection Act (TVPA),⁷⁶ a 1991 law that creates a federal cause of action for violation of international prohibitions on torture and extrajudicial killing. The TVPA expressly incorporates customary norms into federal law, thereby obviating any need to rely on the modern position for jurisdictional purposes. The significance of the TVPA for broader

Goodman & Jinks, *supra* note 3, at 478-79. Article III jurisdiction over ATCA suits might be supported on a theory of “protective jurisdiction,” under which Congress might choose to provide a federal forum while leaving unexercised its admitted power to also provide substantive rules of decision. See William R. Casto, *The Federal Courts’ Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 512-25 (1986) [hereinafter Casto, *Protective Jurisdiction*]; Russell J. Weintraub, *Establishing Incredible Events by Credible Evidence: Civil Suits for Atrocities that Violate International Law*, 62 BROOK. L. REV. 753, 769 (1996). On protective jurisdiction generally, compare Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS 216, 224-25 (1948) (advocating this theory of jurisdiction), and Paul Mishkin, *The Federal “Question” in the District Courts*, 53 COLUM. L. REV. 157, 184-96 (1953) (same), with *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 469-84 (1957) (Frankfurter, J., dissenting) (rejecting the notion of protective jurisdiction); see also RICHARD H. FALLON, JR., DANIEL J. MELTZER, & DAVID L. SHAPIRO, HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 900-07 (4th ed. 1996) [hereinafter HART & WECHSLER] (collecting arguments pro and con). I am generally skeptical of the protective jurisdiction argument for the reasons Justice Frankfurter gave in *Lincoln Mills*.

72. Goodman & Jinks, *supra* note 3, at 495 (footnotes omitted); see also Gordon A. Christenson, *Customary International Human Rights Law in Domestic Court Decisions*, 25 GA. J. INT’L & COMP. L. 225, 230 (1995/96).

73. See Goodman & Jinks, *supra* note 3, at 498-505. Messrs. Goodman and Jinks also identify a more amorphous category of “ancient” customary law violations, having to do with subjects like diplomatic immunity, that have also formed the basis of a successful ATCA claim. See *id.* at 505-06.

74. See *id.* at 509-12.

75. See *infra* Section II.D.2.

76. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350).

debates about customary law is much disputed.⁷⁷ For present purposes, however, the important point is that the TVPA substantially lowers the practical stakes of debates over customary law by providing a statutory foundation for most contemporary human rights litigation.

Finally, it is worth noting that customary international law may support ATCA litigation outside the human rights context. For example, customary international law is widely thought to impose a duty upon states to prevent trans-boundary pollution, such as that arising from a chemical spill in an international waterway or from air pollution that crosses national frontiers.⁷⁸ In recent years, victims of pollution have filed ATCA cases against transnational corporations based in the United States.⁷⁹ These claims are most often interwoven with human rights arguments, but may also stand on customary international environmental principles alone.⁸⁰ Although such claims are largely untested and face formidable legal obstacles, they have the potential to assume increased importance in the future.⁸¹

2. *Preemption of State Practices and Customary Law Defenses*

The ATCA claims discussed in the previous subsection are primarily directed at the activities of *foreign* actors.⁸² It is fair to say that, to the extent that the modern position has been endorsed by the courts, it has been in the context of upholding federal question jurisdiction over such

77. See *infra* text accompanying notes 483-491.

78. See, e.g., Astrid Boos-Hersberger, *Transboundary Water Pollution and State Responsibility: The Sandoz Spill*, 4 ANN. SURV. INT'L & COMP. L. 103, 111-14 (1997); Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 AM. J. INT'L L. 259, 264-66 (1992).

79. See, e.g., *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998); see generally Richard L. Herz, *Litigating Environmental Abuses Under the Alien Tort Claims Act: A Practical Assessment*, 40 VA. J. INT'L L. 545 (2000). Because customary environmental law is generally thought to include a state action requirement, plaintiffs must allege that the private actor acted in concert with governmental authorities. See *id.* at 635.

80. See *id.* at 574-634 (identifying human rights claims based on a right to a healthy environment and similar rights); *id.* at 634-37 (discussing pure environmental law claims).

81. See *id.* at 549-51.

82. ATCA claims must be brought by an alien, see 28 U.S.C. § 1350, and while TVPA claims may be brought by a United States citizen, the plaintiff must allege that the defendant acted under color of a foreign government's law. See TVPA, *supra* note 76, § 2(a). There is some evidence that the ATCA was designed in part to provide a remedy for mistreatment of foreign nationals in this country, see Casto, *Protective Jurisdiction*, *supra* note 71, at 489-94, but current litigation against domestic defendants seems to focus on acts of the United States government in other nations or concerning the treatment of aliens in this country, see Koh, *Transnational Public Law Litigation*, *supra* note 12, at 2369. These sorts of suits, while important, do not implicate the validity of internal American law. See generally Curtis A. Bradley, *Customary International Law and Private Rights of Action*, 1 CHI. J. INT'L L. 421 (2000) (describing the many obstacles to suits under customary international law against domestic defendants).

claims. The view that customary international law is federal law, however, also creates the potential for such law to trump domestic law in a variety of contexts. One example—which I note but do not discuss further here—is the claim that new norms of customary law supersede preexisting federal statutes.⁸³ More plausible arguments hold that customary international law preempts contrary state law or provides defenses to state law claims.

The most prominent instance in which customary international norms have been asserted to preempt state law involves the issue of capital punishment. Current debates seem to focus on particular aspects of the death penalty, such as the execution of murderers for crimes committed as juveniles.⁸⁴ The state of Texas, for example, recently executed Gerald Lee Mitchell for murders committed when he was only 17 years of age. In refusing to commute Mitchell's sentence, Governor Rick Perry rejected pleas from foreign leaders that Mitchell's execution violated norms of international law.⁸⁵ Another Texas death-row inmate, Napoleon Beazley, has likewise argued that his sentence is invalid on international law grounds.⁸⁶

Other commentators argue that customary international law will inevitably outlaw capital punishment altogether in the future.⁸⁷ But whatever the scope of the customary norm asserted, the argument for preemption is straightforward: Because federal common law generally has the same preemptive effect as federal statutes and constitutional provisions,⁸⁸ the modern position's view that customary international law *is* federal common law requires that such law preempt contrary state

83. See *supra* note 55 and accompanying text.

84. See, e.g., Lisa Kline Arnett, Comment, *Death at an Early Age: International Law Arguments Against the Death Penalty for Juveniles*, 57 U. CIN. L. REV. 245, 257-60 (1988); Fitzpatrick, *supra* note 18, at 166 (1995) (identifying other aspects of capital punishment attacked under international law).

85. See Mike Tolson, *Killer Executed Despite Protests, Age Controversy*, THE HOUSTON CHRON., Oct. 23, 2001, at A19.

86. See Ed Timms, *Beazley Stay May Not Be About Age*, THE DALLAS MORNING NEWS, Aug. 17, 2001, at 35A. Observers have suggested, however, that the court's review in the Beazley case will focus on domestic issues of inadequate representation. See *id.*

87. See, e.g., Robert F. Drinan, *Will Religious Teachings and International Law End Capital Punishment?* 29 ST. MARY'S L.J. 957, 966 (1998) ("There are, to be sure, many debates to be resolved before the death penalty can be said to be contrary to customary international law, but the undeniable trend is in that direction."); William A. Schabas, *International Law and Abolition of the Death Penalty*, 55 WASH. & LEE L. REV. 797, 799 (1998) ("While it is still premature to declare the death penalty prohibited by customary international law, it is clear that we are somewhere in the midst of such a process, indeed considerably close to the goal."); *But see* Book Note, *No End in Sight*, 108 HARV. L. REV. 483 (1994) (identifying reasons to doubt Schabas's similar prediction in an earlier book).

88. See, e.g., *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504-13 (1988) (holding state tort law preempted by federal common law government contractor defense).

law.⁸⁹ While the actual extent of customary norms regulating capital punishment remains disputed, the modern position holds that “the permissibility of particular applications of the death penalty must be determined by consulting international legal norms themselves.”⁹⁰

Internationalists are quick to acknowledge that this position—unlike the modern position on federal question jurisdiction under the ATCA—has not been widely adopted by the courts. Advocates who have argued to American courts that customary international law trumps domestic norms report a “blank stare phenomenon”—that is, extreme judicial skepticism about the domestic force of customary law.⁹¹ In the death penalty area, the Supreme Court has rejected the seemingly more modest claim that customary international norms should inform interpretation of the Eighth Amendment.⁹² More generally, even leading advocates of the preemption theory acknowledge that “[i]n fact, few instances exist in which courts have squarely relied on customary international law to invalidate the actions of the states.”⁹³

89. See, e.g., Brilmayer, *Preemptive Power*, *supra* note 6, at 295-96 (presenting the argument as an obvious syllogism).

90. *Id.* at 325.

91. See Paul L. Hoffman, *The “Blank Stare Phenomenon”: Proving Customary International Law in U.S. Courts*, 25 GA. J. INT’L & COMP. L. 181 (1995/96); see also Fitzpatrick, *supra* note 18, at 167 (reporting that “there is little evidence of alertness or receptivity to the international dimension of capital punishment even among American jurists critical of existing execution practices”).

92. See *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989) (“We emphasize that it is American conceptions of decency that are dispositive, rejecting the contention of petitioners and their various amici that the sentencing practices of other countries are relevant.”) (citation omitted); but see *Thompson v. Oklahoma*, 487 U.S. 815, 830-31 & n. 34 (1988) (plurality opinion) (citing evidence of state practice in holding capital sentence for crime committed as a fifteen-year-old unconstitutional). As Professor Brilmayer points out, the *Stanford* Court’s rejection of the notion that customary international law ought to inform the content of “evolving standards of decency” under the Eighth Amendment does not foreclose the more straightforward argument that customary law simply preempts contrary state law of its own force. See Brilmayer, *Preemptive Power*, *supra* note 6, at 325. But does anyone doubt that the current Court would reject the latter argument as well? Even Professor Brilmayer acknowledges that “[g]iven the Court’s current mood, one hesitates to place too much hope on the likely success of this appeal.” *Id.* at 326.

93. Brilmayer, *Preemptive Power*, *supra* note 6, at 313. Moreover, it is worth noting that there may not actually be a customary norm forbidding U.S. use of even the juvenile death penalty. This might be so for a number of reasons: There may simply be no such norm on the international plane, the U.S. may qualify as a persistent objector, or the U.S. courts may be bound by the political branches’ view that there is no such norm. Any of these reasons for refusing to preempt state death penalty laws would, as Gerald Neuman has pointed out, be perfectly consistent with the modern position. See E-mail from Gerald Neuman to Ernest Young, Jan. 9, 2002 (on file with author). For this reason, the death penalty example is not a perfect one. It is, however, the example of outright preemption most frequently cited in the literature, see, e.g., Brilmayer, *Preemptive Power*, *supra* note 6, at 325, and I think it is a fair representation of the kinds of problems that might arise if courts were to take seriously the preemption implication of the modern position.

Customary international law has played a more important (and far less controversial) role in creating defenses to criminal prosecution or civil causes of action under state law.⁹⁴ Traditional notions of diplomatic, consular, or foreign sovereign immunity all derive from customary international law, although these issues are nowadays chiefly governed by statute or treaty.⁹⁵ Some potentially important immunities in this area remain uncodified, such as the immunity of visiting heads of state;⁹⁶ in these areas, the modern position that such customary norms trump state law retains substantial importance. Although I will argue later on that there are important differences between preempting a state right or duty and recognizing an immunity to state law claims,⁹⁷ the practical effect is the same: State law is thwarted by the interposition of customary international law.

3. Customary Norms and Statutory Interpretation

Finally, customary international norms can play an important persuasive role even where they do not apply of their own force. Under the *Charming Betsy* canon of interpretation, “an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains.”⁹⁸ Under this canon, ambiguities in legislative enactments are resolved in favor of compliance with both treaties and customary international law. It has been invoked, for example, to construe ambiguous statutes not to have extraterritorial effects.⁹⁹

The *Charming Betsy* canon is not entirely uncontroversial.¹⁰⁰ As I discuss further in Part III, *Charming Betsy* is vulnerable to all the criticisms normally associated with normative canons of statutory

94. See, e.g., Trimble, *supra* note 6, at 688 (observing that “[t]he largest group of cases [applying CIL in U.S. courts] involve foreign sovereign immunity”); *id.* at 690-92 (discussing diplomatic and consular immunity).

95. See, e.g., Brilmayer, *Preemptive Power*, *supra* note 6, at 313 n.55. Even where treaties have superseded customary norms, those norms may govern the rights and immunities of non-parties to the treaty. See, e.g., Neuman, *supra* note 3, at 391.

96. See Koh, *State Law?*, *supra* note 3, at 1829 n.25; Shobha Varughese George, Note, *Head-of-State Immunity in the United States Courts: Still Confused After All These Years*, 64 *FORDHAM L. REV.* 1051 (1995); Jerrold L. Mallory, Note, *Resolving the Confusion over Head of State Immunity: The Defined Rights of Kings*, 86 *COLUM. L. REV.* 169 (1986).

97. See *infra* Section III.B.2(a), (b).

98. *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); see also *RESTATEMENT (THIRD)*, *supra* note 32, § 114.

99. See, e.g., *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991). On the customary norm against extraterritorial application, see Trimble, *supra* note 6, at 696-707.

100. See, e.g., Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 *GEO. L.J.* 479 (1998) [hereinafter Bradley, *Charming Betsy*] (noting arguments against the canon but ultimately concluding that it is legitimate as a mechanism to protect separation of powers).

construction.¹⁰¹ These criticisms aside, however, use of international custom to inform interpretation of legislative enactments is perfectly consistent with the revisionist view that such custom is not itself federal law. For present purposes, then, the important point is that many current applications of customary law by domestic courts would remain even if the revisionist perspective were adopted.

C. *Is Customary Law Really Law?*

The revisionist critique of the modern position on customary international law addresses the status of that law in the domestic legal realm. The critique generally assumes—for the sake of argument, at least—that customary international law is a valid concept in international law. That assumption, however, is itself the subject of vigorous debate in international law circles.¹⁰² Patrick Kelly, for example, has recently argued in the pages of this journal that “[c]ustomary law theory is indeterminate, not just because its application requires discretion, but because there is no common understanding of how to determine customary norms.”¹⁰³ I cannot undertake any comprehensive evaluation of that debate here. However, one cannot ignore it entirely without distorting consideration of customary law’s status in domestic courts.

The initial problem is that it is very difficult to actually determine whether a given norm satisfies the traditional requirements for customary international law. We might start with the problem of *opinio juris*: When nations act—much less refrain from acting—they often do not explain whether they have acted from a sense of legal obligation or simply from political expedience.¹⁰⁴ The usual response of courts and commentators has been to proceed inductively by inferring *opinio juris* from practice.¹⁰⁵ Once we have a substantial enough pattern of state practice on a given point, we presume that states act in this way out of a sense of legal obligation.

101. See *infra* text accompanying notes 571-574.

102. See, e.g., D’AMATO, *supra* note 38, at 5 (noting “a tremendous amount of disagreement among scholars and publicist over the rules of customary international law”). For an overview, see Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 A.M. J. INT’L L. 757, 757-60 (2001)

103. Kelly, *supra* note 34, at 516; see also Roberts, *supra* note 102, at 784 (“The formation and modification of custom is an uncertain process because international law lacks an authoritative guide as to the amount, duration, frequency, and repetition of state practice required to develop or change a custom.”).

104. Kelly, *supra* note 34, at 469-70.

105. See, e.g., RESTATEMENT (THIRD), *supra* note 32, § 102 cmts. b-c; Simma & Alston, *supra* note 35, at 88-89.

So far, so good. But practice has problems of its own. Disagreements exist as to what sort of things ought to count as practice: Should we only count actual state *actions*, on the theory that they speak louder than words? Many states, however, never have the occasion to act on most questions, and a customary law based only on acts will tend to reflect the views of the strongest nations that feel able to assert their rights with impunity. The temptation is thus to broaden "practice" to include all sorts of diplomatic correspondence, legal opinions, and the like.¹⁰⁶ But this sort of material is only rarely collected in any systematic way,¹⁰⁷ and some scholars have charged that "[t]he practices and attitudes of Japan, China, and the many nations of Africa, Asia, and Latin America are virtually ignored in the Western literature."¹⁰⁸ The result, according to Professor Kelly, is that "practice is rarely general or consistent. Conclusions are drawn by scholars and courts based on a few incidents of state practice with little attention to practices or views of the broader international community."¹⁰⁹ Derivation of customary international law thus can be, in some circumstances, much like Judge Harold Leventhal's description of legislative history: a matter of "looking over a crowd and picking out your friends."¹¹⁰

In response to these sorts of problems, both critics and advocates of customary international law have recognized the tendency to find it "creatively" without reference to traditional evidence of state practice. Some derive principles of customary law not from practice but directly from international agreements and declarations.¹¹¹ To the extent that the views of nations as expressed in such documents trump their actual failures to live up to these norms in their actual conduct, one might see this approach as the triumph of *opinio juris* over practice: Customary international law is the rules that nations *say* they are willing to live by out of legal obligation, whether or not they actually act in accordance with those norms. "The approach now used," according to Bruno

106. See Kelly, *supra* note 34, at 500-01; see also *supra* note 36 and accompanying text (listing various sorts of evidence concerning state practice).

107. See Kelly, *supra* note 34, at 472 ("Much of state practice is unavailable. . . . Only the largest and most sophisticated nations collect and publish their state practice.").

108. *Id.*; see also Roberts, *supra* note 102, at 767 (noting that "most customs are found to exist on the basis of practice by fewer than a dozen states").

109. *Id.* at 470; see also Anthony D'Amato, *Trashing Customary International Law*, 81 AM. J. INT'L L. 101, 102 (1987) (criticizing "the absence of supporting research into state practice" in the World Court's *Nicaragua v. United States* decision (*infra* note 115)).

110. Patricia M. Wald, *Some Observations of the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 215 (1983) (citing a personal conversation).

111. See, e.g., Palmer, *supra* note 78, at 267-68 (urging that the Stockholm Declaration on environmental issues "has a strong claim to be regarded itself as a source of customary international law").

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is *deductive*: rules or principles proclaimed, for instance, by the General Assembly . . . are taken not only as starting points for the possible development of customary law in the event that State practice happens to lock on to these proclamations, but as a law-making process which is more or less complete in itself, even in the face of contrasting 'external' facts.¹¹²

Anthea Roberts makes a similar point by distinguishing between "traditional" and "modern" versions of customary international law.¹¹³ The former is primarily descriptive of what states actually do, while the latter relies heavily on *opinio juris* and is primarily normative in nature.¹¹⁴

As Professor Roberts' terminology suggests, much (although certainly not all) customary international law today involves a substantial departure from the traditional conception of "customary" law. Anthony D'Amato offered an example of the method in his scathing critique of the World Court's decision in *Nicaragua v. United States*¹¹⁵:

The World Court in the Nicaragua case gets it completely backwards. The Court starts with a disembodied rule, for example, the alleged rule of nonintervention found in various treaties, United Nations resolutions and other diverse sources such as the Helsinki Accords. It then finds that state acceptance of such a rule supplies the *opinio juris* element. Finally, it looks vaguely at state practice. Although the practice of states, notes the Court, has not been "in absolutely rigorous conformity with the rule," the Court "deems it sufficient" that "instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule."¹¹⁶

This approach, Professor D'Amato insists, "completely misunderstands customary law."¹¹⁷ This is true for at least two reasons. First, given the circumstances under which these broad international declarations of

112. Simma & Alston, *supra* note 35, at 89-90.

113. See Roberts, *supra* note 102, at 758.

114. *Id.* at 762-63.

115. Military and Paramilitary Activities (Nicar. v. U.S.), Merits, 1986 I.C.J. Rep. 14 (June 27).

116. D'Amato, *supra* note 109, at 102 (*quoting* Nicaragua v. United States, 1986 I.C.J. Rep. at 98, ¶ 186).

117. D'Amato, *supra* note 109, at 102. Professor Roberts is less critical but cites the *Nicaragua* case as a paradigm of the "modern" deductive approach. See Roberts, *supra* note 102, at 758-59.

rights are enacted, how can we be sure that a given country's willingness to support a nonbinding declaration really represents *opinio juris*?¹¹⁸ The best answer is essentially one of estoppel: Nations ought not to be agreeing to these declarations if they are not prepared to live up to them, and so it is fair to treat such agreement as *opinio juris*. But this answer leads to a second and related problem. If the international agreements in question are nonbinding, or if they are enforceable (by their terms) only through specific and limited mechanisms, then why should we presume that signatories have agreed to a norm's status as a generally binding and enforceable principle of customary law?¹¹⁹

The issue of consent points up a second fundamental set of criticisms of current notions of customary law. As Professor Kelly observes, "[t]here is no common understanding whether CIL is based on consent or the general consensus of states."¹²⁰ Under a consensus theory, the nearly universal practice of nations binds all, with or without consent. That is why new nations, for example, are bound by existing rules of customary law. Only fictitious notions of "tacit" consent are consistent with this view, however. The recent emergence of a "persistent objector" principle—i.e., that persistent objectors to a norm during its formation are not bound¹²¹—is more consistent with a regime of *actual* consent.¹²² Such an understanding, however, is in considerable tension with the notion that customary law is binding upon all.

Finally, critics of customary law have argued that the contemporary process of customary law formation "violates fundamental procedural values, including democratic governance, and cannot function as an acceptable or effective process of norm formation in a decentralized community with widely different values and perceptions."¹²³ It is particularly troubling, from a democratic perspective, that "the majority of nations and peoples of the world rarely participate in the creation of customary rules that limit their policy choices and sovereignty."¹²⁴ To

118. See D'Amato, *supra* note 109, at 102. ("[O]pinio juris has nothing to do with 'acceptance' of rules in such documents. Rather, opinio juris is a psychological element associated with the formation of a customary rule as a characterization of state practice.").

119. See *id.* at 103 ("A treaty is obviously not equivalent to custom; it binds only the parties, and binds them only according to the enforcement provisions contained in the treaty itself."). While Professor D'Amato acknowledges that "rules in treaties reach beyond the parties because a treaty itself constitutes state practice," such practice is merely one datum to be considered along with all the other evidence of practice—including contrary acts in the real world. *Id.*

120. Kelly, *supra* note 34, at 499.

121. See, e.g., RESTATEMENT (THIRD), *supra* note 32, § 102 cmt. d.

122. See Kelly, *supra* note 34, at 515-16; see also D'AMATO, *supra* note 38, at 187-99 (criticizing the consent theory of custom).

123. Kelly, *supra* note 34, at 517.

124. *Id.* at 519; see also Roberts, *supra* note 102, at 767-68.

the extent that the process is dominated by western democracies, it is hardly surprising to find “a remarkable correlation between the norms identified as customary rules, and the range of rights which has been incorporated into the U.S. Bill of Rights.”¹²⁵ Nor is it surprising that other rights less congenial to capitalist societies which are nonetheless included in the Universal Declaration of Human Rights—such as “[t]he right to freedom from hunger, the right to adequate housing, the right to access to basic health care, the right to freedom of association, the right to form trade unions and the right to primary education”—do not make it into the *Restatement’s* catalog of customary rights.¹²⁶

What to make of all this? Just as it is hard to swallow some of the more extreme implications of the modern position, it is hard to accept Professor Kelly’s prescription “that CIL should be eliminated as a source of international legal norms and replaced by consensual processes.”¹²⁷ Certainly, it is easy to get the impression from academic commentary that customary international law is highly normative, novel, and even utopian.¹²⁸ It would be a mistake, however, to evaluate customary law based only on the law reviews. Professor Stevens, for example, observes (somewhat wistfully) that academic advocates have been largely unsuccessful in gaining acceptance for broad customary human rights.¹²⁹ “The difficulty involved in reaching consensus ensures that binding norms of customary international law will reflect only the most basic, noncontroversial international rules of conduct.”¹³⁰ We have relied on customary international law in some areas—such as diplomatic immunities—for a long time, and one hates to throw out entirely a regime that seems to function reasonably well in its traditionally limited sphere.

Moreover, the normative project of customary international law—e.g., respect for individual rights, protection of the environmental

125. Simma & Alston, *supra* note 35, at 94.

126. *Id.* at 94-95. Patrick Kelly raises a related democratic objection to the process of common law articulation of customary norms by international tribunals. Kelly, *supra* note 34, at 528-30. The making of common law by domestic courts is often reconciled with democracy on the ground that the legislature can always overturn the results if they are inconsistent with the popular will. See, e.g., Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 26-27 (1985) (noting the argument but expressing skepticism). As Professor Kelly points out, however, there is no international legislative body with a similar power to revise or override norms of customary international law, and the transaction costs of enacting new multilateral treaties are quite high. See Kelly, *supra* note 34, at 528-30.

127. Kelly, *supra* note 34, at 452.

128. See, e.g., Anthony A. D’Amato & Sudhir K. Chopra, *Whales: Their Emerging Right to Life*, 85 AM. J. INT’L L. 21 (1991).

129. See Stephens, *supra* note 3, at 455-56.

130. *Id.* at 455.

commons, compensation for property-owners—is by and large an attractive one, at least to someone who rejects cultural relativism and believes in “right answers” to these sorts of questions. It may be possible, as Professor Roberts argues, to reach a “reflective equilibrium” between the normative and descriptive aspects of customary law in most instances.¹³¹ In any event, the debate about the status and legitimacy of customary norms on the international plane is not something I can conclusively resolve here.

One need not go all the way with the assault on customary norms, however, to agree that their indeterminacy and subjectivity are *relevant* to the status that domestic courts should accord to those norms. Most obviously, the critique suggests that domestic courts should be extremely careful in “finding” customary norms. They should insist, for example, on real and pervasive evidence of state practice and *opinio juris*. More fundamentally, however, courts should be extremely reluctant to supplant the results of domestic political processes in favor of norms that lack either consensus or consent on the international plane. Indeed, it is hard to believe that at least some of our domestic courts’ reluctance to apply customary international norms does not come from a perception that such norms are often dicey on their own terms. To the extent that norms lacking widespread support on the international plane nonetheless represent important aspirational values, I will argue that there are other, less peremptory ways to bring them into domestic law.¹³²

A somewhat narrower observation may also be in order. As I will discuss in the next Part,¹³³ the Framers of our Constitution clearly intended that customary international law should have application in our courts. The criticisms just surveyed, however, highlight the extent to which “new” deductive customary law is a different animal from “old,” inductive customary law grounded in the actual practice of nations.¹³⁴ That change may, in turn, undermine the ability of internationalists to invoke the Framers’ expectations in defense of the modern position.¹³⁵

131. See Roberts, *supra* note 102, at 779-84 (invoking JOHN RAWLS, A THEORY OF JUSTICE 19-20 (1972)).

132. See *infra* text accompanying notes 567-574 (discussing the *Charming Betsy* canon of statutory interpretation).

133. See *infra* Section II.C.3.

134. See Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 2, at 838-42. There is also the issue of an “older” customary law, derived from neither state practice nor multilateral commitments but from natural law. See, e.g., Neuman, *supra* note 3, at 373. Whether the Framers’ expectations focused on “old” or “older” forms of customary law, however, the important point is that they had little exposure to the “new” kind.

135. For internationalist reliance on the Framers’ expectations, see, e.g., Goodman & Jinks, *supra* note 3, at 464 (“As new members in the community of nations, the Founders felt bound,

The Framers' desire to incorporate the empirically-based practice of nations may tell us little about how they would view the deductive implications of multilateral declarations and the like.

Finally, a subsidiary point—arising from the critique of customary norms as undemocratic—concerning the role of legal academics in the formation and articulation of customary norms: Louis Sohn, for example, has observed that “states really never make international law on the subject of human rights. It is made by the people that care; the professors, the writers of textbooks and casebooks, and the authors of articles in leading international law journals.”¹³⁶ It is hard not to see delusions of grandeur in statements like this; after all, the statute of the International Court of Justice declares that scholarly writings are only a “*subsidiary* means for the determination of rules of [international] law.”¹³⁷ To the extent that Professor Sohn’s assertion is true, however, it raises a conflict of interest when international legal academics write about the domestic status of customary norms. Law professors defending the modern position are, at least to some extent, asserting their own power.¹³⁸

These general concerns about customary international law, as I have said, ought to inform our consideration of customary law’s place in the domestic scheme. The domestic debate, however, focuses primarily on considerations unique to our own constitutional structure. I turn to that debate in the next part.

II. EVALUATING THE CRITIQUE

The modern position that customary international law is federal law has become highly controversial in the last decade. This Part tries to sort out the competing arguments over the domestic status of customary law. Section A outlines the basic revisionist argument, grounded in the

both ethically and pragmatically, to inherit and abide by the law of nations.”); Koh, *State Law?*, *supra* note 3, at 1841; Stephens, *supra* note 3, at 399-413.

136. Louis Sohn, *Sources of International Law*, 25 GA. J. INT’L & COMP. L. 399 (1996); see also Roberts, *supra* note 102, at 775 (observing that “academics often cite the work of other writers as evidence of the existence and content of custom instead of thoroughly analyzing state practice”). For a tongue-in-cheek example, see David J. Bederman, *I Hate International Law Scholarship (Sort Of)*, 1 CHI. J. INT’L L. 75, 83-84 (2000) (“Many international law scholars do certainly regard themselves as keepers of arcane knowledge, an academic elite. I know I do. A few years ago, my students gave me a t-shirt emblazoned, ‘I AM a source of international law.’ I wear it with pride.”).

137. Statute of the International Court of Justice art. 38, para. 1(d) (1945), 59 Stat. 1055, T.S. No. 993 (emphasis added). *But see* BROWNLIE, *supra* note 33, at 25 (noting that, “[w]hatever the need for caution, the opinions of publicists are used widely”).

138. One might, I suppose, raise similar concerns about people who defend federalism while about to come up for tenure at a state university. See *supra* note *.

Supremacy Clause's exclusive catalog of federal lawmaking procedures. That argument, revisionists have argued, is confirmed by the Supreme Court's declaration in *Erie Railroad v. Tompkins* that "[t]here is no federal general common law."¹³⁹ Section B then develops three broader constitutional values embodied in *Erie*'s restriction of federal common lawmaking—democracy, separation of powers, and federalism—and evaluates the internationalists' arguments that the modern position is consistent with these values.

The heart of this Part considers the internationalists' efforts to either distinguish *Erie* or to live within its strictures. Section C addresses—and rejects—the argument that *Erie*'s rejection of broad federal common lawmaking powers simply does not apply in the context of foreign affairs. I suggest, however, that the modern position is really predicated on a different argument. In the years since *Erie*, the Supreme Court has recognized limited enclaves of common lawmaking authority; the Court has held, moreover, that the judge-made law in this area is truly *federal* in that it preempts contrary state law and gives rise to federal question jurisdiction.¹⁴⁰ The modern position on customary international law, I suggest, really depends on this "new federal common law" because the pre-*Erie* "general" common law did not have these crucial characteristics. Section D thus considers whether customary international law can fit within the established bounds of this new federal common law.

Even if a federalized customary international law cannot be squared with the structural theory of *Erie* and the Supremacy Clause, it might be sustainable by way of two final sorts of arguments. Internationalists have claimed, in essence, that the modern position is so firmly grounded in judicial precedent, as well as in the practice of the Executive and Legislative branch, that it should not now be abandoned. They have also argued that the practical consequences of adopting the revisionist view would be so dire that the critique should be abandoned. I consider these arguments in Sections E and F, respectively. Section G essays a brief summation.

A. *The Basic Argument*

It will help to start with a basic textual argument. The modern position claims that customary international law is federal in the sense, *inter alia*, that it preempts contrary state law. That claim ought to point us toward the Supremacy Clause, which sets out a categorical list of the

139. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

140. *See supra* text accompanying notes 46-49.

types of law that have this effect:

The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any state to the Contrary notwithstanding.¹⁴¹

This listing, as Brad Clark has demonstrated, provides an exclusive set of means by which supreme federal law may be produced.¹⁴² It does not, of course, mention customary international law. That law *is* mentioned, however, in Article I, Section 8, where Congress is given the power “[t]o define and punish . . . Offenses against the Law of Nations.” This placement among Congress’s enumerated powers—which are subject to the lawmaking procedures set out in Article I, Section 7—indicates that *Congress* must incorporate customary norms by statute before those norms can be recognized, under the Supremacy Clause, as supreme federal law.

We know, nonetheless, that the courts of the early Republic applied international law and, indeed, that the Framers intended them to do so. That practice can be easily reconciled with the constitutional text once we recognize that the law of nations was *not* considered federal law in this period. Rather, as virtually all participants in the customary law debate agree,¹⁴³ it had the status of “general” law: neither state nor

141. U.S. CONST. art. VI, cl. 2.

142. See Clark, *Separation of Powers*, *supra* note 60, at 1332-34.

143. See *supra* note 43. Jordan Paust has flatly denied the consensus view that customary international law was “general” law during the Founding period and most of the nineteenth century. See Paust, *supra* note 43, at 306 (asserting that “what [Bradley and Goldsmith] term the ‘modern position’ was generally endorsed long ago and has been evidenced fairly consistently in the continuous use of customary international law both directly and indirectly by federal courts for more than 200 years”). Much of Professor Paust’s treatment is simply an exercise in name-calling, see, e.g., *id.* at 335 (inveighing against “new and radical theories scantily dressed in supposed historic veils”), and his response to Professors Bradley and Goldsmith does not directly address the federalism and separation of powers arguments that form the core of the revisionist critique. Paust’s historical and precedential position seems to rest almost entirely on a large number of statements from the Founders and early cases to the effect that “[t]he law of nations . . . is . . . a part of the law of the land.” *Id.* at 301 (quoting Attorney General John Randolph, 1 Op. Att’y Gen. 26, 27 (1792)), as well as pronouncements that the states were “bound by . . . the ‘law of nations,’” see *id.* at 311 (quoting *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 560 (1857) (McClellan, J., dissenting)). Paust’s treatment of these sorts of statements conflates two senses in which international law might be “binding.” As Stewart Jay has explained, “[i]t is . . . inaccurate from an eighteenth-century perspective to depict the binding effect of the law of nations as springing from its ‘federal’ character. Instead, the force of the law of nations stemmed from the conception that it was rooted in natural law.” Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 835 (1989). Because of this connection to natural law, Professor Jay observes, jurists in the early Republic “typically recited that as to its obligatory

federal, and not preemptive of contrary state norms. Indeed, the other sort of “general” law applied by both federal and state courts during the nineteenth century the general commercial law of *Swift v. Tyson*—was simply a subset of customary international norms.¹⁴⁴

By the end of the nineteenth century, however, the general commercial law had become *de facto* preemptive of contrary state rules¹⁴⁵—as, in fact, had some of the more clearly “international” portions of the law of nations.¹⁴⁶ This development created the pressure that led to *Erie*,¹⁴⁷ and *Erie* can thus be seen as a reaffirmance of the Supremacy Clause’s exclusive recipe for supreme federal law. “Except in matters governed by the Federal Constitution or by Acts of Congress,” Justice Brandeis wrote, “the law to be applied in any case is the law of the State. . . . There is no federal general common law.”¹⁴⁸ “After *Erie*,” Professors Bradley and Goldsmith argue, “a federal court can no longer apply CIL in the absence of some domestic authorization to do so, as it could under the regime of general common law.”¹⁴⁹

B. *Erie’s Constitutional Values: Of Separation of Powers, Democracy, and Federalism*

As presented in the revisionist critique, *Erie* embodies three sets of constitutional values that are at least partially distinct. First, it upholds the federal separation of powers by ensuring that Congress, not the federal courts, remains the primary maker of federal law. Second, *Erie* promotes democracy by shifting lawmaking authority to the elected

elements the law of nations could not be violated by positive enactments”; rather, “American legislation in an area subject to the law of nations was said to be ‘declaratory of the law of nations,’ or to have ‘provided a particular manner of enforcing it.’” *Id.* at 827 (quoting *Grand Jury Charge*, in W. PATERSON, PATERSON PAPERS (n.p. circa 1795), and *Talbot v. Janson*, 3 U.S. (3 Dall.) 133, 161 (1795) (Iredell, J.)). The belief that the law of nations was “binding” in this way, however, tells us nothing about whether the version of international law “declared” by a federal court could be imposed to preempt, under the Supremacy Clause, the version “declared” in state legislation. In other words, the evidence cited by Professor Paust is consistent with the conclusion that “[t]he law of nations was classified as ‘general law’ in the sense that *Swift v. Tyson* later employed that term.” *Id.* at 832.

144. See Conant, *supra* note 25, at 155-58; Clark, *Federal Common Law*, *supra* note 25, at 1276-83; Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 853 n. 2 (1987) [hereinafter Henkin, *Chinese Exclusion*].

145. See, e.g., Lawrence Lessig, *Erie-Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785, 1792-93 (1997); see also *infra* text accompanying notes 447-454.

146. See, e.g., Stephens, *supra* note 3, at 425-427; see also *infra* text accompanying notes 460-469.

147. See Lessig, *supra* note 145, at 1792-95.

148. *Erie*, 304 U.S. at 78.

149. Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 2, at 852-53.

branches of government. Third, *Erie* protects federalism by assuring the primacy of state law in areas where the federal political branches have not acted. Each of these values takes on more particular significance in the debate over customary international law. While these arguments can be and sometimes are made wholly apart from *Erie*, that decision's insistence on a closed set of constitutionally mandated lawmaking procedures provides an important unifying theme.

1. *Separation of Powers*

Erie was a separation of powers decision in that it dealt with the allocation of lawmaking authority among the branches of the federal government. As I discuss in more detail later on,¹⁵⁰ the problem in *Erie* was not that the federal government as a whole lacked power to promulgate the rule of tort law at issue in the case. Rather, *Erie* held that in the *absence* of action by the political branches, the federal courts ordinarily lack power to fashion a rule of decision and must therefore apply state law.¹⁵¹

Erie's separation of powers concerns relate to the debate about customary international law in two distinct ways. First, the principle that courts do not ordinarily make federal law protects the political branches' control over foreign affairs. Revisionists read the Supreme Court's decision in *Sabbatino*, for example, as an endorsement of judicial restraint in this area. Professors Bradley and Goldsmith thus insist that "*Sabbatino*'s federal common law analysis was designed to shield courts from involvement in foreign affairs. It was not an endorsement of a free-wheeling coordinate lawmaking power for federal courts in the foreign affairs field."¹⁵²

Second, the federal separation of powers serves an instrumental function in protecting other values. *Erie* protected democracy by shifting lawmaking authority to the politically accountable branches of the federal government; the modern position, however, allows the federal courts to apply norms that have no such democratic mandate behind them.¹⁵³ Similarly, *Erie* protected federalism by denying to federal courts the independent ability to preempt state law; the modern position, on the other hand, allows such preemption without any input from the federal political branches.¹⁵⁴ I elaborate the democracy and federalism arguments in the following two subsections.

150. See *infra* Section II.C.1.

151. See, e.g., *Erie*, 304 U.S. at 78; Clark, *Separation of Powers*, *supra* note 60, at 1403-04.

152. Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 2, at 861.

153. See *id.* at 857.

154. See *id.* at 868.

The internationalist rebuttal to these claims makes four main points. First, internationalists point out that the federal political branches are involved in the creation of customary international law,¹⁵⁵ and they can override that law when international processes yield up a norm of which they do not approve.¹⁵⁶ Second, internationalists argue that federal courts do not, in fact, exercise legislative power when they apply customary international law. "When construing customary international law," Professor Koh insists, "federal courts arguably exercise *less* judicial discretion than when making other kinds of federal common law, as their task is not to create rules willy-nilly, but rather to discern rules of decision from an existing corpus of customary international law rules."¹⁵⁷ Third, to the extent that the revisionist view is contrary to executive and legislative endorsements of the modern position,¹⁵⁸ Professor Koh argues that "Bradley and Goldsmith's approach creates, rather than alleviates, separation of powers concerns."¹⁵⁹ Finally, internationalists suggest that state departures from customary law pose a greater threat to political branch authority than federal judicial activism. By investing the federal courts with power to prevent such departures, the modern position preserves the primacy of the federal political branches on balance.¹⁶⁰

I find most of these internationalist arguments unpersuasive. Political branch "participation" in the making of customary law does not really satisfy constitutional separation of powers concerns unless it takes place through the quite specific lawmaking procedures prescribed by the

155. Professor Neuman, for example, complains that the revisionists "write as if the United States had been a passive observer of the Nuremberg trials, the adoption of the Universal Declaration of Human Rights, and the later unfolding of human rights law." Neuman, *supra* note 3, at 384-85. The reality, he insists, is that "the normativity of international human rights did not just happen to the United States; the political branches deliberately participated in its creation." *Id.* at 385. Similarly, Professor Koh observes that "multilateral treaty drafting processes and fora such as the United Nations, regional fora, standing and ad hoc intergovernmental organizations, and diplomatic conferences have become the driving forces in the creation and shaping of contemporary international law." Koh, *State Law?*, *supra* note 3, at 1854. "In nearly all of these organizations and fora," he points out, "the United States ranks among the leading participants." *Id.* See also LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 43 (2d ed. 1996) [hereinafter HENKIN, FOREIGN AFFAIRS] (describing how the President "acts and speaks the part of the United States in the subtle process by which customary international law is formed").

156. See, e.g., Neuman, *supra* note 3, at 384 ("Our system follows a practice of presumptive enforceability of customary international law, subject to congressional override.").

157. See Koh, *State Law?*, *supra* note 3, at 1853 (emphasis added), (citing Professor Henkin's argument that courts "find" customary law rather than "make" it, Henkin, *International Law*, *supra* note 6, at 1561-62).

158. See *infra* text accompanying notes 480-491.

159. Koh, *State Law?*, *supra* note 3, at 1845.

160. See *id.* at 1850-52.

Constitution.¹⁶¹ In fact, the Executive branch may even prefer supra-national forms of lawmaking such as customary law precisely because those forms allow it to act in a legislative capacity on the international plane, whereas actual legislation at the national level requires the support of a coordinate branch.¹⁶² The internationalists' reliance on the political branches' ultimate right to override customary rules, on the other hand, tends to underplay significant concerns about legislative inertia.¹⁶³ Even if the modern position is just a default rule, default rules are important.

The second argument—that judges applying customary law do not really have discretion—assumes that customary law is highly determinate. The broader critique of customary law discussed in the last Part, however, belies that assumption.¹⁶⁴ The third argument hinges on an equally problematic assumption that judicial power may be augmented beyond constitutional bounds so long as the other branches concur. That sort of argument has never made much headway in separation of powers law.¹⁶⁵

The last internationalist argument, however, may have something to

161. *INS v. Chadha*, 462 U.S. 919, 946 (1983) (“These provisions of Art. I [setting out lawmaking procedures] are integral parts of the constitutional design for the separation of powers.”); Clark, *Separation of Powers*, *supra* note 60, at 1459 (concluding that separation of powers is satisfied only by adhering to the precise federal lawmaking procedures specified in the Constitution).

162. An analogous dynamic exists in the European Union, where the executive branches of the Member States play a legislative role at the EU level through their participation in the Council of Ministers. *See, e.g.*, J.H.H. Weiler, *The Transformation of Europe*, 100 *YALE L.J.* 2403, 2430 (1991) (explaining that, in the European Community, Community-level action allows Member State executives to exercise *legislative* power in a way that might be impossible at home, due to domestic institutional or political constraints); Giandomenico Majone, *Europe's 'Democratic Deficit': The Question of Standards*, 4 *EUR. L.J.* 5, 7 (1998) (“[B]ecause of the supremacy of European law over national law, the governments of the Member States, meeting in the Council, can control their own parliaments rather than being controlled by them.”). Similarly, in our own system, a President may favor a treaty but know that he cannot win Senate approval, perhaps because the opposing political party holds a majority in that chamber. That obstacle is readily circumvented if the mere signing of the treaty can create binding customary law.

163. Professor Merrill, for example, observes that, “given its crowded agenda, Congress is far more likely not to act than to act with respect to any particular issue presented for its attention.” Merrill, *supra* note 126, at 22-23. He thus concludes that “[t]he theoretical possibility of congressional override cannot disguise the fact that lawmaking by federal courts would in most cases give the last word to the federal courts rather than to Congress.” *Id.* at 23.

164. *See supra* Section I.C.

165. *See, e.g.*, *Clinton v. New York*, 524 U.S. 417, 451-52 (1998) (holding that the grant of line-item veto powers to the President violated the constitutional separation of powers, despite the fact that Congress voluntarily voted to augment the President's power); *Freytag v. Commissioner*, 501 U.S. 868, 880 (1991) (observing that “the structural interests protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic,” and “[n]either Congress nor the Executive can agree to waive [the] structural protection[s]” the Clause provides).

it. A retreat from the modern position would surely loosen controls on state courts in cases raising foreign policy concerns. The extent of legitimate concern would turn on the frequency of such cases, the availability of alternate controls, and of course the sort of tradeoffs involved in pursuing the internationalists' vision of uniformity. Because so much depends on what sort of regime replaces the modern position, I must put off further consideration of this issue to the next two Parts.¹⁶⁶

2. *Democracy*

The most familiar version of the democracy argument holds that when federal courts apply customary international law, they are engaged in judicial lawmaking just as surely as federal courts making "general federal common law" prior to *Erie*.¹⁶⁷ As the criticisms discussed in Section I.C make clear, there is neither a single authoritative arbiter of customary international law nor a hard and fast rule for when a principle attains "legal" status. Indeed, the sheer variety of claims advanced under the banner of customary law attests to the difficulty of achieving consensus on the content of that law.¹⁶⁸ Under such circumstances, judges necessarily inherit a great deal of discretion in determining what customary rules to enforce. That sort of discretion tends to exacerbate the "countermajoritarian difficulty" often associated with judicial review.¹⁶⁹ Where judges cannot show that their decisions are clearly mandated by an external source of law, they become vulnerable to charges that they are simply enforcing their own preferences at the expense of the democratic majority.¹⁷⁰

A somewhat different version of the democracy argument emphasizes the extra-territorial sources of customary law rather than the indeterminacy of the underlying rules. The problem, Professor Trimble argues, is that "at least some of the potential lawmakers, such as foreign governments, are neither representative of the American political

166. See *infra* Sections III.B, IV.B.

167. See Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 2, at 857.

168. See, e.g., Weisburd, *State Courts*, *supra* note 6, at 9-10.

169. See ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-23 (1962). The courts' decision to enforce norms not recognized by democratic majorities has a countermajoritarian aspect even if federal statutes are not invalidated. Moreover, when a court holds a *state* rule preempted by customary norms, it is engaged in judicial review pure and simple.

170. For elaboration of this point in a domestic context, see Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 *DUKE L.J.* 75, 101 (2001). Professor Trimble advances a somewhat different version of this point when he notes that customary law need not be "principled" in the sense that we ordinarily demand of judge-made law. See Trimble, *supra* note 6, at 707-09.

community nor responsive to it.”¹⁷¹ Trimble concludes that “if customary international law can be made by practice wholly outside the United States it has no basis in popular sovereignty at all.”¹⁷² Customary law, on this view, is radically different from treaties that must be negotiated by an elected President and ratified by the People’s elected representatives.¹⁷³ Indeed, one of the most troubling aspects of the modern position is that “U.S. courts rely on multilateral treaties as a source of CIL even in situations in which the United States has not ratified the treaty or has declared the relevant provisions of the treaty to be non-self-executing.”¹⁷⁴

The internationalists seek to rebut these charges with many of the same arguments discussed in relation to separation of powers. They emphasize participation by the federal political branches in the formulation of customary international law, as well as the ability of democratic majorities to override that law by statute. “While this is not direct democracy,” Professor Neuman admits, it is nonetheless “a form of representative democracy.”¹⁷⁵ It is a quite different form of representative democracy, of course, from that framed by the Constitution’s provisions.

Two additional arguments, however, reveal the divergent perspectives of the revisionists and the internationalists. In addition to arguing that customary law is not incompatible with processes of representation set out in the American constitution, internationalists tend to invoke the pro-democracy substance of many international norms themselves—especially international human rights law. “How can it be undemocratic,” they basically ask, “to be for international human rights?”¹⁷⁶ An even more fundamental response is to question the democratic nature of the constitutional processes invoked by the revisionists. “With respect to democratic values,” Professor Paust urges,

171. Trimble, *supra* note 6, at 721; see also Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 2, at 857 (noting that “under modern conceptions of CIL, CIL rules may be created and bind the United States without any express support for the rules from the U.S. political branches”); RESTATEMENT (THIRD), *supra* note 32, § 102 cmt. d (stating that a customary rule binds all nations except those that actively dissent from the rule during its formation).

172. Trimble, *supra* note 6, at 721.

173. *Id.* at 727-31.

174. Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 2, at 858 (citing *Filartiga v. Pena-Irala*, 630 F.2d 876, 880-85 (2d Cir. 1980) (relying, *inter alia*, on treaties not ratified by the United States to find a customary international law rule prohibiting torture)).

175. Neuman, *supra* note 3, at 384.

176. See, e.g., Paust, *supra* note 43, at 320-21 (asserting that “customary international law” is “the most democratic form of international law” and that “in human history, democracies have fostered, and dictatorships have feared, customary international law, especially the guaranteeing of human rights for each human being” (citation omitted)).

“it is worth emphasizing that no single institutional arrangement necessarily represents authority or guarantees a democratic functioning or outcome.”¹⁷⁷ Professor Koh is even more explicit: “Bradley and Goldsmith nowhere explain why explicit federal legislation—a process notoriously dominated by committees, strong-willed individuals, collective action problems, and private rent-seeking—is invariably more democratic than the judge-driven process they criticize.”¹⁷⁸

The revisionists, then, largely equate democracy with the constitutional processes that define the political branches of our system; departure from those processes, either through ceding lawmaking authority to international actors or by departing from the lawmaking procedures spelled out in Articles I and II, necessarily threatens democratic values. The internationalists, on the other hand, suggest that democracy is something of an ideal standard against which any system of norm creation—including our own constitutional processes—may and ought to be measured. This difference in perspectives may explain why the two groups so often seem to be talking past one another. It also suggests that, to the extent that “democracy” for the revisionists really means adherence to separation of powers (and federalism), it may not be all that helpful to analyze “democracy” as a separate category.

3. *Federalism*

The last—and, in my view, most important—set of arguments against the internationalists’ view of federal common law rests on principles of federalism. I have already discussed the central implication of the modern position that customary international law trumps contrary state law.¹⁷⁹ This implication would have only minor significance for state autonomy under traditional nineteenth-century conceptions of international law, which primarily governed the relationship of nation-states to one another. As international law became increasingly concerned with regulating the relationship between states and their citizens, however, the potential for conflict with state law expanded exponentially.¹⁸⁰ And as globalization further erodes the distinction

177. *Id.* at 320.

178. Koh, *State Law?*, *supra* note 3, at 1854; *see also* Paust, *supra* note 43, at 320 (noting that “legislative bodies may merely represent special interests”). This sort of argument is not unique to internationalists. As Professor Koh points out, Larry Kramer has made a similar argument defending federal common law generally as no more “undemocratic” than the legislative process. *See* Koh, *State Law?*, *supra* note 3, at 1854-55 n.173 (quoting Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 PACE L. REV. 263, 272 (1992)).

179. *See supra* Section I.B.2.

180. *See* Weisburd, *State Courts*, *supra* note 6, at 8-11; Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 2, at 840-41, 846-47.

between “foreign” and “domestic” affairs, the potential for conflict can only increase.¹⁸¹

The federalism argument against the modern position ultimately rests on “[t]he Supreme Court’s modern federalism jurisprudence.”¹⁸² But the jurisprudence that Professors Bradley and Goldsmith have in mind is not the Court’s most recent “Federalist Revival,”¹⁸³ exemplified by cases like *United States v. Lopez*¹⁸⁴ or *Printz v. United States*.¹⁸⁵ Rather, they emphasize *Garcia v. San Antonio Metropolitan Transit Authority*,¹⁸⁶ which announced the primacy of ‘political safeguards’ for federalism.¹⁸⁷ As Justice Blackmun wrote for the majority, “the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself.”¹⁸⁸ The States are represented in Congress, and they participate indirectly in the selection of the President.¹⁸⁹ As a result, the Court adopted Herbert Wechsler’s influential assertion that “the Court is on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interest of the states, whose representatives control the legislative process and, by hypothesis, have broadly acquiesced in sanctioning the challenged Act of Congress.”¹⁹⁰

The *Garcia*/Wechsler model raises any number of difficulties and its adequacy as a protection for federalism has been seriously questioned.¹⁹¹

181. See, e.g., Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139, 179-82 (2001) [hereinafter Young, *Dual Federalism*] (describing the erosion of this distinction); G. Edward White, *Observations on the Turning of Foreign Affairs Jurisprudence*, 70 U. COLO. L. REV. 1109, 1111-17 (1999) (same).

182. Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 2, at 868.

183. Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?* 111 HARV. L. REV. 2180, 2213 (1998).

184. 514 U.S. 549 (1995).

185. 521 U.S. 898 (1997).

186. 469 U.S. 528 (1985).

187. See *id.* at 551.

188. *Id.* at 550.

189. *Id.* at 551; see also THE FEDERALIST NO. 45, at 259 (James Madison) (Clinton Rossiter ed., 1961) (observing that “each of the principal branches of the federal government will owe its existence more or less to the favor of the State governments, and must consequently feel a dependence, which is much more likely to beget a disposition too obsequious than too overbearing towards them”).

190. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 559 (1954); see also JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 171-259 (1980).

191. See, e.g., Baker & Young, *supra* note 170, at 106-33; Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459 (2001); Larry Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 217-19 (2000); William Marshall, *American Political Culture and the Failures of Process Federalism*, 22 HARV. J.L. & PUB. POL’Y 139 (1998).

At the same time, a “political safeguards” model does seem to impose one irreducible minimum requirement: federal law must, in fact, be made in a way that respects the political and institutional safeguards for state autonomy built into the federal structure. As Brad Clark has demonstrated, the Supremacy Clause accords “supreme Law of the Land” status only to rules made by very specific procedures.¹⁹² “Each set of procedures,” he argues, “safe-guards federalism in two related ways”:

First, each procedure requires the participation and assent of multiple actors to adopt federal law. This creates the equivalent of a supermajority requirement and thus reinforces the burden of inertia against federal action, leaving states greater freedom to govern. Second, each procedure limits participation to actors—such as the Senate—originally structured to be responsive to state prerogatives.¹⁹³

On this view, any form of federal lawmaking that does *not* go through the specified procedures—either Article V’s provisions for constitutional amendment, Article I’s provisions for statutory enactment, or Article II’s treaty-making procedures—is highly suspect. The implications for customary international law are obvious. As Professors Bradley and Goldsmith observe, “the interests of the states are neither formally nor effectively represented in the lawmaking process” that gives rise to customary law.¹⁹⁴ Nor is customary law

192. See Clark, *Separation of Powers*, *supra* note 60, at 1332 (arguing that both the text of the Constitution limits “supreme” status to “the ‘Constitution,’ ‘Laws,’ and ‘Treaties’ of the United States adopted in accordance with the corresponding lawmaking procedures prescribed elsewhere in the Constitution”); *id.* at 1338 (observing that “the constitutional structure confirms that the federal lawmaking procedures prescribed by the Constitution are the exclusive means adopting ‘the supreme Law of the Land’”).

193. *Id.* at 1339; see also Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1362 (2001) [hereinafter Young, *Two Cheers*]. Federal lawmaking procedures, Professor Clark argues, “reveal an important, if overlooked, bargain reflected by the original constitutional structure: the states recognized the supremacy of federal law (and the corresponding displacement of state law) in exchange for the right to participate, at least indirectly, in the adoption of all forms of supreme federal law.” Clark, *Separation of Powers*, *supra* note 60, at 1339.

194. Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 2, at 868. This is true in two distinct senses: First, subnational units are not generally thought to be relevant actors in the process by which customary law evolves on the international plane, see, e.g., Roberts, *supra* note 102, at 774, although why this should be true is not obvious. Second, state governments are not represented on the federal bench that internationalists would have derive and apply principles of customary law in actual cases. See, e.g., Ernest A. Young, *Preemption at Sea*, 67 GEO. WASH. L. REV. 273, 333-41 (1999) (arguing, in the context of admiralty jurisdiction, that federal courts are uniquely troubling legislators from a “political safeguards” perspective) [hereinafter Young, *Preemption at Sea*].

subject to the procedural hurdles and burdens of inertia that tend to safeguard state regulatory autonomy even in the absence of effective political representation.¹⁹⁵

By circumventing the political and procedural safeguards of federalism entirely, a federalized customary international law flouts even the minimal protections for federalism left standing after *Garcia*.¹⁹⁶ This is especially true where, as I have already discussed in the context of separation of powers and democracy, customary international law rules are derived from sources that the political branches—who *are* subject to political safeguards—have declined to incorporate into American law explicitly, such as unratified multilateral treaties.¹⁹⁷ Indeed, focusing on political and institutional safeguards for state autonomy reveals that the democracy, separation of powers, and federalism objections to the modern position are all interrelated: The system is designed to protect state autonomy by channeling federal

195. See, e.g., Clark, *Separation of Powers*, *supra* note 60, at 1339-42; Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1609 (2000) [hereinafter Young, *Constitutional Avoidance*] (observing that “the ultimate political safeguard [for federalism] may be the procedural gauntlet that any legislative proposal must run and the concomitant difficulty of overcoming legislative inertia”).

196. *Garcia*, after all, was widely heralded as the “second death of federalism.” See William W. Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709, 720 (1985). One might argue, I suppose, that to the extent that *Garcia*’s abdication of judicial review is no longer good law, see John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311 (1997), the “political safeguards” emphasized in *Garcia* are no longer important. This, I think, would be a mistake. As I have argued elsewhere, political safeguards will remain primary whether or not we also have judicial review; the question, rather, is whether some level of judicial review is necessary to maintain the vitality of political checks. See Young, *Two Cheers*, *supra* note 193, at 1354 (arguing that some judicial review *is* necessary). Nothing in the federalist revival calls that primacy of political safeguards into question. See, e.g., *Lopez*, 514 U.S. at 577-78 (Kennedy, J., concurring) (arguing that the political branches must protect federalism “in the first and primary instance,” but that this does not imply “a complete renunciation of the judicial role”).

197. Indeed, the political branches not infrequently attach express reservations to treaties designed to avoid any incursion on state autonomy—surely an example of Professor Wechsler’s “political safeguards” at work. And yet internationalists frequently argue that such reservations are invalid, so that the rejected norms bind the states notwithstanding the efforts of national political actors to prevent precisely that result. Professor Paust, for example, states that

[a]lthough the instruments of ratification for certain human rights treaties contain a declaration that much (but not all) of the articles are “non-self-executing,” such declarations function as reservations that are fundamentally inconsistent with the objects and purposes of the treaties and, under international law, are thus void ab initio and can have no legal effect.

Paust, *supra* note 43, at 322-23. (Professor Paust does not explain why the invalidity of a reservation on the international plane would necessarily render the reservation invalid as a statement of the treaty’s effect on domestic law and domestic actors.) In any event, Paust declares that even such non-self-executing treaties “should still trump inconsistent state law under the Supremacy Clause of the United States Constitution and the doctrine of federal preemption.” *Id.* at 323.

lawmaking to the political branches, who are accountable to both the People and the States and who can act only after overcoming significant procedural hurdles.¹⁹⁸

Internationalists have responded to the federalism argument not by attempting to refute it, but by dismissing its importance. Professor Neuman, for example, does “not deny that the modern position shifts some degree of power from the States.”¹⁹⁹ Similarly, Professor Koh calls the federalism argument made by Professors Bradley and Goldsmith “even stranger” than their other arguments, and quotes with approval dicta in a number of judicial decisions indicating that “in the foreign affairs realm, claims of states’ rights carry little weight.”²⁰⁰ More specifically, Koh argues that the states never possessed any foreign affairs powers, so that “reserved powers” arguments founded in the Tenth Amendment are irrelevant in this context.²⁰¹ This view is consistent with Louis Henkin’s famous statement that “[f]ederalism . . . was largely irrelevant to the conduct of foreign affairs even before it began to be a wasting force in U.S. life generally.”²⁰²

The thrust of the internationalist view on federalism, then, is that the modern position *does* eliminate state authority in areas covered by customary international law—and rightly so. Since this view forms the core of internationalists’ efforts to distinguish *Erie* itself, I take it up at some length in the next section.

C. *Does Erie Apply in International Cases?*

Just one year after the *Erie* decision came down, Judge Philip Jessup sought to head off its extension to international cases. “If the dictum of Mr. Justice Brandeis in the *Tompkins* case is to be applied broadly,” he worried, “it would follow that hereafter a state court’s determination of

198. See generally Young, *Two Cheers*, *supra* note 193, at 1356-57, 1368-70. James Madison’s own version of the political safeguards argument, for example, relied both on federal accountability to state governments—through such mechanisms as indirect election of senators—and on federal accountability to the People, whom Madison thought would in turn protect the interests of the states out of loyalty to their state governments. See FEDERALIST NO. 46, *supra* note 189, at 262-68; Young, *Two Cheers*, *supra* note 193, at 1356 (describing Madison’s emphasis on popular loyalty). Customary law’s “democratic deficit” is thus relevant to federalism concerns as well.

199. Neuman, *supra* note 3, at 383.

200. Koh, *State Law?*, *supra* note 3, at 1846-47.

201. *Id.* at 1846-48; see also Neuman, *supra* note 3, at 384 (“The States have no reserved sovereignty to act on the international plane; the Constitution was designed to take that away from them.”).

202. HENKIN, FOREIGN AFFAIRS, *supra* note 155, at 149. As Professor Henkin’s statement suggests, it is hard to avoid the impression that most internationalists find federalism a trivial concern in *domestic* as well as foreign affairs.

a rule of international law would be a finding regarding the law of the state and would not be reviewed by the Supreme Court of the United States.”²⁰³ That result, Jessup insisted, could not have been what the Court intended:

Mr. Justice Brandeis was surely not thinking of international law when he wrote his dictum. Any question of applying international law in our courts involves the foreign relations of the United States and can thus be brought within a federal power. . . . The several states of the Union are entities unknown to international law. It would be as unsound as it would be unwise to make our state courts our ultimate authority for pronouncing the rules of international law.²⁰⁴

Like Jessup, present-day internationalists dispute *Erie*'s applicability to international cases.

This way of posing the issue is somewhat misleading, however. When one thinks of “international cases” one tends to envision either of two sorts of scenarios: cases involving the “old” international law governing the relations among States, such as head-of-state immunity; or, on the other hand, “new” international law claims involving, for example, fundamental human rights, but occurring in a foreign context. *Filartiga*'s claim of a Paraguayan family for the torture and murder of their son by Paraguayan officials is the classic example.

But the modern position actually claims much more than this. I have already suggested that the recent case of Napoleon Beazley, who is on Texas's death row for a crime committed when he was 17 years of age,

203. Philip C. Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM. J. INT'L L. 740, 742 (1939). Judge Jessup's repeated reference to Justice Brandeis's “dictum” is curious, although it reflects widespread academic practice from the time of the decision to the present. See, e.g., EDWARD PURCELL, *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA* 195-96, 202 (2000) (recounting the tendency of contemporaneous commentary and subsequent judicial opinions to downplay the constitutional ground in *Erie*); Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 920 (1986) (suggesting that “*Erie*'s constitutional discussion was unnecessary to the decision”). The practice is odd because, while courts generally leave the question of what is dictum and what is not to subsequent interpreters, Justice Brandeis's opinion squarely addressed it. “If only a question of statutory construction were involved,” he wrote, “we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear and compels us to do so.” *Erie*, 304 U.S. at 77-78 (citation omitted). As Judge Friendly has explained, “[a] court's stated and, on its view, necessary basis for deciding does not become dictum because a critic would have decided on another basis.” Friendly, *supra* note 46, at 385-86; see also PURCELL, *supra*, at 172-77 (demonstrating the centrality of the constitutional analysis to Brandeis's reasoning in *Erie*).

204. Jessup, *supra* note 203, at 743.

is an “international” case in the sense that Texas’s attempt to execute Beazley may conflict with a customary norm against the juvenile death penalty.²⁰⁵ Under the modern position, state law would have to give way to any such norm—notwithstanding the fact that Beazley and his victim were both American citizens, the crime was committed in the United States, and hence no foreign government can claim any particular interest in the affair.²⁰⁶ It would thus be more precise to formulate this Section’s question as “Does *Erie* Apply to Cases that Implicate Customary Norms of International Law?”—whether or not those cases would strike us as “international” in the intuitive sense.

With this refinement of the issue in mind, I consider in this Section whether *Erie* controls the domestic application of international norms. Professor Koh’s effort to distinguish *Erie* provides a helpful framework for that discussion. He gives three reasons why *Erie*’s insistence that state law applies absent a positive federal enactment should not apply to cases involving customary international law: First, Koh argues that Justice Brandeis’s opinion rested on a lack of federal *legislative* power to create the federal norm applied by the lower courts in *Erie*; there is no such lack, Koh says, in international cases.²⁰⁷ Second, *Erie* also rested on “an allocation of law-making functions between state and federal legislative processes”—an allocation which Koh says is likewise missing in foreign affairs, where federal power is exclusive.²⁰⁸ Third, Koh argues that “to treat determinations of customary international law as questions of state law” would “have raised the specter that multiple variants of the same international law rule could proliferate among the several states.”²⁰⁹ This is because such treatment “would have rendered both state court and federal diversity rulings effectively unreviewable by the U.S. Supreme Court.”²¹⁰

This Section is largely organized around Professor Koh’s arguments for setting *Erie* aside, although I consider the related views of other internationalists throughout. Subsection One deals with the notion that *Erie* was predicated on a lack of federal legislative power over intrastate activity that is *not* lacking in international affairs. The next two

205. See *supra* text accompanying notes 84-88.

206. See, e.g., Brilmayer, *Preemptive Power*, *supra* note 6, at 322-26; see also Ed Timms & Diane Jennings, *Stay Given to Man Who Killed as Teen*, THE DALLAS MORNING NEWS, Aug. 16, 2001, at 1A (noting that Beazley and his victims were all Texas residents and that the crime occurred in Tyler, Texas).

207. Koh, *State Law?*, *supra* note 3, at 1831.

208. *Id.* at 1831-32 (quoting *Hanna v. Plumer*, 380 U.S. 460, 474-75 (1965) (Harlan, J., concurring)).

209. *Id.* at 1832 (citation omitted).

210. *Id.*

subsections consider the contention that federal power over international affairs is exclusive of the states; Subsection Two focuses on the analytical coherence of the argument, especially in an age of globalization, while Subsection Three emphasizes the original constitutional and statutory structure. Finally, Subsection Four briefly touches on Professor Koh's concerns about Supreme Court review and the uniformity of customary international law, although I defer extended consideration of the uniformity issue to Part IV.

1. *Erie and the Limits of Federal Legislative Power*

Professor Koh's first point raises a well-known ambiguity in the *Erie* opinion. Justice Brandeis wrote that that the regime of *Swift v. Tyson* was unconstitutional because "Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts."²¹¹ International law, Koh says, is different. "[G]iven both Congress's enumerated authority to define and punish offenses against the law of nations and its affirmative exercise of that power in a range of statutes, no one could similarly claim that federal courts lacked power to make federal common law rules with respect to international law."²¹²

The problem in *Erie*, however, was not Congress's lack of enumerated authority to reach the conduct at issue in that case. Tompkins had been injured traveling on foot along a railroad right of way, and the critical question in the case involved the duty of care owed by the railroad to persons like Tompkins. There is little doubt that Congress could have provided a federal answer to that question by statute under the Commerce Clause.²¹³ After all, *Erie* was decided in 1938, hard on the heels of *Jones & Laughlin* and the Court's "switch in time."²¹⁴

To be sure, the completeness of the Court's retreat from enforcing limits on Congress's commerce power did not become clear until the unanimous decisions in *United States v. Darby*²¹⁵ and *Wickard v.*

211. *Erie*, 304 U.S. at 78.

212. Koh, *State Law?*, *supra* note 3, at 1831.

213. See Clark, *Federal Common Law*, *supra* note 25, at 1258; Field, *supra* note 203, at 926; Merrill, *supra* note 126, at 14-15; Paul J. Mishkin, *Some Further Last Words on Erie—The Thread*, 87 HARV. L. REV. 1682, 1684 n.10 (1974).

214. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding the National Labor Relations Act as within Congress's commerce power and marking the end of aggressive judicial review of federal legislation under the Commerce Clause).

215. 312 U.S. 100 (1941) (upholding the Fair Labor Standards Act's regulation of wages and hours for workers engaged in producing goods for interstate commerce).

Filburn,²¹⁶ three and four years after *Erie*, respectively. But a federal statute prescribing rules for railroads—classic “instrumentalities” of interstate commerce—would likely have passed muster even before the Court’s 1937 change of course.²¹⁷ As the Court observed in *Stafford v. Wallace*, decided in 1924,

[t]he authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations.²¹⁸

In any event, *Erie*’s constitutional holding is not generally thought to have become obsolete in our post-1941 world; it must rest, therefore, on something other than a lack of federal legislative power over the subject matter of the general common law.²¹⁹

That “something” is the lack of *judicial* power to act in the absence of prior congressional authorization. As Henry Monaghan has observed, *Erie* “recognizes that federal judicial power to displace state law is not coextensive with the scope of dormant congressional power. Rather, the Court must point to some source, such as a statute, treaty, or constitutional provision, as authority for the creation of substantive federal law.”²²⁰ *Erie* recognized, in other words, a principle of *judicial* federalism which denies to federal courts the power to “go first” in making federal law, even if the same law would not be beyond the legislative competence of Congress.²²¹ Justice Brandeis reinforced this

216. *Wickard v. Filburn*, 317 U.S. 111 (1942) (holding that the Agricultural Adjustment Act was constitutional even as applied to the production of wheat on a single farm for consumption on the farm).

217. *See, e.g., Smith v. Alabama*, 124 U.S. 465, 479 (1888) (acknowledging that “[i]t would, indeed, be competent for Congress . . . to prescribe the qualifications of locomotive engineers for employment by carriers engaged in foreign or interstate commerce”).

218. *Stafford v. Wallace*, 258 U.S. 495, 522 (1922) (quoting the *Minnesota Rate Cases*, 230 U.S. 352, 399 (1913)).

219. Nor should *Erie* be read as turning on the fact that tort law—the common law subject at issue in the case—was a “reserved” power of the States. Justice Brandeis did quote Justice Field’s earlier dissent in *Baltimore & Ohio R. Co. v. Baugh*, 149 U.S. 368, 401 (1893), which argued that *Swift* amounted to “an invasion of the authority of the State” and (in a portion *not* quoted by Brandeis) explicitly invoked the Tenth Amendment, *see id.* As Edward Purcell has painstakingly demonstrated, however, Brandeis’s constitutional theory in *Erie* was not based on the notion that the States possess an inviolable “sphere” of regulatory authority. *See* PURCELL, *supra* note 203, at 178-80.

220. Henry Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 11-12 (1975); *see also Texas Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) (“[T]he existence of congressional authority under Art. I [does not] mean that federal courts are free to develop a common law to govern those areas until Congress acts.”).

221. *See Young, Preemption at Sea, supra* note 194, at 308; Field, *supra* note 203, at 924-

reading when he quoted Justice Holmes to the effect that *Swift* was “an unconstitutional assumption of powers *by courts* of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct.”²²²

So why did the Court also say that “*Congress* has no power to declare substantive rules of common law applicable in a State”?²²³ Edward Purcell offers one possibility in his excellent recent study of *Erie*. The constitutional principle at work in *Erie*, Professor Purcell argues, was Brandeis’s belief “that legislative and judicial powers were coextensive.”²²⁴ The *Swift* regime defied this principle because it did not tie judicial power to formulate rules of common law to an enumerated grant of federal legislative power. “The point of [Brandeis’s] analysis,” Purcell explains, “was not that Congress lacked certain powers but that the federal courts ignored the relevance of whatever those powers were.”²²⁵ Judicial power to apply general common law often turned, for example, on whether a state had departed from the general law by statute. That principle, however, conceded that general common law was—at least some of the time—being made in an area within the legislative power of the states and therefore, *outside* the legislative power of Congress.²²⁶ Because the *Swift* regime allowed federal courts to ignore questions concerning the reach of federal legislative power, it was unconstitutional even if the particular exercise of federal judicial power in *Erie* itself fell in an area in which Congress *could* legislate.²²⁷

25. Louise Weinberg has suggested that this “judicial federalism” view of *Erie* involves a “prudential distinction between the judiciary and the legislature that seems irrelevant in any direct way to federalism.” Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 817 (1989) [hereinafter Weinberg, *Federal Common Law*]. I have argued elsewhere, in response to Professor Weinberg, that this distinction is neither “irrelevant” to federalism nor “prudential” in nature. See Young, *Preemption at Sea*, *supra* note 194, at 308-10; see also Clark, *Federal Common Law*, *supra* note 25, at 1261 (explaining that “*Erie*’s conception of judicial federalism rests upon mutually reinforcing principles of federalism and separation of powers”); PURCELL, *supra* note 203, at 293-95 (criticizing Weinberg’s view).

222. *Erie*, 304 U.S. at 79 n.23 (1938) (emphasis added) (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 532 (1928) (Holmes, J., dissenting)).

223. *Erie*, 304 U.S. at 78 (emphasis added).

224. PURCELL, *supra* note 203, at 172. According to Professor Purcell, Justice Brandeis saw this principle as “inherent in the constitutional structure.” *Id.* The Framers’ generation seems also to have believed that federal legislative and judicial jurisdiction must be coextensive. See Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. PA. L. REV. 1231, 1242 (1985).

225. PURCELL, *supra* note 203, at 173.

226. As I explain below, the “therefore” in the text depends on the assumptions of “dual federalism,” which posited that state and federal spheres of regulatory authority are necessarily exclusive of one another. See *infra* note 233.

227. *Id.* For a similar view, see George Rutherglen, *Reconstructing Erie: A Comment on the Perils of Legal Positivism*, 10 CONST. COMMENTARY 285, 288 (1993) (characterizing Justice Brandeis’s argument as holding that “federal general common law as a whole was illegitimate

If Professor Purcell's account is correct, it would—to some extent, at least—support the position that *Erie* does not bar recognition of customary international law as federal common law. Article I endows Congress with a seemingly comprehensive power to “define and punish . . . Offenses against the Law of Nations”;²²⁸ there is thus no issue of some *judicial* applications of customary international law treading beyond the limit of federal *legislative* power. Any comfort this reading of *Erie*'s “constitutional axiom” can provide for the modern position is minimal, however, because “Brandeis added a critical and prudential corollary that further restricted the judiciary: even in areas within congressional power, the federal courts should not, absent compelling reasons, make nonconstitutional law in advance of applicable legislation.”²²⁹ Brandeis thus insisted that “[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State.”²³⁰ The modern position's categorical insistence that customary international law is federal law—whether or not “compelling reasons” exist to federalize any particular area—would surely run afoul of this “prudential corollary.”

In any event, although Professor Purcell's study has many virtues, his argument that the judicial federalism aspect of *Erie* was merely prudential is problematic for a number of reasons. To begin with, it fits uncomfortably with the actual text of the opinion. Justice Brandeis writes that “Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or ‘general,’ be they commercial law or a part of the law of torts.”²³¹ That language does not suggest that the problem in *Swift* was that *some* applications of the common law stepped outside the bounds of federal legislative power; rather, it indicates that *each* of the examples cited would be unconstitutional in and of itself. Since some of those examples—such as “general commercial law”—would surely fall within a Brandeisian view of the commerce power,²³² it seems that the fault with general common law cannot be simply that it allows courts to stray outside the scope of federal legislative authority.²³³

because it exceeded the power of Congress, not necessarily on the special facts of the case before the Court, but in a broad range of other cases”).

228. U.S. CONST. art. I, § 8.

229. PURCELL, *supra* note 203, at 173.

230. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

231. *Id.*

232. See PURCELL, *supra* note 203, at 174 (quoting a letter in which Brandeis urged “that it was wise . . . to treat the constitutional power of interstate commerce as very broad”).

233. As an historian, Professor Purcell's goal is to understand the reasoning that motivated Justice Brandeis to rule as he did in *Erie* and to place that ruling in the context of Brandeis's broader beliefs. His approach thus parallels “intentionalist” approaches to interpreting the

More broadly, the reasons supporting the supposedly “prudential corollary” of Justice Brandeis’s reasoning—that is, the idea that federal courts may not act until Congress has legislated in an area—are so compelling and so well-grounded in constitutional structure that it is hard to say why Professor Purcell finds them merely “prudential.” The

Constitutional text, and much of his evidence comes not from the opinion but from, for example, letters and internal Court memoranda generated by the litigation. *See, e.g.*, PURCELL, *supra* note 203, at 173 (relying heavily on an internal communication from Brandeis to Justice Stanley Reed for the account of *Erie*’s constitutional rationale). On intentionalist interpretation, see generally George H. Taylor, *Structural Textualism*, 75 B.U. L. REV. 321, 330-33 (1995); Ernest A. Young, Alden v. Maine and the Jurisprudence of Structure, 41 WM. & MARY L. REV. 1601, 1621-22 (2000). In bringing *Erie* to bear on present controversies, however, it is not obvious that an “intentionalist” interpretation of the opinion makes methodological sense. This is especially true where, as Professor Purcell recounts, the particular subjective interpretation of the opinion’s text harbored by the author almost surely did not command the assent of four other justices. *See* PURCELL, *supra* note 203, at 114 (observing that “for his statements concerning congressional power—which embodied the opinion’s underlying constitutional theory—he may well have had no supporters who accepted them fully and without reservation”). Indeed, this fact leads Purcell to question “efforts to use ‘original intent’ as an authoritative legal norm.” *Id.* at 6.

Erie retains a central place in our constitutional scheme, both functionally and theoretically, *see, e.g.*, Field, *supra* note 203, at 920, yet the intentionalist reading would ground its holding in a constitutional rationale that is anachronistic in important respects. Indeed, much of the point of Professor Purcell’s study—and what makes it so interesting—is to show how understandings of *Erie* have shifted away from Justice Brandeis’s own rationale over time. *See* PURCELL, *supra* note 203, at 195. Justice Brandeis’s theory, as elaborated by Professor Purcell, reasoned that the conceded legitimacy of state statutory law in areas formerly governed by general common law proved that such areas were outside the legislative competence of the federal government. But this reasoning rested crucially on assumptions of “dual federalism”—that is, the notion that the spheres of state and federal regulatory authority are mutually exclusive—that have mostly disappeared from our jurisprudence. *See, e.g.*, Alpheus Thomas Mason, *The Role of the Court, in FEDERALISM: INFINITE VARIETY IN THEORY AND PRACTICE* 8, 24-25 (Valerie A. Earle ed., 1968) (explaining that “dual federalism” contemplates “two mutually exclusive, reciprocally limiting fields of power”). On dual federalism generally, *see* Young, *Dual Federalism*, *supra* note 181, at 143-46; Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950). For an argument that dual federalism has largely been replaced by a regime of concurrent state and federal regulatory jurisdiction over most matters, at least in the domestic arena, *see* Young, *Dual Federalism*, *supra* note 181, at 150-52. Similarly, the notion that the entire regime of *Swift* would be unconstitutional simply because *some* judicial applications of the common law might fall outside the zone of federal legislative power seems inconsistent with the modern facial challenge doctrine. *See generally* United States v. Salerno, 481 U.S. 739, 745 (1987) (“A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.”); Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235 (1994). The Railroad would not have been able to make an “as applied” challenge to *Swift* in *Erie* because the particular rule at issue there was surely within Congress’s legislative power. *See supra* text accompanying notes 213-219. For those who must apply *Erie* today, I suggest, the important task is to develop an interpretation (a) that the text of the opinion will bear and (b) that coheres with the subsequent development of our law, the surrounding doctrinal context, and the best theory of the underlying structural principles. Indeed, Professor Purcell himself suggests “that historical evolution creates limitations and imperatives that infuse with new meaning the words of authoritative documents. The test of the wisdom and validity of those new meanings is only partially a historical question.” PURCELL, *supra* note 203, at 6.

first reason is that “congressional abstention in any area within its authority represented a political judgment by the representative branch that states should exercise control in that area, and courts should defer to that judgment.”²³⁴ This point essentially reiterates the notion that the primary safeguards of federalism are political in nature—a point of *constitutional* structure—and its corollary that the states should not be deprived by non-representative bodies of victories they have won in the political arena.²³⁵ Purcell’s second point—that the judiciary is institutionally unsuited “to deal with complex social and economics issues”²³⁶—is also frequently employed as a *constitutional* argument for judicial deference in areas like economic substantive due process.²³⁷

The third argument cited by Professor Purcell—that “if the federal courts could make rules in advance of congressional legislation, they would frequently be forced to frame decisions in hypothetical and ‘advisory’ terms”²³⁸—is similar to arguments for restrictive doctrines of standing and ripeness.²³⁹ These arguments are most often pitched in prudential terms, but they sometimes take on constitutional overtones.²⁴⁰ Finally, Purcell observes that “Brandeis knew that a limit based on possible but hypothetical congressional legislation would, as a practical matter, be wholly insufficient to restrain the national courts.”²⁴¹ Once again, such issues of efficacy are relevant to all questions of doctrinal design, whether the doctrine under consideration is prudential or constitutional in nature.²⁴²

In the end, these arguments for Professor Purcell’s “prudential corollary” fit comfortably with the basic constitutional argument for a

234. *Id.* at 174.

235. See Young, *Two Cheers*, *supra* note 193, at 1358-59.

236. PURCELL, *supra* note 203, at 174.

237. See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726, 729-31 (1963); *Baker & Young*, *supra* note 170, at 85-86.

238. PURCELL, *supra* note 203, at 174.

239. See, e.g., *Bennett v. Spear*, 520 U.S. 154, 167 (1997) (noting that constitutional standing requirements demand an injury that is, *inter alia*, “concrete” and “not conjectural or hypothetical”); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967) (observing that the “basic rationale [of the ripeness requirement] is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies”).

240. See, e.g., *Raines v. Byrd*, 521 U.S. 811, 819 (1997); *Allen v. Wright*, 468 U.S. 737, 750-52 (1984); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239-40 (1937).

241. PURCELL, *supra* note 203, at 174-75.

242. For example, *Garcia*’s holding that courts should not generally engage in substantive judicial review of the limits of Congress’s power *vis à vis* the states is essentially a judgment about efficacy; the Court adopted a relatively weak constitutional rule because it felt that the rule would nonetheless be an adequate constraint on federal aggrandizement. See, e.g., *Baker & Young*, *supra* note 170, at 106-08 (discussing *Garcia*’s “political safeguards” argument as a claim about the “necessity” of judicial review).

judicial federalism reading of *Erie*. That is Professor Clark's point that the federal separation of powers—and particularly the specific and arduous constitutional procedures for federal lawmaking set out in Articles I and II—provide important protections for federalism:

Careful analysis reveals that *Erie's* constitutional holding is best understood as an attempt to enforce federal lawmaking procedures and the political safeguards of federalism they incorporate. In other words, *Erie* reflects the idea that the Constitution not only limits the *powers* granted to the federal government, but also constrains the *manner* in which the federal government may exercise those powers to displace state law.²⁴³

This emphasis on the *manner* in which federal law is made is consistent both with the recognition of broad concurrent federal regulatory jurisdiction over most areas of life²⁴⁴ and with *Garcia's* insistence that the primary protection for state autonomy is “one of process rather than one of result.”²⁴⁵

The fact that *Congress* has broad power to legislate in the area of foreign affairs, including a specific grant of authority to define and punish violations of international law, thus proves nothing about the federal *judiciary's* authority to perform the same task. Principles of judicial federalism require that federal common lawmaking can take place only in the interstices of a federal statute or constitutional provision, or subject to an express delegation of lawmaking authority.²⁴⁶ Proponents of the modern position, however, advocate federal common lawmaking authority precisely to avoid the procedural and political safeguards that *Erie* demands.²⁴⁷ Professor Koh candidly rejected these

243. Clark, *Separation of Powers*, *supra* note 60, at 1414 (emphasis added).

244. See, e.g., Young, *Dual Federalism*, *supra* note 181, at 159-60 (arguing that the Court's Commerce Clause decisions leave broad federal regulatory power intact); Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 63 (suggesting that *Lopez* may be little more than a “warning shot across [Congress's] bow”)

245. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1985).

246. See, e.g., *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966) (“It is by no means enough [to justify federal common lawmaking] that . . . Congress could under the Constitution readily enact a complete code of law governing [the subject matter of the case]. Whether latent federal power should be exercised to displace state law is primarily a decision for Congress.”).

247. This rejection of procedural constraints on federal lawmaking extends to the process by which customary international law is created in the first place. Professor Koh, for example, refers to a “customary international law rule of ‘prompt, adequate, and effective’ compensation for expropriation”—a rule which, he claims, “was first announced in an executive branch letter written by Cordell Hull in 1938.” Koh, *State Law?*, *supra* note 3, at 1856. *But see* Kelly, *supra* note 34, at 467 (arguing that the Hull letter did not in fact reflect a consensual norm). The idea that a *letter* from an executive branch official could “announce” a binding norm of federal law—without any delegation of authority from Congress—is simply extraordinary in our system. *Cf.* *United States v. Mead Corp.*, 533 U.S. 218 (2001) (holding that executive branch opinion

limitations on judicial lawmaking in advancing his vision of “transnational public law litigation,” asserting that “the executive branch and Congress are not the only law-pronouncing entities within our governmental structure; courts represent a coordinate source of governmental power with independent common lawmaking capacity.”²⁴⁸ He thus urged more recently that international law should be like constitutional law, an area in which (he says) “[t]he Framers decided to commit final resolution of constitutional cases to federal judges because they deemed such judges to be ‘free of the political webs connecting Congress, state legislatures, state courts, and temporary parochial majorities.’”²⁴⁹ Those “political webs,” of course, are Herbert Wechsler’s “political safeguards of federalism.” The representation of the States in Congress is designed to make Congress responsive to state institutions, even “temporary parochial majorities.”²⁵⁰

letters do not even receive *Chevron* deference as interpretations of pre-existing federal norms absent a clear indication that Congress intended such letters to have binding effect).

248. Koh, *Transnational Public Law Litigation*, *supra* note 12, at 2397. Professor Koh added that “courts are unusually well-positioned to enunciate norms, because of both their independence and their willingness to engage in dialogue over legal meaning.” *Id.* The courts’ lack of political accountability thus becomes, in Koh’s eyes, a *basis* for lawmaking authority rather than a “difficulty.” Compare BICKEL, *supra* note 169, at 16-23. While I have some sympathy for the view that the institutional characteristics of courts emphasized by Koh should not always be viewed as a drawback, the advantages of judicial decisionmaking will generally depend on a much more restrained approach to judicial lawmaking than Koh advocates. See Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. (forthcoming Fall 2002).

249. Koh, *State Law?*, *supra* note 3, at 1850 (quoting Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688, 700 (1989)). Even Professor Koh’s description of how the Framers dealt with constitutional cases is somewhat misleading. The Framers did not provide for general federal question jurisdiction—which would include general jurisdiction over constitutional claims—until 1875. See HART & WECHSLER, *supra* note 71, at 349 (stating that, under the first Judiciary Act, “[f]ederal question cases that did not fall into some more specialized grant of jurisdiction had to be litigated in state court, subject to Supreme Court review. Only in 1875 did a Reconstruction Congress provide an enduring grant of general federal question jurisdiction”). The obvious implication, as Henry Hart famously observed, is that “[i]n the scheme of the Constitution, [state courts] are the primary guarantors of constitutional rights, and in many cases they may be the ultimate ones.” Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1401 (1953). This is true despite the fact that the Supreme Court’s ultimate power of review over state courts on federal questions was established early on. See *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304 (1816). The ability of the Supreme Court to provide a final federal resolution in every state court case raising a federal issue has always been doubtful, and in any event Congress did not provide even the possibility of Supreme Court review in every such case until 1914. See *Commonwealth Bank of Ky. v. Griffith*, 39 U.S. (14 Pet.) 56 (1840) (denying jurisdiction to review a state court decision *upholding* a claim of federal right); HART & WECHSLER, *supra* note 71, at 492-93 (recounting the gradual expansion of the Supreme Court’s appellate jurisdiction); See generally Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1585-99 (1990) [hereinafter Meltzer, *Article III*] (discussing the implications of this gap for the view that federal resolution of constitutional claims is constitutionally required).

250. See, e.g. Baker & Young, *supra* note 170, at 117-18 (arguing that the “political

The internationalists' hostility to this basic aspect of federalism²⁵¹ suggests that their ultimate reliance is not so much on the grant of power over international affairs to Congress but on the absence of any concurrent power in the states. They thus argue that *any* principles of federalism—judicial or otherwise—are simply irrelevant in the context of foreign affairs. I take up that argument in the next two subsections.

2. *Is the Federal Foreign Affairs Power Exclusive?*

Justice Harlan read *Erie* as resting on the principle that “the scheme of our Constitution envisions an allocation of law-making functions between state and federal legislative processes which is undercut if the federal judiciary can make substantive law affecting state affairs beyond the bounds of congressional legislative powers in this regard.”²⁵² This statement is entirely consistent with the account of *Erie* I have urged in the preceding section, so long as we read “the bounds of congressional legislative powers” to include the Article I procedures that federal lawmaking must follow²⁵³ as well as the subjects that federal lawmaking can reach. Professor Koh argues, however, that “with respect to international and foreign affairs law, the Constitution envisions no similar role for state legislative or judicial process.”²⁵⁴ As a result, “[f]ederal judicial determination of most questions of customary international law transpires not in a zone of core state concerns, such as state tort law, but in a foreign affairs area in which the Tenth Amendment has reserved little or no power to the states.”²⁵⁵ Put more crudely, the modern position cannot violate “states’ rights” because the states *have* no rights in this area.

The most extreme statement of this view—although there are many

safeguards” argument is predicated on federal responsiveness to state preferences, for good or ill). Professor Koh is likewise impatient with the “procedural safeguards” of federalism—that is, the procedural hurdles and roadblocks that Articles I and II place in the way of expeditious federal statute- and treaty-making. *See, e.g.*, Koh, *State Law?*, *supra* note 3, at 1852 (complaining that Congress cannot “realistically” hope to monitor the treatment of customary international law by state institutions). But those hurdles and roadblocks are integral to the system, *see* Clark, *Separation of Powers*, *supra* note 60, at 1370-71, and there are good reasons to see *Erie* as concerned with preserving them, *see, e.g.*, Young, *Preemption at Sea*, *supra* note 194, at 337-41 (arguing that broad federal common lawmaking powers untethered to legislative enactments makes federal lawmaking too easy).

251. *See also* Neuman, *supra* note 3, at 385 (identifying political solicitude for “states’ rights” with basic opposition to human rights).

252. *Hanna v. Plumer*, 380 U.S. 460, 474-75 (1965) (Harlan, J., concurring).

253. One would also want to include Article II’s procedures for treaty-making and ratification, as well as Article V’s procedures for constitutional amendment. *See* Clark, *Separation of Powers*, *supra* note 60, at 1342-44.

254. Koh, *State Law?*, *supra* note 3, at 1831.

255. *Id.* at 1831-32.

extreme statements²⁵⁶—occurred in *United States v. Belmont*,²⁵⁷ a case involving a suit by the federal government to recover money deposited by a Russian corporation in a New York bank prior to the nationalization of all such corporations in the wake of the Russian Revolution. The Soviet government had assigned its claim to the money to the United States as part of a diplomatic settlement of the conflicting claims of American and Russian nationals; the bank, however, defended on the ground that the Soviet claim to the money arose out of an act of “confiscation” and was therefore contrary to the public policy of New York. The United State Supreme Court emphatically rejected that argument, asserting that

[p]lainly, the external powers of the United States are to be exercised without regard to state laws or policies. . . . In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the State of New York does not exist.²⁵⁸

As a result, “state constitutions, state laws, and state policies are irrelevant to the inquiry and decision” of cases like *Belmont*.²⁵⁹

With all respect to Mr. Justice Sutherland, that claim was silly when made—and it is even sillier today.²⁶⁰ A political community of 19 million people does not “cease to exist” simply because a lawsuit raises one particular kind of issue rather than another.²⁶¹ The State of New York has the world’s ninth largest economy;²⁶² it now houses the United

256. See, e.g., *United States v. Pink*, 315 U.S. 203, 222-23 (1942) (reiterating the language in *Belmont*); *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889) (“For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.”); *Holmes v. Jennison*, 39 U.S. 540, 575, 14 Pet. 470, 501-02 (1840) (“Every part of [the Constitution] shows that our whole foreign intercourse was intended to be committed to the hands of the general government.”).

257. 301 U.S. 324 (1937).

258. *Id.* at 331.

259. *Id.* at 332. Professor Koh expressly invokes this language from *Belmont* in support of his position. See Koh, *State Law?*, *supra* note 3, at 1847.

260. For a contemporary echo, see HENKIN, *FOREIGN AFFAIRS*, *supra* note 155, at 150 (“At the end of the twentieth century as at the end of the eighteenth, as regards U.S. foreign relations, the states ‘do not exist.’”).

261. Population figures are from 2000 census, posted on the New York State Data Center and available at <http://www.empire.state.ny.us/data_home.html>. Obviously, figures for 1937, when *Belmont* was decided, would be smaller—but they would still be *large*.

262. The ranking is based on 1999 gross domestic/state product figures, available on the New York State Data Center at <http://www.empire.state.ny.us/nysdc/ftp/Economic/GSP_Home.html>; see also Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1249 (1999) (“If they stood as independent nations, seven American states would be counted among the top twenty-five countries in terms of gross domestic product. . . . Subfederal governments now have international economic clout.”).

Nations and the world's most important financial center; it has commercial missions in nine countries and receives 150,000 immigrants each year.²⁶³ *Of course* the State of New York *exists* in international affairs.

Mr. Justice Sutherland was surely aware of these sorts of realities; what he meant was that the State of New York has no formal role in foreign affairs as a legal matter. But the very extravagance of his rhetoric ought to alert us to the excessive formalism of his legal claim. The notion that an entity like New York State could cease to "exist" for certain legal purposes is surely the sort of "transcendental nonsense"²⁶⁴ that the Legal Realists ought to have inoculated us against long ago. Indeed, the notion that there is a conceptual category of "foreign affairs" that is so radically distinct from "domestic affairs" that one can wholly ignore domestic political entities in the former class of cases is precisely the sort of otherworldly notion that the Realists condemned. As Edward White has explained,

Today's judges do not think of themselves as discerning boundaries between the essentialist spheres of federal and state power; most think of themselves as balancing interests, making pragmatic adjustments based on an appreciation of the consequences or extending or contracting the scope of federal law where choice of law or federalism issues are at stake.²⁶⁵

Justice Sutherland's rigid, formal categories thus represent an interpretive methodology that "is no longer in fashion."²⁶⁶

Consider, for example, some recent disputes involving the State of California. For some years, California has calculated its franchise tax on corporations doing business within the state on a "worldwide combined reporting method" that multinational businesses claim is unfair. Despite the fact that foreign nations had protested California's practice, the Supreme Court—without dissent—upheld the practice against a claim that it interfered with the federal government's ability to conduct foreign affairs.²⁶⁷ Similarly, California's Proposition 187 ballot initiative would have sharply curtailed the ability of the state government to

263. A listing of trade missions is available at <<http://www.empire.state.ny.us/ESDOffices.html>>. Immigration estimates are based on 1996 figures available on the Immigration and Naturalization Service web page at <<http://www.ins.usdoj.gov/graphics/aboutins/statistics/310.html>>.

264. See Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

265. White, *supra* note 181, at 1115.

266. *Id.*

267. *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298 (1994).

provide social services to undocumented aliens, including a large group of Mexican immigrants. As Peter Spiro has recounted, the passage of Proposition 187 drew protests and the implicit threat of trade sanctions—not against the United States as a whole, but against California directly—from the Mexican government.²⁶⁸

In both these instances, the State of California did not “cease to exist” because foreign affairs were involved. Both situations illustrate the importance of “state constitutions, state laws, and state policies” as a factor in the nation’s relationship with other countries.²⁶⁹ If Justice Sutherland’s rhetoric in *Belmont* were actually the law, California’s policies on taxation and social benefits would have been declared invalid under the doctrine of “foreign affairs preemption” announced in *Zschernig v. Miller*.²⁷⁰ That doctrine suggests, in keeping with *Belmont*, that state policies are unconstitutional if they have an impact upon or interfere with foreign affairs.²⁷¹ Internationalists, however, seem reluctant to defend *Zschernig*; according to Professor Koh, “*Zschernig* has been appropriately criticized for its failure to delineate clearly when a state’s decision has such broad international repercussions that it should be deemed specifically preempted.”²⁷² This sensible

268. See Spiro, *supra* note 16, at 1261-62.

269. See also Daniel Halberstam, *The Foreign Affairs of Federal Systems: A National Perspective on the Benefits of State Participation*, 46 VILL. L. REV. 1015, 1027-40 (2001) (detailing the broad extend of state and local participation in the foreign affairs arena).

270. 389 U.S. 429 (1968).

271. See *id.* at 441. The *Zschernig* court never identified a specific “test” for preemption, and the Court has not had occasion to apply the doctrine again since *Zschernig*. See HENKIN, FOREIGN AFFAIRS, *supra* note 155, at 165 (observing that *Zschernig* “remains a unique statement and a sole application of constitutional doctrine”). The First Circuit, however, recently employed an aggressive formulation of the doctrine as invalidating any state policies that have “more than an incidental or indirect effect on foreign relations.” *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 52 (1st Cir. 1999), *aff’d on other grounds*, *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000). See also Carlos Manuel Vázquez, *W(h)ither Zschernig?*, 46 VILL. L. REV. 1259, 1262 (2001) (arguing that the Supreme Court’s decision in *Crosby*, although purportedly resting on statutory preemption grounds, was a tacit application of *Zschernig*).

272. Koh, *State Law?*, *supra* note 3, at 1847; see also HENKIN, FOREIGN AFFAIRS, *supra* note 155, at 436 n.64 (observing that the *Zschernig* court “did not build sturdy underpinnings for its constitutional doctrine or face substantial arguments against it”). In at least partial defense of *Zschernig*, however, Professor Koh suggests that *Zschernig* “fell squarely under *Sabbatino*’s rationale.” Koh, *State Law?*, *supra* note 3, at 1847. That seems like a hard statement to support. *Sabbatino* announced a doctrine of judicial self-restraint, withholding decision on the validity of a foreign government’s action in deference to the federal political branches. See *infra* Section II.D.1. *Zschernig*, on the other hand, announced an aggressive *expansion* of judicial power to strike down state laws that did not violate any particular constitutional provision, and the Court did so *despite* the federal Executive’s position that the state law at issue was unobjectionable. See *Zschernig*, 389 U.S. at 434-35 (noting the State Department’s position). For an extended critique of *Zschernig*, see Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617 (1997); Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 1999 NOTRE DAME L. REV. 341 (1999); compare

circumspection on *Zschernig* ought to counsel a retreat from the extravagant rhetoric of *Belmont* as well.²⁷³

Professor Koh acknowledges, moreover, that

[i]n the modern era, situations increasingly arise in which state and national governments exercise overlapping authority, the federal government has arguably condoned state action inconsistent with customary norms of international law, or customary international law and state law rules are insufficiently contradictory for a court to give the former preemptive force.²⁷⁴

This acknowledgement of “overlapping” state and federal authority and the potential legitimacy of state law rules even in areas where customary international law may operate calls into question the entire enterprise of trying to define and police exclusive “foreign” and “domestic” spheres of activity. Indeed, Justice Sutherland’s effort to do exactly that in *Belmont* was part and parcel of his larger commitment—along with the other members of the “Four Horsemen”—to the pre-1937 regime of “dual federalism.” That regime is best known for the Court’s attempt to protect the “local” or state sphere from intrusion by federal regulation.²⁷⁵ *Belmont* makes clear, however, that the same justices²⁷⁶ in the same period were trying to use the same sorts of formal categories to preserve an exclusive *federal* sphere in the area of foreign affairs.²⁷⁷

Vázquez, *supra* note 271, at 1304-23 (defending *Zschernig*).

273. The result in *Belmont*, on the other hand, is sustainable simply as a result of the preemptive effect of the President’s agreement with the Soviet government in that case. The ability of the President to take actions with the preemptive effect of federal law does, of course, raise federalism questions of its own. What limitations, if any, there are on such actions are outside the scope of this article. But any doctrine that requires some politically accountable official to act before preemption may be found is preferable from a federalism perspective to the “dormant” preemption rationales suggested by *Zschernig* and *Belmont*. See Young, *Dual Federalism*, *supra* note 181, at 172.

274. Koh, *State Law?*, *supra* note 3, at 1847-48; see also HENKIN, FOREIGN AFFAIRS, *supra* note 155, at 6 (acknowledging that it is “hardly obvious” that “‘foreign affairs’ can be defined, isolated, distinguished”).

275. See Young, *Dual Federalism*, *supra* note 181, at 146-50.

276. It is telling that Justice Sutherland’s opinion in *Belmont* was joined by the other “Four Horsemen”—Justices Van Devanter, McReynolds, and Butler—as well as Chief Justice Hughes and Justice Roberts. This was the pre-1937 coalition that opposed the New Deal by insisting that the “local” sphere of activity was equally exclusive and impervious to federal regulation. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (Sutherland, J., joined by Van Devanter, McReynolds, Butler, Roberts, and (in part) Hughes) (striking down the Bituminous Coal Conservation Act of 1935). Three justices who had resisted dual federalism in the domestic context—Justices Stone, Brandeis, and Cardozo—refused to accept Justice Sutherland’s reasoning in *Belmont*. See 301 U.S. at 333 (Stone, J., concurring).

277. The doctrine of federal exclusivity continues to have this formal character. The First Circuit’s opinion in the Massachusetts Burma Law case, for example, explicitly framed its

The oddity is that we have not rejected “dual federalism” in foreign affairs despite having demolished it in the domestic arena.²⁷⁸ I have argued elsewhere that “[j]ust as it became impossible by 1937 to isolate ‘manufacturing’ or even ‘intrastate’ activity from the integrated national economy, it is no longer possible in an age of globalization to draw a bright line between ‘foreign’ and ‘domestic’ affairs.”²⁷⁹ At least two different factors have conspired to “problematize” this distinction. One is the integration of economic markets and communication networks.²⁸⁰ Dissenting in *Lopez*, Justice Breyer, for example, was able to trace a persuasive chain of causation all the way from the safety of our schools through the quality of our education to the international competitiveness of our workforce.²⁸¹ Second, as many scholars have pointed out, the central concerns of international law and foreign policy have expanded from the interactions of nation-states with one another to the relationship of nation-states to their citizens.²⁸² This expansion includes not only the increasing prominence of international human rights, but also the new centrality of economic and other non-security issues to

interpretation of *Zschernig* in terms of “direct” and “indirect” effects on foreign affairs. See *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 45-50 (1st Cir. 1999), *aff’d on other grounds*, *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000). Compare *Carter v. Carter Coal Co.*, 298 U.S. 238, 307 (1936) (striking down federal regulation of activity with “indirect” rather than “direct” effects on interstate commerce).

278. See, e.g., Corwin, *supra* note 233, at 17 (observing that the dual federalist system lay “in ruins” by 1950). After 1937, the same New Deal Justices who destroyed the dual federalist system in domestic law embraced the rhetoric of dual federalism in foreign affairs. See *Hines v. Davidowitz*, 312 U.S. 52, 63 (1940) (Black, J.) (“The Federal Government . . . is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties,” while “the several States of the Union exist” for “local interests”); *United States v. Pink*, 315 U.S. 203, 233 (1942) (Douglas, J.) (“Power over external affairs is not shared by the States; it is vested in the national government exclusively.”) As with most cases in this area, these decisions can actually be read to stand for much narrower positions that the quoted rhetoric suggests. See, e.g., Young, *Dual Federalism*, *supra* note 181, at 176-77 n. 245 (discussing *Hines*).

279. Young, *Dual Federalism*, *supra* note 181, at 141.

280. See, e.g., ROBERT GILPIN, *THE CHALLENGE OF GLOBAL CAPITALISM* 19-20 (2000) (observing that the integration of national markets will make national economies more and more susceptible to the effects of actions in other nations); THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* xi-xv (2000) (recounting how the collapse of Thailand’s currency contributed to the failure of domestic business ventures in the United States).

281. *United States v. Lopez*, 514 U.S. 549, 621 (1995) (Breyer, J., dissenting). The *Lopez* majority rightly rejected this argument, but not on the grounds that Justice Breyer’s account was factually implausible. Rather, it proved *too much*; if the reach of Congress’s commerce power were allowed to turn on such facts, then there would be nothing left that Congress could *not* regulate. See *id.* at 641 (majority opinion).

282. See, e.g., Bradley, *Treaty Power*, *supra* note 16, at 396-97; Gerald L. Neuman, *The Nationalization of Civil Liberties, Revisited*, 99 COLUM. L. REV. 1630, 1649 (1999); Paul B. Stephan, *The New International Law—Legitimacy, Accountability, and Freedom in the New Global Order*, 70 U. COLO. L. REV. 1555, 1556-57 (1999).

nations' foreign policy agendas.²⁸³ One need not linger over the question whether "foreign" and "domestic" were *ever* wholly distinct, or when their convergence reached a critical mass,²⁸⁴ in order to conclude that a rigid dichotomy between the two no longer makes sense.²⁸⁵

Modern internationalist scholarship embraces this trend to the extent that it seeks to apply international norms to activities—like a state's death penalty regime—that would previously have been thought to be "domestic" in nature.²⁸⁶ As Peter Spiro has written,

Globalization makes everything international. There is hardly an area of the law that can be fully understood (or taught) without some reference to international law and institutions; in some areas, such as environmental and intellectual property law, the international content now looms large, and even in such traditionally domestic subjects as family, labor, bankruptcy, and criminal law, one finds increasingly significant international components.²⁸⁷

In such a world, however, a rule of exclusive federal power for everything "touching on" or "affecting" foreign affairs is simply unthinkable. Are we to oust the states from regulating family law simply because a state's compliance with so-far unratified provisions of the International Convention on the Rights of the Child (which may, under

283. See, e.g., Ivo D. Duchacek, *Perforated Sovereignities: Towards a Typology of New Actors in International Relations*, in *FEDERALISM AND INTERNATIONAL RELATIONS: THE ROLE OF SUBNATIONAL UNITS* 1, 2 (Hans J. Michelmann & Panayotis Soldatos eds., 1990) [hereinafter *FEDERALISM AND INTERNATIONAL RELATIONS*] ("Today . . . trade, investment, technology and energy transfers, environmental and social issues, cultural exchanges, migratory and commuting labour, and transfrontier drug traffic and epidemics have forced their way on to the foreign-policy agenda"); David E. Sanger, *A Grand Trade Bargain*, *FOREIGN AFFAIRS*, Jan./Feb. 2001, at 65 (arguing that the Clinton administration sought to "reorient American foreign policy" by putting "America's commercial interests—promoting exports and opening markets—on par with the country's traditional security interests"); Steven R. Ratner, *International Law: The Trials of Global Norms*, *FOREIGN POLICY*, Spring 1998, at 65, 75 (observing that "trade law is becoming the locus of many critical areas of foreign policy"); see generally Young, *Dual Federalism*, *supra* note 181, at 180-82.

284. Cf. *1492 and All That*, *THE ECONOMIST*, Aug. 25, 2001, at 61 (surveying recent debates about when trends toward global economic integration really began).

285. See, e.g., ROBERT O. KEOHANE & JOSEPH S. NYE, *POWER AND INTERDEPENDENCE* 236 (2d ed. 1989) (observing that "many of the relevant policy decisions in situations of complex interdependence will appear in traditional political perceptions to be domestic rather than foreign").

286. See, e.g., Brilmayer, *Preemptive Power*, *supra* note 6, at 297 ("States . . . cannot be considered exempt from international law on the grounds that what they do is not of international law's concern.").

287. Peter J. Spiro, *Globalization, International Law, and the Academy*, 32 *N.Y.U. J. INT'L L. & POL.* 567, 578 (2000).

some theories, have already become “binding” customary law)²⁸⁸ may have an effect on American foreign relations?²⁸⁹ Surely not. The theory of federal exclusivity is implausible because it proves too much.

Just as the expansion of the federal interstate commerce power during the New Deal cemented the presumption that states exercise concurrent power over such commerce,²⁹⁰ so, too, the expansion of the “international” will require the recognition of concurrent state authority in many areas that now raise foreign affairs concerns. A growing political science literature on globalization thus reaches the somewhat counterintuitive conclusion that the role of subnational governments will likely *expand*, rather than contract, as more issues take on international overtones.²⁹¹ To be sure, this overlap may lead to all sorts

288. See, e.g., Susan H. Bitensky, *Spare the Rod, Embrace Our Humanity: Toward a New Legal Regime Prohibiting Corporal Punishment of Children*, 31 U. MICH. J.L. REF. 353, 391 (1998) (“The Convention of the Child has arguably become customary international law, applicable even to non-parties such as the United States, because it was adopted by consensus of the U.N. General Assembly and has been ratified by an overwhelming majority of nations.”).

289. See, e.g., Sister Mary Rose McGeady, *The International Need for U.S. Ratification of the U.N. Convention on the Rights of the Child*, 5 GEO. J. ON FIGHTING POVERTY 253, 254-55 (1998) (suggesting that U.S. failure to ratify the Convention may undermine the credibility of the national government as it seeks to encourage acceptance of and compliance with human rights principles in this and other areas).

290. See Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 801-06 (1994). Professor Gardbaum demonstrates that in the pre-New Deal period, when the scope of the Commerce Clause was relatively narrow, federal legislation in a given area was presumptively deemed to preempt the field. See *id.* at 801; *Southern Ry. Co. v. Reid*, 222 U.S. 424, 436 (1912). As the commerce power radically expanded after 1937, however, the Court moved to an opposite presumption *against* preemption. See Gardbaum, *supra*, at 806; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). “In this context of a revolutionary extension of federal legislative competence,” Gardbaum writes, “the consequence of the preexisting preemption doctrine (established while there were still significant areas of exclusive state jurisdiction) would have been to threaten vast areas of state regulation of seemingly local matters with extinction.” Gardbaum, *supra*, at 806.

A similar, and even more directly relevant, compensating movement may have contributed to *Erie* itself. Edward Purcell’s history of *Erie* describes Chief Justice Charles Evans Hughes’ decision to join the *Erie* opinion in terms similar to Gardbaum’s: “Sensitive to the need to preserve local law in the midst of the New Deal’s centralizing drive, Hughes may also have seen termination of the federal common law as a useful balance to the Court’s decisions of the previous year that had substantially expanded federal power.” PURCELL, *supra* note 203, at 103.

291. See, e.g., Jong S. Jun & Deil S. Wright, *Globalization and Decentralization: An Overview*, in GLOBALIZATION AND DECENTRALIZATION: INSTITUTIONAL CONTEXTS, POLICY ISSUES, AND INTERGOVERNMENTAL RELATIONS IN JAPAN AND THE UNITED STATES 1, 3-4 (Jong S. Jun & Deil S. Wright eds., 1996); Earl H. Fry, *The U.S. States and Foreign Economic Policy: Federalism in the ‘New World Order,’* in FOREIGN RELATIONS AND FEDERAL STATES 122 (Brian Hocking ed., 1993) [hereinafter FOREIGN RELATIONS AND FEDERAL STATES]; Brian Hocking, *Introduction*, in FOREIGN RELATIONS AND FEDERAL STATES, *supra*, at 3; John Kincaid, *Constituent Diplomacy in Federal Politics and the Nation-state: Conflict and Co-operation*, in FEDERALISM AND INTERNATIONAL RELATIONS, *supra* note 283, at 54, 73. For legal academics expressing a similar view, see, e.g., Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. (forthcoming April 2002) [hereinafter Spiro, *Globalization*]

of confusion and coordination problems.²⁹² But those problems will not be avoided by pretending that the world has not changed or that “foreign affairs” can be cabined to a manageable zone of federal exclusivity.²⁹³

3. *Federal Exclusivity, Concurrent Jurisdiction, and the Original Structure of Judicial Power in Foreign Affairs Cases*

I hope to have shown in the preceding subsection that a regime of exclusive federal power is unworkable under modern conditions. In this subsection, I argue that the Founders never sought to create such a system.²⁹⁴ To be sure, they did seek to strengthen the ability of the national government to conduct a coherent foreign policy and respond effectively to crises in international affairs.²⁹⁵ But internationalists have surely exaggerated the extent to which this commitment should be read to eclipse other concerns. Ryan Goodman and Derek Jinks claim, for example, that “the Framers held the Constitutional Convention in large part due to the perceived inability of the Confederation to uphold American obligations under international law.”²⁹⁶ Similarly, Beth Stephens asserts that “[w]hen they set about drafting a Constitution to reformulate the terms of the union, the framers focused on the need to ensure federal control over enforcement of the law of nations.”²⁹⁷ These sorts of claims, however, seem like examples of the natural tendency to exaggerate the centrality of one’s own subject. After all, judges and scholars have said the same thing about the need to avoid economic Balkanization, to secure the federal credit and revenue, and to protect property (just to name a few other “central purposes”).²⁹⁸ I suspect that

(arguing that globalization will bring about the end of federal exclusivity in foreign affairs); Mark Tushnet, *Globalization and Federalism in a Post-Printz World*, 36 TULSA L.J. 11, 18 (2000) (observing that there is “no necessary connection between globalization and centralization”).

292. See Young, *Dual Federalism*, *supra* note 181, at 184.

293. Indeed, attempts to preserve the federal monopoly may exacerbate the confusion. See Hans J. Michelmann, *Conclusion*, in FEDERALISM AND INTERNATIONAL RELATIONS, *supra* note 283, at 299, 313 (observing that attempts by central government officials “to monopolize interactions with foreign entities . . . would lead to bottlenecks in communications, inflexibility in reactions to commercial and other opportunities abroad . . . and ill-informed responses to international stimuli when the domestic expertise resides, as it not infrequently does, in public bureaucracies outside the national capital”); see also Spiro, *Globalization*, *supra* note 291, (making a similar point).

294. Compare, e.g., Koh, *State Law?*, *supra* note 3, at 1846 (acknowledging that the modern position does transfer constitutional authority from the states to courts and international actors, but insisting that “that transfer of authority did not take place recently . . . but at the beginning of the Republic”).

295. See, e.g., THE FEDERALIST NO. 3, at 43-45 (John Jay) (Clinton Rossiter ed., 1961).

296. Goodman & Jinks, *supra* note 3, at 464.

297. Stephens, *supra* note 3, at 404.

298. See, e.g., *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979) (asserting that the need to

the Constitution had *many* “central” or “primary” purposes; among the others were protecting individual rights and dividing and limiting governmental power.²⁹⁹

We should likewise avoid over-reliance on extravagant general statements from members of the Founding Generation—particularly when we are addressing issues of institutional detail. For example, Professor Stephens highlights Thomas Jefferson’s statement that “[m]y general plan would be to make the States one as to everything connected with foreign nations, and several as to everything purely domestic.”³⁰⁰ Putting aside Jefferson’s dubious status as a Framers³⁰¹ and his statement’s reliance on conceptions of dual federalism that later turned out to be unworkable,³⁰² the real problem with this idea is that it does not reflect what the Framers actually *did*. The Constitution’s provisions governing foreign affairs cannot be reduced to any such simple principle, and they do not fit well with a doctrine of federal exclusivity. Such statements are correct, of course, for the general purposes for which they were uttered; the Constitution *does* generally tend to centralize control over foreign affairs in the federal government. But for difficult questions of institutional detail—such as the precise status of customary international law in the system—these generalities tell us little.

The actual text of the Constitution does not mention a general “foreign affairs power.” Rather, it parcels a number of particular foreign affairs *powers* to the President³⁰³ and to Congress,³⁰⁴ and it forbids the exercise of certain other foreign affairs prerogatives by the States.³⁰⁵

avoid “economic Balkanization” was “a central concern of the Framers that was an immediate reason for calling the Constitutional Convention”); Calvin Johnson, *Reigning in the Rogue States* (unpublished manuscript) (arguing that the need to secure reliable federal revenue and payment of federal debts was the central motivating purpose of the Constitution); Andrew S. Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis “Goes Too Far,”* 49 AM. U. L. REV. 181, 195 (1999) (“For many of the Framers, protection of property was the most important, or one of the most important, purposes of the Constitution.”).

299. THE FEDERALIST No. 51, *supra* note 295, at 322 (James Madison).

300. Letter to Edward Carrington (Aug. 4, 1787) (quoted in Stephens, *supra* note 3, at 404).

301. He participated in neither the Philadelphia Convention nor any ratification debates, as he was in France for the relevant period.

302. See Young, *Dual Federalism*, *supra* note 181, at 143-50; *supra* Section II.C.2.

303. See, e.g., U.S. CONST. art. II, § 2 (making the President the Commander in Chief of the military and authorizing him to make treaties and appoint ambassadors).

304. See, e.g., U.S. CONST. art. I, § 8 (conferring on Congress the power to regulate international commerce and immigration; to define and punish piracy and offenses against the law of nations; and to declare War, grant letters of marque, and regulate captures); *id.* art. II, § 2 (giving the Senate the power to ratify treaties and confirm ambassadors).

305. See, e.g., U.S. CONST. art. I, § 10 (forbidding the states to make treaties and alliances or grant letters of marque; to lay imposts or duties on imports or exports; or to keep a military or engage in war with foreign powers). Some of these prohibitions, however, are not as absolute as

Advocates of a general “foreign affairs power” have thus had to look elsewhere, as Justice Sutherland (the champion of dual federalism) did in *United States v. Curtiss-Wright Corp.*³⁰⁶ But Justice Sutherland’s notion of “powers inherent in sovereignty” has been subjected to withering criticism.³⁰⁷ In any event, the Constitution provides specifically for adjudication of international law cases and for incorporation of international law. Unless we are to read these provisions out of the Constitution, we must attend to their intricacies rather than relying on blanket “powers inherent in sovereignty.”³⁰⁸ And these provisions strongly suggest a concurrent role for state institutions—particularly state courts—in the adjudication of international law cases and the incorporation of international law.

Professor Stephens demonstrates that “the framers sought to design a system of government in which the federal government would have the power to guarantee the enforcement of the law of nations.”³⁰⁹ They

one might think. The states can lay duties or imposts on imports or exports where they are “absolutely necessary for executing its inspection Laws,” *id.*; they arguably can raise military forces in wartime, *compare id.* (forbidding such activity “in time of Peace”); and they can “engage in War” if they are “actually invaded, or in such imminent Danger as will not admit of delay,” *id.* It is hard to imagine the states taking on such an independent military role today, but that is because of current institutional and political realities—not because the constitutional text forbids it.

306. 299 U.S. 304 (1936).

307. See Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 70 GEO. WASH. L. REV. (forthcoming 2002) [hereinafter Cleveland, *Powers Inherent in Sovereignty*]. Professor Henkin collects many of these criticisms and acknowledges their force. See HENKIN, FOREIGN AFFAIRS, *supra* note 155, at 18-22. In particular, he admits that the proposition that “the new United States government was to have major powers outside the Constitution is not intimated in the Constitution itself, in the records of the Convention, in the Federalist Papers, or in contemporary debates.” *Id.* at 19-20. Moreover, “[t]he Sutherland theory requires that a panoply of important powers be deduced from unwritten, uncertain, changing concepts of international law and practice, developed and growing outside our constitutional tradition and our particular heritage.” *Id.* at 20. He nonetheless—in what is frankly an extraordinary statement—suggests that “[s]tudents of the Constitution may have to accept Sutherland’s theory, with its difficulties, or leave constitutional deficiencies unrepaired.” *Id.* This is tantamount to saying that the results permitted by Sutherland’s theory are so important that the Constitution need not be followed.

308. Professor Neuman concedes that Justice Sutherland’s theory in *Curtiss-Wright* “remains controversial.” Neuman, *supra* note 3, at 375 n.24. He relies upon it, however, for “the modern trend toward a unified conception of the federal foreign affairs powers, as opposed to the clause-by-clause parsing exhibited in portions of [Bradley & Goldsmith].” *Id.* I will engage in some similar “clause-by-clause parsing” here, and I have expressed cautions about grand unified theories elsewhere. See Adrian Vermeule & Ernest A. Young, *Hercules, Herbert, and Amar: The Trouble with Intratextualism*, 113 HARV. L. REV. 730, 739-59 (2000). For present purposes, it is sufficient to note that without actually undertaking to defend Justice Sutherland’s more general theory of the foreign affairs power, internationalists do not have a good answer to the criticism that the shift away from the Constitution’s particular foreign affairs provisions simply covers a usurpation of powers not granted in the document.

309. Stephens, *supra* note 3, at 405.

pursued two distinct strategies to this end. The first conferred power on the federal courts to hear cases with international implications,³¹⁰ the second conferred power on Congress to federalize the law of nations by “defin[ing] and punish[ing]” offenses against it.³¹¹ As Congress made relatively little use of the latter strategy, my discussion here will focus on the provision for judicial jurisdiction. It is important to keep the potential availability of uniform federal substantive rules under the “define and punish” power in mind, however, as it helps put what Congress *did* do in perspective.

Article III provided for federal jurisdiction over cases implicating international affairs according to two sets of criteria: the subject matter of the suit, and the parties involved. The most obvious subject matter grant covered cases “arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.”³¹² The Supremacy Clause made treaties “the supreme Law of the Land”;³¹³ the Constitution did *not*, however, seek to exclude the state courts from enforcing them. Indeed, by leaving the decision whether to establish inferior federal tribunals to Congress, the famous “Madisonian Compromise” necessarily contemplated that most of the cases over which Article III conferred jurisdiction might be heard initially in the state courts.³¹⁴ And although Congress did, in fact, decide to create lower federal courts, Congress did not confer general “arising under” jurisdiction upon them until 1875.³¹⁵ The founding generation must, therefore, have contemplated that the state courts could play a role in the enforcement of the United States’ international obligations.

The most important aspect of federal judicial power in “international” cases, however, was probably the subject matter grant of admiralty jurisdiction.³¹⁶ As Alexander Hamilton observed in *Federalist No. 80*:

The most bigoted idolizers of State authority have not thus far shown a disposition to deny the national judiciary the cognizance

310. *See id.* at 407 (“The intent of the framers was to ensure national control over foreign affairs, in part by assigning the federal courts jurisdiction over such matters.”).

311. *See* U.S. CONST. art. I, § 8.

312. *Id.* art. III, § 2.

313. *See id.* art. VI, cl. 2.

314. *See* HART & WECHSLER, *supra* note 71, at 8-9, 348.

315. *See id.* at 29-30, 33, 349, 879-81. The exception is the “Midnight Judges” bill, in which the outgoing Federalist Congress provided for general federal question jurisdiction in 1801 as part of their strategy to retain power after their defeat by the Jeffersonian Republicans in the 1800 elections. *See* Act of February 13, 1801, § 2, 2 Stat. 89. The Act was repealed by the Republican Congress a year later, *see* Act of March 8, 1802, 2 Stat. 132; HART & WECHSLER, *supra* note 71, at 349 n.1.

316. *See, e.g.*, HART & WECHSLER, *supra* note 71, at 15 (noting that “it was in the admiralty jurisdiction that disputes with foreigners were most likely to arise”).

of maritime causes. These so generally depend on the laws of nations and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace.³¹⁷

James Madison echoed this sentiment, stating that federal courts should have “exclusive jurisdiction” over “the exposition of treaties, . . . cases affecting ambassadors and foreign ministers, [and] admiralty and maritime cases” because “our intercourse with foreign nations will be affected by decisions of this kind.”³¹⁸

It is important to understand two things about the admiralty grant, which in turn shed light on the question of federal exclusivity. The first is that Madison did not get his wish that admiralty jurisdiction be exclusively federal. Despite the Madisonian Compromise, admiralty turned out to be an area where all agreed lower federal courts were necessary, and federal admiralty courts were promptly established. But the first Judiciary Act explicitly qualified its exclusive grant of federal maritime jurisdiction by “saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it.”³¹⁹ The upshot of this language is that admiralty jurisdiction is *concurrent*—i.e., shared by state and federal courts—except in certain narrow classes of cases.³²⁰

The second point is that neither the Constitution nor any statute purported to make the law applied in maritime cases *federal* in nature. Indeed, the Constitution did not even confer *legislative* power on Congress to make law in the maritime area, outside the narrow compass of prize and criminal cases.³²¹ Courts in the late eighteenth and early

317. THE FEDERALIST NO. 80, *supra* note 295, at 478 (Alexander Hamilton). Hamilton went on to note that “[t]he most important part of them [admiralty cases] are by the present Confederation, submitted to federal jurisdiction,” *id.*, —an indication that he was thinking about prize cases, since that was the limit of the preexisting federal jurisdiction. See Clark, *Federal Common Law*, *supra* note 25, at 1337 & n.440; Young, *Preemption at Sea*, *supra* note 194, at 315-16.

318. 3 ELLIOT’S DEBATES 532 (2d ed. 1836) (statement of James Madison, Virginia Convention).

319. Judiciary Act of 1789, ch. 20, § 9(a), 1 Stat. 73, 77 (1789). For the modern version, see 28 U.S.C. § 1333 (1994) (“saving to suitors in all cases all other remedies to which they are otherwise entitled”).

320. See Young, *Preemption at Sea*, *supra* note 194, at 282-84; GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY § 1-13 (2d ed. 1975).

321. Congress’s power to enact maritime statutes like the Jones Act has—weirdly—been inferred from the grant of *judicial* jurisdiction in Article III. See *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 386 (1924); Note, *From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century*, 67 HARV. L. REV. 1214, 1230-37 (1954). This matters little, however, as it is hard to think of any maritime statutes that could not be justified under the Commerce Clause. See Young, *Preemption at Sea*, *supra* note 194, at 281 & n.55.

nineteenth centuries seem to have treated maritime law as “general” in nature.³²² This is not surprising, given that the maritime law and the general commercial law or “law merchant” both derived from similar sources in the law of nations.³²³ The central foreign affairs concerns that motivated Article III’s grant of federal admiralty jurisdiction thus did *not* require either exclusive federal jurisdiction to decide admiralty cases or a federal set of substantive rules to govern them. This in itself seems like fairly compelling evidence against a notion of federal exclusivity in the enforcement and incorporation of international law.

The Constitution’s arrangements for other sorts of international cases are even more compelling. As Beth Stephens has recounted, early drafts of Article III referred to cases that “arise . . . on the Law of Nations”; this reference was later removed, however, and replaced with a set of primarily *party*-based provisions.³²⁴ This was an important choice, because the concerns addressed by a law-based regime and a party-based regime are not identical. If the Framers’ central concern involved compliance with international law, regardless of who the parties were, then the initial formulation of Article III would have been the better approach. The choice of a party-based regime instead thus indicates a more central concern with offence to foreign nations by mistreatment of

322. See, e.g., *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 545-46 (1828) (Marshall, C.J.) (“A case in admiralty does not, in fact, arise under the Constitution or laws of the United States. These cases are as old as navigation itself; and the law, admiralty and maritime, as it has existed for ages, is applied by our Courts to the cases as they arise.”). Despite *Canter*’s unequivocal statement, there is very little direct discussion of the status of the maritime law in the nineteenth-century case law. See Young, *Preemption at Sea*, *supra* note 194, at 318. I have surveyed what I think to be compelling circumstantial evidence of admiralty’s “general law” status in Young, *Preemption at Sea*, *supra* note 194, at 318-25. See also DAVID W. ROBERTSON, *ADMIRALTY AND FEDERALISM: HISTORY AND ANALYSIS OF PROBLEMS OF FEDERAL-STATE RELATIONS IN THE MARITIME LAW OF THE UNITED STATES* 138 (1970) (“It is clear that as to maritime matters the prevailing assumption has been that the constitutional grant of admiralty jurisdiction to the federal courts presupposed the existence of an at-large body of substantive principle to be drawn upon in deciding maritime cases.”); Clark, *Federal Common Law*, *supra* note 25, at 1280 (noting that the “law maritime” was considered a branch of the general law of nations in the Founding Era). Those who disagree with my ultimate conclusions on maritime law (and those dissenters are legion) have not generally disputed this point. See, e.g., Jonathan M. Gutoff, *Federal Common Law and Congressional Delegation: A Reconceptualization of Admiralty*, 61 U. PITT. L. REV. 367, 385 (2000) (conceding the “general” status of maritime law in the Founding Era).

323. See, e.g., Clark, *Federal Common Law*, *supra* note 25, at 1280-81 (explaining that “[t]he law of nations had three principal branches—the law merchant, the law maritime, and the law governing the rights and duties of sovereign states”); Fletcher, *supra* note 27, at 1517 (“The law merchant, usually described as part of the common law, was the general law governing transactions among merchants in most of the trading nations in the world. The maritime law was an even more comprehensive and eclectic general law than the law merchant.”).

324. See Stephens, *supra* note 3, at 407. The one exception to this party-based approach was, as I have discussed, the admiralty jurisdiction.

their citizens in state judicial proceedings. Alexander Hamilton reasoned that “[a]s the denial or perversion of justice by the sentences of courts . . . is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned.”³²⁵ Hamilton went on to explicitly reject any “distinction . . . between cases arising upon treaties and the laws of nations and those which may stand merely on the footing of the municipal law”; judicial mistreatment of an alien in either sort of case might give the feared offense, and therefore federal jurisdiction should depend on party rather than source of law.³²⁶

It may be, as Professor Stephens and others have urged, that “contemporaries viewed the list [of party-based heads of jurisdiction] as covering the entire field of cases implicating relations with other nations and their citizens.”³²⁷ Nonetheless, the way in which the field was covered yields important implications for the customary international law debate. First and foremost, the structure reveals no contemporaneous understanding that “the law of nations” was a part of federal law; otherwise discussion would have centered around the “arising under” head of jurisdiction in Article III. Nor does the structure reveal a uniform federalized version of international law was thought necessary in order to protect American foreign policy interests. Instead, discussion focused on the availability of a federal *forum* to apply whatever law—state, federal, or “general”—might be applicable in the case.³²⁸

Second, the structure is primarily concerned with making a federal forum *available*—not with excluding state court jurisdiction over cases that might affect foreign relations.³²⁹ Article III guaranteed federal jurisdiction in the first instance only for those cases “affecting Ambassadors, other public Ministers and Consuls,” which fell within the original jurisdiction of the Supreme Court.³³⁰ Provision for original federal court jurisdiction over all other cases involving foreign nationals was left to Congress pursuant to the Madisonian Compromise. And

325. THE FEDERALIST NO. 80, *supra* note 295, at 476.

326. *Id.* at 476-77.

327. Stephens, *supra* note 3, at 407-08.

328. See THE FEDERALIST NO. 80, *supra* note 295, at 476-77; Casto, *Protective Jurisdiction*, *supra* note 71, at 521 (observing that “Hamilton, like Jay [in Federalist No. 3], was concerned primarily with infractions of treaties and of the law of nations, but he expressly refused to draw a distinction between the law of nations and domestic law”).

329. See Casto, *Protective Jurisdiction*, *supra* note 71, at 508-09 (discussing the general presumption that the states retain concurrent jurisdiction unless divested by Congress, and noting that “the Supreme Court has never suggested that, in the absence of implementing legislation, considerations of foreign policy pre-empt state court subject matter jurisdiction”).

330. U.S. CONST. art. III, § 2, cl. 2.

although Congress did in fact provide for lower courts to hear these party-based suits from the first Judiciary Act on, it was content to leave the state courts with concurrent jurisdiction in many important respects.³³¹

The original version of the Alien Tort Claims Act, for example, explicitly made federal jurisdiction “concurrent with the courts of the several states.”³³² And the Judiciary Act’s provision for alien-citizen diversity jurisdiction provided that state court jurisdiction would be *exclusive* where the amount in controversy was less than \$500.³³³ According to Anne-Marie Burley, “[t]his requirement reflected a necessary compromise with the Anti-Federalists, many of whom had opposed the Diversity Clause in the constitutional debates and regarded the alienage provision as a particular affront to the integrity of state courts.”³³⁴ It was of considerable practical importance, moreover; as William Casto has pointed out, most tort suit damage awards at the time fell below that amount.³³⁵ Neither the Constitution itself nor the first

331. State courts have always had concurrent jurisdiction over cases in which ambassadors, foreign consuls and vice-consuls were *plaintiffs*. See 28 U.S.C. §§ 1251, 1351 (1994); see also Casto, *Protective Jurisdiction*, *supra* note 71, at 468 n.4 (citing a rare instance in which an ambassador chose to bring a tort claim in state court in 1797). Moreover, they had concurrent jurisdiction over cases *against* consuls and vice-consuls from 1875 to 1911. See, e.g., HART & WECHSLER, *supra* note 71, at 335. Most important, the alien-citizen diversity jurisdiction has never been exclusively federal; rather, as in diversity cases generally, the plaintiff has an initial forum choice, subject to the defendant’s potential right of removal. See *id.* at 30-31.

332. Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (1789). Professor Casto points out, moreover, that the 1878 revision’s elimination of this language “should not be read as making the district courts’ jurisdiction exclusive, because the plan of the Revised Statutes was to enact a single section consolidating all instances of exclusive federal jurisdiction” which did not include the ATCA. Casto, *Protective Jurisdiction*, *supra* note 71, at 468 n.4. Indeed, Casto suggests that any effort to exclude the states from ATCA-type cases would be unworkable, due to the difficulty of drawing a manageable line between ordinary torts and those that violate the law of nations. See *id.* at 509.

333. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 (1789).

334. Burley, *supra* note 66, at 466. Professor Burley illustrates the flavor of the Anti-federalist objection by quoting George Mason: “Cannot we trust the state courts with disputes between a Frenchman, or an Englishman, and a citizen; or with disputes between two Frenchmen? This is disgraceful; it will annihilate your state judiciary; it will prostrate your legislature.” 3 ELLIOT’S DEBATES, *supra* note 318, at 527, *quoted in* Burley, *supra* note 66, at 466 n.22.

335. Casto, *Protective Jurisdiction*, *supra* note 71, at 497 n.168. The ATCA—which lacked an amount in controversy requirement—may well have been designed to plug this hole for tort cases. See *id.* at 497. But as Professor Burley points out, the combined alien diversity and ATCA provisions still left important classes of claims in state court. See Burley, *supra* note 66, at 466-68. In particular, neither statute covered most suits against American debtors by British creditors—a class of cases that “had created continuing friction with Great Britain, providing the British Government with an excuse to escape its own obligations under the [1783 Peace] Treaty.” *Id.* at 467; see also Casto, *Protective Jurisdiction*, *supra* note 71, at 507-08 (agreeing that the jurisdictional scheme was designed to exclude these cases).

Judiciary Act, then, suggests any intent categorically to exclude the state courts from involvement in cases implicating international affairs.³³⁶

This second point is particularly important when viewed in conjunction with the first: If Congress did not provide any uniform *substantive* law to govern cases with international implications, *and* it left the state courts with concurrent jurisdiction to decide such cases, then the founding generation must have anticipated that the state courts would end up, in many instances, either applying their own law or their own interpretations of the law of nations. Neither of these sorts of law would be subject to Supreme Court review.³³⁷ It is therefore too much to say, as Professor Stephens does, that “[i]nternational law could not be left to the diverse decisions of the states and their judiciaries, for the states were neither responsible for its implementation nor accountable on an international level for its violation.”³³⁸ The Framers no doubt anticipated that most adjudication of international norms would take place in federal courts, and this may well be how things played out in practice. But the Constitution provided no guarantee of federal uniformity in this area, and the Judiciary Act left too many holes to support an intent to exclude the potential for state court interpretation and application of international norms.

The Constitution did, of course, provide a remedy for the disuniformities that might result from state court activity by providing for the *second* strategy that I mentioned earlier: Congress was empowered under Article I to “define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations,” as well as to “make Rules concerning Captures on Land and Water.”³³⁹ This provision surely gives Congress broad power to federalize rules of customary international law.³⁴⁰ But it also strongly implies that the choice to federalize or not to federalize is left to Congress—not the federal courts. Certainly the constitutional structure cannot be read as supporting a categorical federalization of *all* international law rules, without any action by Congress, or a categorical exclusion of state courts and state law from cases bearing on international affairs.

336. See also Casto, *Protective Jurisdiction*, *supra* note 71, at 508 n.232 (noting that “[b]oth before and after the Judiciary Act’s passage, the state courts provided criminal sanctions for violations of the law of nations”); Henkin, *Chinese Exclusion*, *supra* note 144, at 868-69 n. 70 (observing that, in the founding era, “state courts of appropriate jurisdiction were, and presumably still are, open to suits in tort for violations of international law”).

337. See *infra* note 348 and accompanying text.

338. Stephens, *supra* note 3, at 412.

339. U.S. CONST. art. I, § 8, cls. 10-11.

340. For present purposes, I need not consider whether there may be any substantive restrictions on this power. Cf. Bradley, *Treaty Power*, *supra* note 16, at 450-61 (reviewing various options in the parallel case of the treaty power).

Justice Sutherland said in *Belmont*—and internationalist academics never tire of repeating³⁴¹—that “[g]overnmental power over external affairs is not distributed, but is vested exclusively in the national government.”³⁴² With respect to the decision of cases with international implications and the incorporation of international law, however, this statement is seriously misleading. It is accurate *only* if we take it as an assertion about the *potential* reach of federal power. That is, Congress (probably) could employ its Article I “define and punish” power to articulate an exclusive list of international principles and incorporate them into federal law, preempting any state power to recognize and apply other aspects of international law by way of their own choice of law rules. Congress could then vest exclusive jurisdiction to apply these federalized international law principles in the federal courts. Justice Sutherland would not yet be home free: Congress would still have to vest exclusive *party*-based jurisdiction over ambassadors and the like in the federal courts and perhaps, pursuant to its foreign commerce power, preempt the state courts from hearing alien vs. alien cases as well.³⁴³ Needless to say, Congress has not chosen to do any of these things. And so it is simplest to say that Justice Sutherland was just wrong.

4. *Supreme Court Review and the Problem of Uniformity*

Professor Koh’s final argument for distinguishing *Erie* is not so much a claim about *Erie*’s meaning as a concern about the consequences of its application. Koh argues that “to treat determinations of customary international law as questions of state law would have rendered both state court and federal diversity rulings effectively unreviewable by the U.S. Supreme Court.”³⁴⁴ “Such unreviewability,” he worries, “would have raised the specter that multiple variants of the same international law rule could proliferate among the several states.”³⁴⁵ This is not a stand-alone argument. It does not provide an account of *Erie*’s rationale that would render it inapplicable in cases involving customary

341. See, e.g., Stephens, *supra* note 3, at 406; Neuman, *supra* note 3, at 375; Koh, *State Law?*, *supra* note 3, at 1847; Louis Henkin, *Provisional Measures, U.S. Treaty Obligations, and the States*, 92 AM. J. INT’L L. 679, 682-83 (1998); Daniel M. Price & John P. Hannah, *The Constitutionality of United States State and Local Sanctions*, 39 HARV. INT’L L.J. 443, 455 (1998).

342. *United States v. Belmont*, 301 U.S. 324, 330 (1937).

343. Even this is plainly not enough if we broaden our perspective to take in foreign affairs generally. In order to fully oust the states from “external affairs,” Congress would need to codify—since the courts are unlikely to ever fully enforce—the *Zschernig* doctrine, so that any state activity that affects foreign relations is preempted. In an age of globalization, of course, that could well paralyze state governments in many areas.

344. Koh, *State Law?*, *supra* note 3, at 1832.

345. *Id.*

international law; rather, it provides a policy justification for preferring such an account—if it is otherwise available and plausible in its own right—over one that would not accord federal-law status to customary international norms.

Nonetheless, a few observations about the uniformity argument are in order. First, it is undisputed (except by a few outliers³⁴⁶) that the intolerable situation that Professor Koh posits was the law for much, if not all, of the nineteenth century. As Koh himself acknowledges, federal courts in that period “construed both commercial and noncommercial rules of customary international law” as “part of the ‘general common law’ to be interpreted by federal courts sitting in diversity jurisdiction.”³⁴⁷ Part of what made this law “general” was that it did not create appellate jurisdiction in the Supreme Court. Judge Fletcher has observed, “[s]tate courts generally followed common law decisions by the United States Supreme Court, but they were quite explicit in stating that they did not do so because of any legal compulsion.”³⁴⁸ As a result, it is hard to believe that the unreviewability of state court decisions applying customary norms would “have raised [a] specter” that would have frightened the founding generation.³⁴⁹

The second point is that Professor Koh’s uniformity argument is similar to claims made in opposition to *Erie* itself. Prior to the Court’s decision, the defenders of *Swift v. Tyson* praised the “general law” regime on the ground that it produced a uniform system of commercial rules for businesses operating throughout the country.³⁵⁰ As the notion

346. See *supra* note 43 (noting the views of Professor Paust).

347. Koh, *State Law?*, *supra* note 3, at 1830-31; see also Koh, *Transnational Public Law Litigation*, *supra* note 12, at 2354 (“[T]hroughout the early nineteenth century, American courts regularly construed and applied the unwritten law of nations as part of the general common law, particularly to resolve commercial disputes, without regard to whether it should be characterized as federal or state.”) (citing Fletcher, *supra* note 27, at 1515-17).

348. Fletcher, *supra* note 27, at 1561; see also TONY FREYER, HARMONY AND DISSONANCE: THE *SWIFT* AND *ERIE* CASES IN AMERICAN FEDERALISM 40 (1981) (observing that “no one imagined that federal judges possessed authority over state courts [in cases under the general common law], any more than state judges had the power to instruct their brothers on the federal bench”).

349. Indeed, as I discuss further *infra* in Section IV.B.1, Judge Fletcher states that the general law system managed to maintain a surprisingly high degree of uniformity despite the lack of a single appellate tribunal with power to bind all the participants. See Fletcher, *supra* note 27, at 1562.

350. See, e.g., *Western Union Telegraph Co. v. Call Publishing Co.*, 181 U.S. 92, 101 (1901) (Brewer, J.) (proclaiming “a general common law existing throughout the United States”); *Railroad Co. v. National Bank*, 102 U.S. 14, 57-58 (1880) (Clifford, J., concurring) (defending *Swift* solely on the basis of a need for national uniformity in commercial law); PURCELL, *supra* note 203, at 65 (“[C]orporations heralded the uniformity of the federal common law that the *Swift* doctrine made possible. State laws varied widely and made it difficult for them to plan efficiently, they maintained, while the existence of a uniform federal common law simplified their operations

that judges simply “found” the general common law became increasingly unpersuasive in the early Twentieth Century, defenders of that system “increasingly stressed *Swift*’s status as an established precedent and its practical role in unifying the national economy.”³⁵¹ And after 1938, *Erie*’s critics worried that the decision “would prove ‘very damaging’ because it decentralized the law where national uniformity was required.”³⁵² The similarity of Koh’s argument to the claims of *Swift*’s defenders suggests that his overriding concern with uniformity across different state jurisdictions was considered and rejected in *Erie* itself.³⁵³ Moreover, the aftermath of *Erie*—which did not see the sky fall on enterprises subject to the rules of more than one state—suggests that the consequences of applying *Erie* in cases involving customary norms may not be as catastrophic as internationalists sometimes suggest.³⁵⁴

I will have a great deal more to say about uniformity in Part IV.³⁵⁵ For now, it is sufficient to say that Professor Koh’s concerns about Supreme Court review and uniformity are part and parcel of longstanding debates over *Erie*; they are not grounds to distinguish *Erie* away.

and thereby facilitated interstate commerce.”); FREYER, *supra* note 348, at 81-84 (collecting views of prominent supporters of *Swift*).

351. PURCELL, *supra* note 203, at 69.

352. *Id.* at 217 (quoting Zechariah Chafee, Jr., *Do Judges Make or Discover Law?*, 91 PROCEEDINGS OF THE AM. PHIL. SOC. 405, 415 (1947)).

353. Professor Koh acknowledges that “[i]n *Erie*, Justice Brandeis had assailed *Swift* for ‘attempting to promote uniformity of law throughout the United States [and thus] . . . prevent[ing] uniformity in the administration of the law of the State.’” Koh, *State Law?*, *supra* note 3, at 1832 n.43 (quoting *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 75 (1938)). Koh argues, however, that “if customary international law were treated as part of the new specialized federal common law, which is both binding on state and federal courts and subject to Supreme Court review, the uniformity of international legal rules could be maintained both throughout the United States and within the individual states.” *Id.* This added measure of uniformity, however, would come only at the expense of dramatically extending the preemptive effect of previously “general” law beyond anything it possessed prior to *Erie*; under *Swift*, after all, general common law supplanted state law only in cases in federal court. *Erie* did not merely prefer “vertical” uniformity within a state to “horizontal” uniformity among states; rather, its constitutional holding stands for the inability of any uniformity concerns to trump the basic postulate of federalism that “[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State.” *Erie*, 304 U.S. at 78.

354. Moreover, if Supreme Court review is the central concern, it is not obvious that Congress could not provide for such review of decisions by the state courts construing customary international law, so long as Article III is otherwise satisfied (e.g., by the existence of alien-citizen diversity). If we take seriously the notion that courts “find” rather than “make” customary international law, see Henkin, *International Law*, *supra* note 6, at 1561-62, then Supreme Court review of customary law issues would not divest the state courts of control over their own law in contravention of *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590 (1875).

355. See *infra* Section IV.B.

D. *Customary Rules and the "New" Federal Common Law*

The last section demonstrated that the internationalists cannot distinguish *Erie* away. The impulse to do so is itself curious, however, because the modern internationalist position *depends* on *Erie* in an important respect. As I have discussed, the pre-*Erie* law accorded customary international norms the status of "general" law—neither state nor federal, not binding on the states, and incapable of creating federal question jurisdiction or a basis for Supreme Court review. That is hardly what the internationalists want. If international law were truly "the Land that *Erie* Forgot," then customary law would not have many of the attributes that internationalists claim for it.

On the contrary, the modern position holds that customary international law is part of the "new federal common law" that arose after *Erie*. As Judge Friendly famously explained, however, that uniquely *federal* common law was made possible by *Erie* itself:

[B]y uprooting the spurious uniformity of *Swift v. Tyson* and insisting that federal courts defer to the states on matters outside the states' grant of power to the nation, [*Erie*] cleared the way for the truly uniform federal common law on issues of national concern that has developed so fruitfully and will develop more.³⁵⁶

The modern position, of course, fully embraces this aspect of *Erie*.³⁵⁷

356. Friendly, *supra* note 46, at 384.

357. In essence, the internationalists wish customary law to be assimilated to the status of admiralty law under *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), which held that maritime law is supreme over contrary state law. *Jensen* anticipated *Erie* in the sense that it recognized the common law of admiralty as *federal* rather than merely general; this kinship led Henry Hart to assert that *Jensen* and its progeny embodied the "same logic of federalism which underlay *Erie*." Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 532 (1954); see also PURCELL, *supra* note 203, at 248; Young, *Preemption at Sea*, *supra* note 194, at 325-26. But *Jensen*'s federal embrace of maritime law—which is often wholly judge-made without any reference to federal statutory or constitutional provisions—was flatly inconsistent with *Erie*'s insistence on federal action through constitutionally-prescribed lawmaking procedures as a prerequisite to judicial power. See Clark, *Separation of Powers*, *supra* note 60, at 1412 ("The shift from *Swift* to *Erie* reflects the Court's recognition—supported by the negative implication of the Supremacy Clause—that state law governs under the constitutional structure unless and until affirmatively displaced by federal law adopted in accord with the lawmaking procedures prescribed by the Constitution."); see also PURCELL, *supra* note 203, at 248-49 (offering related arguments for *Jensen*'s inconsistency with *Erie*). For a recent sampling of the longstanding debate over *Jensen*, compare, e.g., *American Dredging Co. v. Miller*, 510 U.S. 443, 458-62 (1994) (Stevens, J., concurring) (calling for *Jensen* to be overruled); Young, *Preemption at Sea*, *supra* note 194, at 358 (same), with Guttoff, *supra* note 322 (reconceptualizing federal common lawmaking in admiralty as a delegation of authority from Congress); Robert Force, *An Essay on Federal Common Law and Admiralty*, 43 ST. LOUIS U. L.J. 1367 (1999) (criticizing *Jensen* but defending broad federal common lawmaking powers). The best general work on *Jensen* and the problem of federal common law in admiralty remains ROBERTSON, *supra* note 322.

Internationalist defenders of that position have thus labored mightily to fit customary international law within the category of “new federal common law” that has grown up since 1938.

Yet the modern position fits uncomfortably with the structure of federal common lawmaking that has grown up since 1938. The Supreme Court has said that appropriate instances of such judicial lawmaking are “few and restricted”³⁵⁸ and “fall into essentially two categories: those in which a federal rule of decision is ‘necessary to protect uniquely federal interests’ and those in which Congress has given the courts the power to develop substantive law.”³⁵⁹ A federal status for customary international law is usually defended on the first of these theories—that is, federalization of customary law is thought to be necessary to protect the uniquely federal interests implicated by foreign affairs.³⁶⁰ But the modern position does not hold that federal courts should formulate such rules of decision as are necessary to protect the foreign affairs interests of the United States. Rather, as Professors Bradley and Goldsmith point out, it requires that “federal courts must apply whatever CIL requires”—whether or not the particular content of customary law is protective of uniquely federal interests.³⁶¹ It is thus odd to invoke those

358. *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (quoting *Wheedin v. Wheeler*, 373 U.S. 647, 651 (1963); see also Field, *supra* note 203, at 885 (“The received academic tradition on federal common law assumes that . . . after *Erie*, federal common law power is the exception, not the rule.”). Not everyone accepts the “received tradition,” however. My colleague Louise Weinberg, for example, has argued forcefully that “the true position” is “that there are no fundamental constraints on the fashioning of federal rules of decision.” Weinberg, *Federal Common Law*, *supra* note 221, at 805; see also Field, *supra* note 203, at 884 (suggesting that “no meaningful limits on judicial power to make federal common law have been articulated or adopted, and that the bounds of federal common law are potentially much broader than is generally supposed”). But see HART & WECHSLER, *supra* note 71, at 756 (observing that “Professor Weinberg’s very broad view finds little support in the case law . . . or among commentators”). Given the internationalists’ desire to ground their position in “hornbook rule[s],” Koh, *State Law?*, *supra* note 3, at 1825, it would be somewhat ironic for them to take refuge in this revisionist view of federal common law. In any event, even the broad theories espoused by Professors Weinberg and Field fit uncomfortably with customary international law for the reasons noted in the text.

359. *Texas Indus.*, 451 U.S. at 640 (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964)). See also Merrill, *supra* note 126, at 35 (characterizing these two categories as “preemptive” and “delegated” lawmaking, respectively).

360. I consider a delegated lawmaking theory *infra* at text accompanying notes 400-404.

361. Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 2, at 857. As a further illustration, compare Professor Henkin’s statement that in “determination of customary international law . . . the federal courts can make law for their own guidance and can decide also whether federal interests require that the [S]tates conform to them,” HENKIN, *FOREIGN AFFAIRS*, *supra* note 155, at 139, —which seems to envision a fairly proactive role for federal courts—with his statement elsewhere that “courts do not *create* but rather find international law, generally by examining the practices and attitudes of foreign states,” Henkin, *supra* note 144, at 876. The former vision of the judicial role at least seems to contemplate a judicial effort in every case to link customary rules to the federal interests that (in theory) authorize their application, but it is

interests as the domestic authorization for common lawmaking that *Erie* requires.³⁶²

The discomfort arises primarily from the modern position's categorical nature: customary international law is *always* federal law and *always* displaces federal law, without consideration of the nature of the particular rule at issue or of the constellation of federal, state, international, and private interests that might be implicated by it. Current federal common law doctrine outside the international context is simply too flexible and particularistic to support this sort of categorical rule. Although the precise boundaries of the new federal common law are notoriously murky,³⁶³ cases such as *Clearfield Trust Co. v. United States*³⁶⁴ and *United States v. Kimbell Foods*³⁶⁵ have developed a two-part test to determine when courts should formulate and apply federal common law rules of decision. As described by Martha Field, the test consists of a "power stage" and a "choice stage":

[F]irst, a court should ask whether the issue before it is properly subject to the exercise of federal power; if it is, the court should go on to determine whether, in light of the competing state and federal interests involved, it is wise as a matter of policy to adopt a federal substantive rule to govern the issue.³⁶⁶

hard to square that vision with the latter proposition that courts take customary law as they find it and have no discretion *not* to apply it.

362. One might argue, in response, that federalizing customary international law will always further a federal interest in *uniformity* by foreclosing the possibility of divergent state interpretations. But there is no guarantee that federal judicial application of customary law will in fact allow the United States to "speak with one voice" in foreign affairs; after all, the political branches of the federal government may take a position that diverges from customary law or may prefer to take no position at all. *See, e.g.,* Bradley & Goldsmith, *Federal Courts*, *supra* note 3, at 2268; *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 436 (1964) (explaining that the Executive often prefers not to take a position on whether particular acts violate international law); *cf. HENKIN, FOREIGN AFFAIRS*, *supra* note 155, at 140 (acknowledging that "[j]udge-made law . . . can serve foreign policy only interstitially, grossly, and spasmodically"). In any event, federal common law doctrine has been skeptical of generalized pleas for uniformity. *See, e.g.,* *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 730 (1979) (rejecting "generalized pleas for uniformity as substitutes for concrete evidence that adopting state law would adversely affect" federal policy).

363. *See, e.g.,* ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* § 6.1, at 354 (3d ed. 1999) ("[F]ederal common law has developed in an ad hoc fashion in a number of different areas. The Court has devoted little attention to developing general principles for when federal common law may or may not be created."); Young, *Preemption at Sea*, *supra* note 194, at 285 n.79 (noting extensive disagreement even as to the *definition* of federal common law).

364. 318 U.S. 363, 367 (1943).

365. 440 U.S. at 726-27.

366. Field, *supra* note 203, at 886; *see also* Friendly, *supra* note 46, at 410 (extracting these two distinct questions from the Court's opinion in *Clearfield Trust*); HART & WECHSLER, *supra* note 71, at 764-65.

If the answer to the second question is “no,” then “state law may be incorporated as the federal rule of decision.”³⁶⁷

This two-part framework has come under pressure from two different directions. Academic critics of the structure such as Professor Field have argued that the “power” constraint is actually very loose; as a result, “the two-fold inquiry often merges into one” with “choice” being the whole ball game.³⁶⁸ Some of the Supreme Court’s recent decisions, on the other hand, have suggested that in the absence of a conflict between state law and federal interests—usually a consideration only at stage two—a federal court lacks *power* to fashion federal common law.³⁶⁹ On this view, the *first* stage would become central.³⁷⁰

Despite these complications, the Court’s traditional two-part analysis provides a helpful way of structuring the argument that follows. Although Professor Field’s extremely broad view of federal common lawmaking authority does render the “power” stage irrelevant in most situations, the particular minimal limit on that power that she identifies—the idea that a federal court must point to *some* sort of legislative or constitutional authorization for making law³⁷¹—becomes highly problematic in the context of customary international law. It thus makes sense to think of “power” as a separate inquiry for present purposes. Similarly, it will help to analyze the potential for conflict between state law rules and federal interests in international affairs separately from the issue of authorization, whether or not the “conflict” inquiry ultimately goes to “power” or “choice.” I thus consider issues of power and authorization in Subsection 1, followed by issues of discretion and conflicting policies and interests in Subsection 2.

1. *Sabbatino and the Authority to Make Federal Common Law in International Cases*

Discussions of federal common law often begin by insisting that the

367. *Kimbell Foods*, 440 U.S. at 728.

368. Field, *supra* note 203, at 950-51.

369. See, e.g., *Atherton v. FDIC*, 519 U.S. 213, 218 (1997) (stating “when courts decide to fashion rules of federal common law, the guiding principle is that a significant conflict between some federal policy or interest and the use of state law . . . must first be specifically shown. . . . Indeed, such a conflict is normally a precondition.”) (internal quotation marks omitted); *O’Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994) (“Our cases uniformly require the existence of such a conflict as a precondition for recognition of a federal rule of decision.”).

370. One might conclude, based on the Court’s cases, that there simply is no settled approach to federal common law. The important point, however, is that none of the contenders categorically federalizes entire subject matter fields, and each requires some degree of conflict between particular federal polities and particular state rules before authorizing displacement of state law.

371. See Field, *supra* note 203, at 929.

instances of appropriate federal common lawmaking are “few and restricted.”³⁷² Rather than articulating general principles by which those instances may be identified, courts have frequently relied on a laundry list of examples. So, for example, the Supreme Court has said that

absent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases.³⁷³

These instances thus “fall into essentially two categories: those in which a federal rule of decision is ‘necessary to protect uniquely federal interests,’ and those in which Congress has given the courts the power to develop substantive law.”³⁷⁴ In a helpful typology, Tom Merrill has designated these two categories as “preemptive” and “delegated” lawmaking, respectively.³⁷⁵

The Court’s decision in *Sabbatino*, which internationalists usually point to as the best Supreme Court precedent for the modern position, is generally thought to recognize an enclave of preemptive lawmaking authority based on strong federal interests in cases implicating foreign affairs.³⁷⁶ *Sabbatino* involved a contract by an American firm, Farr, Whitlock, to buy sugar in Cuba from a Cuban firm, C.A.V. When the sugar was subsequently expropriated by the Cuban government, Farr, Whitlock secured an export license from the Cuban government in exchange for promising to pay the government the proceeds; once the sugar was out of the country, however, C.A.V. demanded the proceeds from Farr, Whitlock on the ground that it was the rightful owner of the sugar. Farr, Whitlock ultimately turned the money over to Sabbatino, who had been appointed as the receiver of C.A.V.’s New York Assets.³⁷⁷ When Banco Nazionale brought a conversion suit in federal

372. *Texas Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (quoting *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963)); see also *Atherton*, 519 U.S. at 218; *O’Melveny & Myers*, 512 U.S. at 87; *Milwaukee v. Illinois*, 451 U.S. 304, 313 (1981); *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966); Field, *supra* note 203, at 885 (“The received academic tradition on federal common law assumes that . . . after *Erie*, federal common law power is the exception, not the rule.”).

373. *Texas Indus.*, 451 U.S. at 641 (footnotes and citations omitted).

374. *Id.* at 640 (quoting *Banco Nazionale de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964)); see generally CHEMERINSKY, *supra* note 363, § 6.1, at 354 (discussing these two categories).

375. Merrill, *supra* note 126, at 35.

376. See, e.g., *Goodman & Jinks*, *supra* note 3, at 481.

377. See *Sabbatino*, 376 U.S. at 401-06.

district court,³⁷⁸ *Sabbatino* defended on the ground that the bank lacked valid title to the sugar because the expropriation had violated international law. Although the lower courts accepted this argument, the Supreme Court reversed, holding that the “act of state doctrine . . . precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory.”³⁷⁹

Justice Harlan’s opinion in *Sabbatino* expressly recognized that the act of state doctrine was not itself required by international law;³⁸⁰ for this reason, *Sabbatino*’s holding provides no direct support for the modern position.³⁸¹ Moreover, as one might expect from Justice Harlan, the Court’s reasoning was considerably more nuanced than the internationalist account. Harlan began by stating that while “[t]he text of the Constitution does not require the act of state doctrine [It] 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 decision in the area of international relations. The doctrine . . . expresses 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.³⁸²

This aspect of the Court’s reasoning would render the act of state

378. Federal jurisdiction was predicated on diversity of citizenship, since *Sabbatino* was a New York corporation. See *Sabbatino*, 376 U.S. at 421.

379. *Id.* at 401.

380. See *id.* at 421-22. Professor Koh does derive support for the modern position from the fact that the Court looked at international law at all. See Koh, *State Law?*, *supra* note 3, at 1833. Koh’s argument is that “if Bradley and Goldsmith were right,” the international law issue “would have raised no substantial federal question worthy of Supreme Court review.” *Id.* But *Sabbatino* was a diversity case; the Court explicitly reserved the question whether federal question jurisdiction would also have existed. See 376 U.S. at 421 n. 20. International issues may be sufficiently important to warrant space on the Court’s docket whether or not they are also federal; that is why, for example, Article III provides for original Supreme Court jurisdiction over cases affecting ambassadors. See also *infra* note 381.

381. The internationalists’ embrace of *Sabbatino* in response to revisionist critiques is somewhat curious. Earlier discussions of that case by internationalist scholars painted it as a considerable setback because the Court refused to consider the central claim that Cuba’s expropriation of the disputed sugar violated international law. As Professor Koh observed, “*Sabbatino* . . . cast a profound chill upon the willingness of United States domestic courts to interpret or articulate norms of international law—both customary and treaty-based—in both private and public cases.” Koh, *Transnational Public Law Litigation*, *supra* note 12, at 2363.

382. *Sabbatino*, 376 U.S. at 423.

doctrine a creature of "federal common law" only to the extent that any constitutional rule not directly mandated by the text may be said to be federal common law.³⁸³ Such interpretation is "delegated" lawmaking in the sense that it is driven not by federal interests as such but by the federal courts' responsibility—"delegated" by Article III itself—to interpret any relevant constitutional provisions in the course of deciding the cases that come before them.³⁸⁴

A second and related strand of Justice Harlan's reasoning in *Sabbatino* emphasized the act of state doctrine's role as a tool of judicial restraint. The doctrine is tantamount to a refusal to engage in judicial review of the act of a foreign government;³⁸⁵ as such, it bears an obvious kinship to prudential doctrines developed by the Courts to limit their exercise of judicial review in domestic cases. Among such "self-imposed limits on the exercise of federal jurisdiction" are the "general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked."³⁸⁶ These prudential rules, like the act of state doctrine in *Sabbatino*, promote separation of powers values even if they are not constitutionally required.³⁸⁷ In other instances, federal courts have likewise formulated federal common law rules to regulate their own exercise of the jurisdiction granted to them by Congress.³⁸⁸

Both these rationales are specific to the act of state doctrine itself; they do not depend on any more general conclusion about the need for

383. See Merrill, *supra* note 126, at 5-6.

384. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, (interpreting *Marbury* in this way); see also *Sabbatino*, 376 U.S. at 427 n.25 (drawing indirect support from several specific constitutional provisions as well as statutory provisions for federal jurisdiction in international cases).

385. See, e.g., Koh, *Transnational Public Law Litigation*, *supra* note 12, at 2362-63 (describing the *Sabbatino* doctrine as a form of "abstention").

386. *Allen v. Wright*, 468 U.S. 737, 751 (1984).

387. See, e.g., Antonin Scalia, *The Doctrine of Standing as an Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 885-86 (1983).

388. One example is the supervisory power in criminal cases. See, e.g., *United States v. Hastings*, 461 U.S. 499, 505 (1983) ("[G]uided by considerations of justice, and in the exercise of supervisory powers, federal courts may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress.") (quoting *McNabb v. United States*, 318 U.S. 332, 341 (1943)). *Sabbatino* might be read to stand for more than a prudential or supervisory rule on the ground that such rules typically limit only the federal courts, whereas Justice Harlan went out of his way to extend the act of state doctrine to state courts as well. See 376 U.S. at 424-25. As Dan Meltzer has argued, however, the idea of a "federal common law of procedure" that would limit state courts' exercise of their jurisdictions as well is not inconceivable. See Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1176-85 (1986).

federal common law in foreign affairs. To be sure, a third strand of Justice Harlan's reasoning *did* voice a more general concern that the act of state doctrine should be a matter of federal law so as to foreclose divergent interpretations by the state courts.³⁸⁹ The Court's reasoning relied directly on Judge Jessup's articulation of "the potential dangers were *Erie* extended to legal problems affecting international relations."³⁹⁰ Echoing Jessup's article, the Court asserted that "[i]t seems fair to assume that the Court did not have rules like the act of state doctrine in mind when it decided *Erie R.R. Co. v. Tompkins*."³⁹¹ And noting Jessup's "caution[] that rules of international law should not be left to divergent and perhaps parochial state interpretations," the Court observed that his "basic rationale . . . is *equally applicable* to the act of state doctrine."³⁹² The internationalist reading of *Sabbatino* is thus an *a fortiori* one: If the Court was willing to make federal common law in *Sabbatino* on the ground that the rule at issue there was *like* customary international law, then surely customary law must itself be federal common law as well.³⁹³

Even here, however, Justice Harlan was more cautious than he is generally given credit for. First, his holding that the relevant rules "must

389. 376 U.S. at 425. Justice Harlan conceded that this question was not strictly before the Court. He acknowledged that "[w]e could perhaps in this diversity action avoid the question of deciding whether federal or state law is applicable to this aspect of the litigation." *Id.* at 424. Because New York had adopted an act of state doctrine virtually identical to the federal one, Harlan admitted that "our conclusions might well be the same whether we dealt with this problem as one of state law . . . or federal law." *Id.* at 425. Nonetheless, the Court felt "constrained to make it clear" that the issue "must be treated exclusively as an aspect of federal law." *Id.*

One might question the ability of a court to issue a binding ruling on a point of law once it concedes—contrary to the situation in *Erie*, see *supra* note 203—that it would reach the same result even if that point were decided the other way. *Cf.* Phillips v. Vasquez, 56 F.3d 1030, 1034 n.3 (9th Cir. 1995) (issuing a ruling on an issue not before the court and stating that "[a]lthough our conclusion might under other circumstances constitute dictum, we make it a part of our opinion"). Although the holding that the act of state doctrine is federal is probably too settled to upset at this late date, we should not close our eyes to the weaknesses that dictum imparts to an opinion. It is not clear, for example, that anyone would have had occasion to brief or argue the question whether the Court should apply the act of state doctrine as a matter of state or federal law. More important, the justices necessarily decided the federal common law question in the abstract, without any ability to glean from the facts of the case before them a sense of the conflicts and interests that might arise were state and federal law to differ on the relevant point. In fact, as I argue in Subpart B.2, *infra*, the way in which those conflicts and interests play out in individual cases has become central to the Court's federal common law analysis in cases after *Sabbatino*. For these reasons, it strikes me as a mistake to place conclusive weight on such aspects of the opinion as Justice Harlan's invocation of Judge Jessup, see *supra* text accompanying notes 203-204, or to use that invocation to resolve questions which the Court did not even purport to decide.

390. *Sabbatino*, 376 U.S. at 425.

391. *Id.*

392. *Id.* (emphasis added).

393. See, e.g., Neuman, *supra* note 3, at 375-76; Koh, *State Law?*, *supra* note 3, at 1834.

be treated exclusively as an aspect of federal law” extended only to “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.”³⁹⁴ This suggests not only that a different result might obtain in the absence of separation of powers concerns but also that federal law might not be necessary outside the “old” international law context of state-to-state relations.

Justice Harlan sounded a second note of caution in a footnote immediately preceding his invocation of Judge Jessup and the perils of state-by-state diversity and immediately following his statement that the act of state doctrine “must be treated exclusively as an aspect of federal law.”³⁹⁵ He wrote:

At least this is true when the Court limits the scope of judicial inquiry. We need not now consider whether a state court might, in certain circumstances, adhere to a more restrictive view concerning the scope of examination of foreign acts than that required by this Court.³⁹⁶

This qualification suggests that the important point was not so much that state courts’ application of the act of state doctrine be *uniform* as that those courts go no further in reviewing the acts of foreign governments than the federal courts would be permitted to go.³⁹⁷ To see why this is significant, consider a paradigm case of international human rights litigation like *Filartiga*. If that case were brought in state court, it would be perfectly consistent with *Sabbatino* for the state court to *refuse* to apply customary international law and simply dismiss the case.³⁹⁸ *Sabbatino* does not, then, make international law or even the federal act of state doctrine “binding” on the state courts in the sense that the state courts must apply them. Rather, Justice Harlan’s opinion simply specifies a federal law limit beyond which the state courts cannot go.

It is difficult, then, to draw from *Sabbatino* the proposition that the broad category of “foreign affairs” is an enclave of preemptive federal

394. *Sabbatino*, 376 U.S. at 425.

395. *Id.*

396. *Id.* at 425 n.23.

397. In this sense, the act of state doctrine operates simply as a federal constraint on state choice of law rules. See *infra* text accompanying notes 695-697.

398. It would not have the ability to do this if the customary law claim were really federal in nature. State courts ordinarily cannot decline to hear federal claims if they hear analogous state law claims (in my hypothetical, a tort claim for wrongful death). See *Testa v. Katt*, 330 U.S. 386 (1947).

common lawmaking authority. I have already argued that such an enclave would be extraordinarily difficult to define and police; the category of “foreign affairs” is simply too pervasive in an age of globalization to provide a useful analytical tool.³⁹⁹ The limits of preemptive lawmaking power, in any event, are necessarily defined by the nature of the federal interests at stake. To the extent that *Sabbatino* authorizes creation of federal rules beyond the act of state doctrine itself, those rules must be justified in terms of the same separation of powers interests to which Justice Harlan constantly referred. It seems obvious that such interests—which may turn importantly on the position, if any, that the political branches have already taken on the issue before the court, the identity of the parties, as well as the action that the court is being asked to take—cannot support anything so categorical as the modern position that customary international law is *always* federal.

Nor can transformation of customary rules into federal common law be justified as an instance of delegated lawmaking. The argument here may be viewed as a more specific form of the revisionist critique of customary law as “undemocratic.”⁴⁰⁰ The problem, however, is not simply that customary law lacks any sort of democratic pedigree but rather that it generally cannot be tied to *law* promulgated through one of the specific lawmaking processes spelled out in the Constitution.⁴⁰¹ It thus makes no difference whether the political branches have participated in the creation of customary norms—much less whether the norms themselves are “prodemocratic”—unless the political branches’ participation takes the form of a valid statute or treaty which can be interpreted to confer lawmaking authority on the courts.

This is true even if we take an extremely broad view of delegated lawmaking. Professor Field has urged, for example, that “the only limitation on courts’ power to create federal common law is that the court must point to a federal enactment, constitutional or statutory, that it interprets as authorizing the federal common law rule.”⁴⁰² Even this

399. See *supra* Section II.C.2. Not surprisingly, the category has not, in fact, proven capable of restraining judicial discretion. For example, judges have employed it to expand not only their substantive lawmaking authority but their *jurisdiction* as well based merely on the invocation of a federal “interest” in the outcome of the case. See, e.g., *Sequihua v. Texaco, Inc.*, 847 F. Supp. 61 (S.D. Tex. 1994). I am indebted to Kendyl Hanks’s research on this point.

400. See *supra* Section II.B.2.

401. See Henkin, *Chinese Exclusion*, *supra* note 144, at 876 (observing that “when courts determine international law, they do not act as surrogates for the national legislature”).

402. Field, *supra* note 203, at 887. As Professor Field points out, this limit could be a narrow or broad one depending on how narrowly one construes “authorization.” See *id.* at 930. Field construes that concept quite broadly to include all sorts of implicit authorizations, see *id.* at 930-31, but this makes no difference for present purposes. The core of the modern position is that

limit is sufficient to rule out the modern position, however, because of its corollary that jurisdictional grants do not themselves count as authorizing courts to make law. As Professor Field explains, “[f]rom the point of view of federal power to make federal common law, the significant holding of *Erie* is that the grant of diversity jurisdiction cannot be the basis for creating any federal common law rule.”⁴⁰³ Whether or not particular provisions of federal law may be found to authorize federal judicial incorporation of customary norms in particular areas,⁴⁰⁴ proponents of the modern position point to no non-judisdictional federal enactments that would authorize such incorporation across the board.

2. *Judicial Discretion to Adopt State Law*

The modern position is equally difficult to square with the second stage of the Court’s federal common law inquiry, which involves the exercise of discretion as to whether to formulate a federal rule or adopt a state one. The leading case here is *Kimbell Foods*, which recognized that “[c]ontroversies directly affecting the operations of federal programs, although governed by federal law, do not inevitably require resort to uniform federal rules.”⁴⁰⁵ As Justice Scalia has observed, “knowing whether ‘federal law governs’ in the *Kimbell Foods* sense—a sense which includes federal adoption of state-law rules—does not much advance the ball”; a court must still determine “whether the [state] rule of decision is to be applied to the issue [at hand] or displaced.”⁴⁰⁶

customary law applies of its own force, without the necessity of explicit *or* implicit authorization from a federal statute. *See, e.g.*, Neuman, *supra* note 3, at 376.

403. Field, *supra* note 203, at 928. Not all jurisdictional grants have been interpreted this way. The grants of federal jurisdiction over admiralty and state vs. state disputes have both been interpreted to confer federal common lawmaking power. *See, e.g.*, *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953) (admiralty); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938) (state vs. state). I have argued at length elsewhere that this conclusion was incorrect as to the admiralty clause, *see* Young, *Preemption at Sea*, *supra* note 194, *passim*, and I suspect the state vs. state dispute clause requires little more than a federal choice of law rule, *see infra* notes 441-442 and accompanying text. In any event, there is no jurisdictional grant specific to “international” cases; instead, customary international law may be applicable to cases brought in federal court on grounds of alien-citizen diversity, regular diversity, foreign minister jurisdiction, or (if the modern position is correct) federal question. Because customary law is not tied to a particular jurisdictional grant, the argument for implied lawmaking authority made in admiralty and state vs. state cases is much more difficult to make.

404. *Cf.* Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 78 U.S.C. §1350) (expressly incorporating customary norms against torture and extra-judicial killing into federal law).

405. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 727-28 (1979).

406. *O’Melveny & Myers v. FDIC*, 512 U.S. 79, 85 (1994). Justice Scalia went on to observe that “if [the state rule] is applied it is of only theoretical interest whether the basis for that application is [the state’s] own sovereign power or federal adoption of [the state’s] disposition.”

This discretionary inquiry is far too flexible to mesh with the modern position's categorical federalization of customary international law.

Under *Kimbell Foods*, "[w]hether to adopt state law or to fashion a nationwide federal rule is a matter of judicial policy 'dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law.'"⁴⁰⁷ Justice Thurgood Marshall summed up the relevant considerations as follows:

Undoubtedly, federal programs that by their nature are and must be uniform in character throughout the Nation necessitate formulation of controlling federal rules. . . . Conversely, when there is little need for a nationally uniform body of law, state law may be incorporated as the federal rule of decision. Apart from considerations of uniformity, we must also determine whether application of state law would frustrate specific objectives of the federal programs. If so, we must fashion special rules solicitous of those federal interests. Finally, our choice-of-law inquiry must consider the extent to which application of a federal rule would disrupt commercial relationships predicated on state law.⁴⁰⁸

In essence, "the Court balances the need for federal uniformity and for special rules to protect federal interests against the disruption that will come from creating new legal rules."⁴⁰⁹

Three aspects of this balancing test are particularly relevant for present purposes. First, it has been applied rule by rule, rather than area by area. *Kimbell Foods* itself, for example, was decided under *Clearfield Trust*'s general authority to adopt federal rules of decision in cases involving the commercial relationships of the United States government;⁴¹⁰ unlike *Clearfield*, however, *Kimbell Foods* found no federal rule to be necessary on the particular commercial law point at issue.⁴¹¹ This aspect of the case law raises a significant objection to the modern position on customary international law. That position, after all,

Id. (citing *Boyle v. United Technologies Corp.*, 487 U.S. 500, 507 n.3 (1988)).

407. *Kimbell Foods*, 440 U.S. at 728 (quoting *United States v. Standard Oil Co.*, 332 U.S. 301, 310 (1947)).

408. *Id.* at 728-29 (citations omitted).

409. CHEMERINSKY, *supra* note 363, § 6.2, at 339.

410. See *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67 (1943); *Kimbell Foods*, 440 U.S. at 728-29 (reaffirming the existence of federal judicial *power* to formulate federal rules of decision in such cases).

411. See *Kimbell Foods*, 440 U.S. at 739-40; see also *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 595 (1973) (assuming without deciding that state property law should generally govern United States land acquisitions, but holding that the particular state rule in question conflicted with federal interests).

is categorical; it holds that *every* customary norm is a rule of federal common law, and it rejects across the board the possibility that state law might instead be adopted in a case where customary law applies by its own terms.⁴¹² The modern position thus forbids precisely the exercise of judicial discretion that current doctrine on federal common lawmaking demands.

Second, the tendency of courts applying the *Kimbell Foods* test, more often than not, has been to adopt state law. Professor Meltzer thus states that “[t]hrough formally federal common law governs the proprietary relationships of the United States, in practice the law applied is presumptively state law.”⁴¹³ This tendency—even in areas which are by definition of strong federal interest—stands in marked contrast to the modern position’s hostility to state law and state courts. The modern position is not simply a particular application of established principles governing federal common law generally, but rather a *sui generis* regime that must be justified—if it *can* be justified—outside that framework.

Third, the *Kimbell Foods* framework has been particularly hostile to the generalized pleas for uniformity upon which the modern position relies so heavily. Justice Marshall’s opinion stated that the Court would “reject generalized pleas for uniformity as substitutes for concrete evidence that adopting state law would adversely affect administration of the federal programs” at issue.⁴¹⁴ That insistence should rule out across-the-board arguments that, in any foreign affairs case, the importance of ensuring that the United States will “speak with one voice” mandates a federal rule of decision. While *Kimbell Foods* might well support adoption of a federal rule based on customary norms in particular instances, it cannot support the categorical requirements of the modern position.

What the federal courts actually do in ATCA cases is not as

412. See, e.g., Louis Henkin, *Act of State Today: Recollections in Tranquility*, 6 COLUM. J. TRANSNAT’L L. 175, 179 (1967) [hereinafter Henkin, *Act of State*] (“If act of state is a principle of international law, it is binding on both state and federal courts (in the absence of superseding legislative or executive action), and the courts could apply an exception to the doctrine only if international law recognized the exception.”).

413. Meltzer, *Article III*, *supra* note 249, at 1583 n.49; see also HART & WECHSLER, *supra* note 71, at 765 (observing that “*Kimbell*’s conclusion that, as a matter of *discretion*, the particular matter in question does not require formulation of a federal rule of decision is one that the Court has frequently reached in post-*Clearfield* cases”). For a particular example, see, e.g., *O’Melveny & Myers v. FDIC*, 512 U.S. 79, 84-85 (1994) (holding that state law governed defenses available to law firm in action brought by the FDIC).

414. *Kimbell Foods*, 440 U.S. at 730; see also *Atherton v. FDIC*, 519 U.S. 213, 220 (1997) (“To invoke the concept of ‘uniformity,’ . . . is not to prove its need.”); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 673 (1979).

categorical as the modern position would suggest. As I have discussed,⁴¹⁵ most courts seem to have limited the scope of *actionable* customary international law to fundamental or *jus cogens* norms, such as the prohibitions on torture or genocide. This sort of limiting discretion is fundamentally inconsistent with the way that the modern position is usually stated—*i.e.*, that *all* customary norms are federal common law.⁴¹⁶ It suggests that there is a domestic law filtering mechanism that determines which international norms are “in” and which are “out” for domestic purposes—an inquiry reminiscent of the revisionist position that customary law may be applied only with some sort of domestic authorization.⁴¹⁷ All the same, the particular filtering mechanism that the lower courts seem to be applying in ATCA cases is inconsistent with *Kimbell Foods*. That mechanism, after all, focuses on the nature of the customary international norms at issue rather than on the existence of a conflict between federal policy and state law.

One might argue, of course, that *Kimbell Foods* should be confined to the context in which it arose—that is, the commercial relationships of the United States government—or at least excluded from the uniquely sensitive field of foreign affairs.⁴¹⁸ Yet its insistence on a particularized analysis of the federal uniformity interest is fundamentally consistent with Justice Harlan’s opinion in *Sabbatino*. That opinion, after all, did not rely on a generalized “one voice” argument applicable to all foreign affairs cases; rather, the Court grounded its federal common law rule in particular separation of powers concerns unique to the act of state doctrine.⁴¹⁹ It is true that the Court did not ask whether the particular

415. See *supra* text accompanying notes 72-73; see also Goodman & Jinks, *supra* note 3, at 480-84 (suggesting that *Sabbatino* creates a “sliding scale” by which some customary norms are enforceable in U.S. courts and others are not).

416. See, e.g., Koh, *State Law?*, *supra* note 3, at 1825 (stating “the hornbook rule—international law, as applied in the United States, must be federal law”).

417. See Bradley & Goldsmith, *Federal Courts*, *supra* note 3, at 2260.

418. It is true that one finds most applications of the *Kimbell Foods* balance in the area of governmental commercial relations. That may be attributable to the fact that this class of cases makes up such a large proportion of federal common law cases generally. In any event, federal courts have applied *Kimbell Foods* widely outside that context when filling in gaps in a federal statute, see, e.g., *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 98 (1991), and the Court’s current approach in admiralty is not fundamentally inconsistent with *Kimbell*’s analysis of conflicting interests, see, e.g., *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 206-16 (1996); *Kossick v. United Fruit Co.*, 365 U.S. 731, 738-39 (1961). In *Bi v. Union Carbide Chems. & Plastics Co.*, 984 F.2d 582, 587 (2d Cir. 1993), the Second Circuit acknowledged *Kimbell Foods*’ relevance to a case involving a variant of the act of state doctrine under *Sabbatino*. Although Judge Newman’s opinion seems to have accepted what amounted to a generalized plea for uniformity based on little more than the fact that the case implicated foreign affairs, see *id.*, the court may have felt that the case was sufficiently close to *Sabbatino* on the facts to be controlled by that precedent without much in the way of further analysis.

419. See, e.g., 376 U.S. at 431-33. Moreover, the Court noted that the same sort of private

state rule at issue—which was in fact identical to the federal one adopted by the court⁴²⁰—would undermine these federal interests, and to that extent *Sabbatino* is inconsistent with *Kimbell Foods*. But *Sabbatino* was of course decided years before the *Kimbell Foods* approach had jelled. The Court has recently equated the foreign affairs and government commercial relations contexts as both involving “uniquely federal interests,” and it has followed *Kimbell Foods* by accepting the necessity of some conflict between state law and federal policy as a prerequisite to adopting a federal rule of decision in such areas.⁴²¹

In any event, the generalized “one voice” argument for uniformity in foreign affairs is unimpressive on its own merits. As I have discussed, we did without the sort of uniformity that the modern position is intended to promote for 150 years prior to *Erie*, during which period customary law was treated as “general,” not federal, law.⁴²² Indeed, as my colleague Sarah Cleveland has persuasively demonstrated, the “one voice” idea has always been something of a myth, given the Constitution’s deliberate division of foreign affairs powers among the three branches of the federal government as well as that government’s longstanding toleration of state activities on the international stage.⁴²³

The most important fact about “one voice” arguments, however, is that in the customary international law context they can cut both ways. As I have discussed, the federal common law rule adopted in *Sabbatino* happened to be a rule of judicial self-restraint;⁴²⁴ the modern position,

reliance interests identified as a factor in *Kimbell Foods* actually favored the federal rule in *Sabbatino*. See *id.* at 433-34 (stating that recognizing an exception to the act of state doctrine for expropriations in violation of international law would “render uncertain titles in foreign commerce”).

420. See *supra* note 389.

421. See *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504, 507-08 (1988).

422. See *supra* notes 143-44.

423. See Sarah H. Cleveland, *Crosby and the ‘One Voice’ Myth in U.S. Foreign Relations*, 46 VILL. L. REV. 975, 984-1006 (2001) [hereinafter Cleveland, *One Voice*]; see also Sanford Levinson, *Compelling Collaboration with Evil? A Comment on Crosby v. National Foreign Trade Council*, 69 FORDHAM L. REV. 2189, 2195 (2001) (“To put it mildly, this ‘one voice’ notion of foreign affairs is subject to challenge, both descriptive and normative.”). Peter Spiro has argued that “one voice” arguments are even less compelling in a post-Cold War environment, see Spiro, *Foreign Relations Federalism*, *supra* note 16, at 1224-26, and Daniel Halberstam has argued that state participation in foreign affairs may actually benefit national interests, see Halberstam, *supra* note 269, at 1056-67. In any event, unless we are to eliminate the *concurrent* jurisdiction of state courts in international cases, the modern position may be ineffective in achieving the “one voice” ideal. Supreme Court review is always uncertain, and many state court interpretations of customary international law will go unreviewed. Many international cases, moreover, may involve the construction of the law of a particular foreign state rather than international law, in which case there would be no Supreme Court appellate jurisdiction to review the state court’s determination. See Casto, *Protective Jurisdiction*, *supra* note 71, at 519.

424. See *supra* Section II.D.1.

however, will frequently create occasions for courts to exercise power in ways that may conflict with the policy adopted by the federal political branches. As Professor Cleveland notes, judicial cognizance of claims based on international law may “allow politically sensitive suits to proceed against foreign states” or “disrupt international affairs by reviewing the legality of foreign relations actions of the political branches.”⁴²⁵ An agreement between the United States and German governments to compensate Holocaust victims, for example, was recently undermined by human rights litigation in a federal district court asserting customary international law claims.⁴²⁶ Nothing in the modern position, in other words, guarantees that the courts will speak with the same “voice” as the federal political branches. At least *Kimbell Foods* asks the right question—that is, whether a federal or state rule will best fit with the policy adopted by Congress and/or the President. In the long run, that inquiry is more likely to satisfy “one voice” concerns than a blanket rule that courts must always apply customary international law regardless of what the political branches are doing.

E. *Precedent and Practice*

According to Professor Koh, the modern position represents “the hornbook rule.”⁴²⁷ Certainly it is the position of the *Restatement (Third) of the Foreign Relations Law of the United States*, which provides in its blackletter statement that “[i]nternational law [defined elsewhere to include customary law] and international agreements of the United States are law of the United States and supreme over the law of the several states.”⁴²⁸ As Professors Bradley and Goldsmith explain, however, the *Restatement (Third)* cannot provide any *independent* support for the modern position.⁴²⁹ I focus, therefore, on the different sorts of authority relied on by the Reporters and other internationalist

425. Cleveland, *One Voice*, *supra* note 423, at 989.

426. See Edmund L. Andrews, *New Legal Disputes Put Holocaust Victim Payments in Doubt*, N. Y. TIMES, March 9, 2001, at A3.

427. Koh, *State Law?*, *supra* note 3, at 1825; see also Brilmayer, *Preemptive Power*, *supra* note 6, at 295 (stating that the modern position “is an ‘unquestioned’ principle of the law of foreign relations”).

428. RESTATEMENT (THIRD), *supra* note 32, § 111(1). Section 111(2) further asserts that “[c]ases arising under international law . . . are within the jurisdiction of the federal courts.” As Professors Bradley and Goldsmith point out, the prior Restatement had acknowledged that the domestic status of customary law was “not settled.” See Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 2, at 830 (quoting RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 3, Reporters’ Note 2 (1965)). The Reporters’ Note to the RESTATEMENT (THIRD) concludes laconically that “[s]ome matters which the previous Reporters deemed ‘not settled’ . . . have now been established.” § 111, Reporters’ Note 9.

429. Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 2, at 834-37.

scholars.

The Reporters' Note to the *Restatement* quotes Justice Gray's famous statement in *The Paquete Habana* that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."⁴³⁰ We may take this reference as shorthand for the mass of cases decided during the nineteenth century under customary international law. These cases bear out the Framers' evident expectations that such norms would be applicable in our courts.⁴³¹ I have already suggested, however, that the Framers focused on providing a federal *forum* for international cases rather than uniform *federal* rules of decision. The law of nations, as nearly all agree, had the status of non-federal "general" law during this period.

Moreover, while we should respect the Founders' concern that international law be enforceable in American courts, we should also appreciate the extent to which the "law of nations" they knew differed from modern customary norms. To be sure, internationalists have been able to poke holes in bright-line distinctions between "old" and "new" customary international law.⁴³² But there is little doubt that the customary law known to the Founders was considerably more focused on state-to-state relations, more inductive and empirical in its origins, and less intrusive on intuitively "domestic" concerns than the customary law of today. The implications of the Founders' expectations, then, are of limited value in assessing the place of modern customary norms in our constitutional structure.⁴³³

The *Restatement* also cites two sets of Supreme Court decisions, but I have already dealt with each. The first, *United States v. Belmont*⁴³⁴ and

430. 175 U.S. 677, 700 (1900).

431. Beth Stephens, for example, has argued that "the intent of the framers . . . was to ensure respect for international law by assigning responsibility for enforcement of that law to the three branches of the federal government, including the judiciary." Stephens, *supra* note 3, at 397. "The federal courts," she insists, "implemented this responsibility in part by interpreting and applying customary international law." *Id.*; see also Neuman, *supra* note 3, at 390.

432. See, e.g., Koh, *State Law?*, *supra* note 3, at 1859 (arguing that "no clear line separates the 'old' from the 'new' customary international law").

433. This is not to say that the Founding-era cases and expectations have *no* significance. See Stephens, *supra* note 3, at 397 (rejecting "the suggestion that *Erie* tossed the law of nations out of federal court along with the general common law"). Certainly they suggest an imperative that international law arguments should, under appropriate circumstances, receive a hearing in American courts. See *infra* text accompanying notes 513-514 (arguing that the Bradley/Goldsmith prescription unduly minimizes the role of customary law). They do *not*, however, prove that those arguments should amount to supreme federal law.

434. 301 U.S. 324 (1937) (upholding an executive agreement between the U.S. and the Soviet Union).

United States v. Curtiss-Wright Export Corp.,⁴³⁵ had no direct bearing on the domestic status of customary international law. Both cases proclaimed that federal power in the area of foreign affairs is exclusive of the states, but I have already demonstrated why they cannot establish the irrelevance of *Erie*'s federalism concerns in the foreign affairs area.⁴³⁶ The other case cited—*Sabbatino*—also did not address the status of customary law directly. As I have already discussed, *Sabbatino* likewise provides little indirect support for the modern position. The upshot is that no case relied upon by the *Restatement* creates any independent authority for the modern position as a matter of stare decisis.⁴³⁷

Beth Stephens has raised a somewhat different precedential argument. Although she concedes that the founding generation viewed international law as “general” law,⁴³⁸ she argues that the late nineteenth and early twentieth century case law provides more support for the modern position than is commonly supposed. “The judicial decisions crafted during this *pre-Erie* period,” she argues, “include the beginnings of the ‘true’ federal common law that eventually emerged. Norms of international law joined a small category governed by a common law that increasingly resembled federal common law, although the legal theories of the day prevented courts from clearly labeling it as such.”⁴³⁹ Professor Stephens is surely correct that the relationships among federal, state, and general law had become blurry by the end of the nineteenth century. But the lines of cases that Stephens cites are best read as cautionary tales about the dangers of federalizing the common law—not as sound foundations for the modern position that developed later on.

Professor Stephens relies primarily on three sets of cases. The first involved disputes between the states over boundaries, water rights, and the like.⁴⁴⁰ In general, the Court's approach to state-vs.-state disputes has been non-controversial. Justice Brandeis upheld these cases as an

435. 299 U.S. 304 (1936) (rejecting a nondelegation challenge to presidential authority).

436. See *supra* Section II.C.2.

437. The *Restatement* also cites dicta from Chief Justice Jay's opinion in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793), for the “inexpediency” of referring cases under the laws of nations to the state courts. The actual holding of *Chisholm*, of course, was overruled by the Eleventh Amendment. Moreover, Jay's opinion on the relevant point reflected only his own views, as the custom at the time was for each justice to give his opinion *seriatim*. In any event, no one disputes that the original structure of Article III and the First Judiciary Act *did*, in fact, confer concurrent jurisdiction on the state courts to hear most sorts of international law cases. See *supra* Section II.C.3.

438. Stephens, *supra* note 3, at 430.

439. *Id.* at 413.

440. See *id.* at 419.

appropriate instance of federal common lawmaking on the same day as *Erie* was decided,⁴⁴¹ although it seems possible to explain most of them as involving nothing more than the appropriate application of “general” law principles governing boundaries and the like in instances where no state’s law can be applicable.⁴⁴² But *Kansas v. Colorado*,⁴⁴³ one of the cases upon which Professor Stephens relies, shows the risk of judicial aggrandizement even in this relatively uncontroversial area. In that case, Justice David Brewer used the notion of a truly “national” common law to seize *exclusive* power for the judiciary to regulate interstate water rights. Rejecting the Attorney General’s suggestion that the rights at issue should be governed by a water reclamation policy articulated by the federal political branches, Justice Brewer instead held the matter governed by the common law.⁴⁴⁴ “In matters national in scope but not delegated to Congress,” Professor Purcell explains, “the national courts were necessarily the authorized voice of a truly ‘national’ common law.”⁴⁴⁵ This is hardly an appealing precedent for federalization of customary international law; rather, Professor Purcell describes *Kansas v. Colorado* as a “judicial coup d’etat.”⁴⁴⁶

The second set of cases dealt with interstate business transactions. Professor Stephens begins with *Baltimore & Ohio Railroad Co. v. Baugh*,⁴⁴⁷ another Brewer opinion generally credited with having extended *Swift*’s “general law” regime to the tort law of industrial accidents.⁴⁴⁸ *Baugh* applied “general law” in the form of a strong

441. See *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938).

442. See Clark, *Federal Common Law*, *supra* note 25, at 1323 (noting that “the states generally lack legislative competence to establish rules of decision to govern disputes among themselves”). This explanation would not work for *Hinderlider* itself, which was in the unusual posture of a private party asserting rights that depended on the appropriate division of rights to water in the Colorado River between Colorado and New Mexico. But even where the governing law is necessarily federal, the principle of “equality of right” that drives most decisions, while inspired by the law of nations, can be justified as an interpretation of the federal constitution itself. See *id.*

443. 206 U.S. 46 (1907).

444. See *id.* at 91-97. According to Professor Purcell, Justice Brewer was the Court’s leading advocate of judicial primacy—and of a nationalized “general” common law as a means to that end—between 1890 and 1910. See PURCELL, *supra* note 203, at 46-51.

445. Justice Brewer justified the Court’s power to impose the common law in part on *The Paquete Habana*’s statement that international law—which contributed to the principles governing interstate disputes—“is part of our law.” 206 U.S. at 97 (quoting 175 U.S. 677, 700 (1900)).

446. PURCELL, *supra* note 203, at 60. See also *id.* at 59:

In a single opinion [Justice] Brewer denied the power of the national legislative and executive branches, elevated the federal judiciary to a position of constitutional primacy over both Congress and the states, and carved out an important area of conflict where the Court’s interstate common law would reign free and unchecked.

447. 149 U.S. 368 (1893).

448. See *id.* at 374 (“[I]t is not open to doubt that the responsibility of a railroad company to

version of the fellow-servant rule, which made it considerably harder for employees to recover on tort claims against their employers.⁴⁴⁹ Stephens also cites *Western Union Telegraph Co. v. Call Publishing Co.*,⁴⁵⁰ which held that general common law, not state law, would govern interstate telegraph rates in the absence of congressional enactment. It is surely true, as Stephens notes, that these cases relied upon “the need for uniform, national rules governing the liability of industries that span many states”⁴⁵¹—a justification that is sometimes invoked to defend a federalized version of customary international law.⁴⁵² But again, these are not appealing precedents. An important reason that the *Swift* regime broke down was that the “general law” came to extend far beyond its originally narrow subject matter into areas like torts; indeed, *Erie* rejected the notion of general law in precisely the same context—torts arising out of railroad accidents—that *Baugh* approved it.⁴⁵³ General law also became problematic because it began to preempt the deliberate policy choices of the states as expressed in judicial decisions and (in *Western Union*) in state statutes.⁴⁵⁴ Cases like *Baugh* and *Western Union*, in other words, extended federal common lawmaking authority past its breaking point.

More important, the assumptions of opinions like these have been soundly rejected today. Professor Stephens cites with apparent approval the assumption of *Western Union* and similar cases that

the Constitution had divided responsibility for various areas or subjects between national and state governments, with the federal government in charge of all “subjects affecting the country or people at large,” while the states were allocated responsibility “over all that are local, or which do not require a uniform system or law for their proper regulation.”⁴⁵⁵

its employees is a matter of general law.”); see also PURCELL, *supra* note 203, at 52; FREYER, *supra* note 348, at 68-71 (discussing *Baugh*).

449. 149 U.S. at 391; see also PURCELL, *supra* note 203, at 52-53.

450. 181 U.S. 92 (1901) (Brewer, J.).

451. Stephens, *supra* note 3, at 421.

452. See, e.g., the argument by Professor Koh quoted at note 496, *infra*.

453. To the extent that Professor Stephens relies on *Baugh* and similar cases as justifying truly federal common law wherever commercial entities do business on a national scale, then, *Erie* is squarely to the contrary. See also Young, *Preemption at Sea*, *supra* note 194, at 343-44 (observing that any number of industries in which participants do business in multiple jurisdictions are not governed by federal common law rules).

454. See, e.g., Lessig, *supra* note 145, at 1792-93; FREYER, *supra* note 348, at 94; see also Stephens, *supra* note 3, at 423 & n.152 (noting that *Western Union*'s refusal to follow a state statute was a “crucial” departure from *Swift*).

455. Stephens, *supra* note 3, at 423 (quoting *Murray v. Chicago & N.W. Ry. Co.*, 62 F. 24 (1894), which the Court had relied upon in *Western Union*).

As I discussed earlier in Section C, this idea of “dual federalism” undergirds much current internationalist thinking but was rejected by the Supreme Court after 1937. Even worse, a number of scholars have demonstrated how the creation of a uniform common law enforced by the federal courts—and usually enforced, as in *Baugh*, with a pro-business bent⁴⁵⁶—was a precursor to the Court’s constitutionalization of the common law in *Lochner v. New York*⁴⁵⁷ and its progeny.⁴⁵⁸ As Professor Purcell has observed, by the time *Erie* was decided, “*Swift* was the private law counterpart of the public law doctrine of substantive due process—twin pillars of the activist federal judiciary that had crimped and barred progressive reforms for half a century.”⁴⁵⁹

Finally, Professor Stephens argues that the common law became federalized in areas touching more directly on foreign affairs—such as immigration and naturalization law, as well as admiralty cases—well before *Erie*.⁴⁶⁰ She acknowledges that the cases do not all go one way; *New York Life Insurance Co. v. Hendren*,⁴⁶¹ for example, held that a dispute about the application of the laws of war to an insurance policy raised “questions of general law alone” and was therefore unreviewable on appeal from the state courts.⁴⁶² Even holding cases like *Hendren*

456. See, e.g., PURCELL, *supra* note 203, at 66 (“[T]he federal common law grew distinctly more favorable toward business in the late nineteenth century and was far more favorable than the common law of many states.”); FREYER, *supra* note 348, at xiii (“By the first third of the twentieth century a body of federal ‘general law’ had evolved that tended to favor the interests of interstate business.”).

457. 198 U.S. 45 (1905); see generally Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 917 (1987) (“The *Lochner* Court required government neutrality and was skeptical of government ‘intervention’; it defined both notions in terms of whether the state had threatened to alter the common law distribution of entitlements and wealth, which was taken to be a part of nature rather than a legal construct.”).

458. See, e.g., Michael G. Collins, *Before Lochner—Diversity Jurisdiction and the Development of General Constitutional Law*, 74 TUL. L. REV. 1263 (2000); L.A. Powe, Jr., *Rehearsal for Substantive Due Process: The Municipal Bond Cases*, 53 TEX. L. REV. 738, 755 (1975). The mutation of the general common law presaged *Lochner* in a number of different respects. One, as Professor Collins demonstrates, was substantive. See Collins, *supra*, at 1308-09. The general common law also facilitated the operation of judge-made restraints on government power by “allow[ing] the Court to cover whatever gaps might result from narrowing or invalidating state and federal statutes.” PURCELL, *supra* note 203, at 52. “Once legislation had been avoided or overturned,” Professor Purcell explains, “the *Swift* doctrine allowed the federal courts to make their own law in the area newly freed from statutory control. Indeed, the Constitution’s limitations on legislative power stood sentinel over the realm of the federal common law.” *Id.* See also Powe, *supra*, at 755 (suggesting that the Court’s development of a nationalized common law in the bond cases left a “legacy of activism” that institutionally prepared the way for *Lochner*).

459. PURCELL, *supra* note 203, at 191.

460. See Stephens, *supra* note 3, at 425-27.

461. 92 U.S. 286 (1875).

462. *Id.* at 286; see Stephens, *supra* note 3, at 427-29 (arguing that *Hendren* had more to do with practical concerns arising out of the Civil War than a general position on the place of

aside, however, the examples of admiralty and immigration law are hardly auspicious ones. *Southern Pacific Co. v. Jensen*,⁴⁶³ which Stephens rightly cites as having anticipated *Erie* by federalizing the general common law of admiralty,⁴⁶⁴ has been controversial since the day it was decided.⁴⁶⁵ As Justice Frankfurter observed, “no decision in the Court’s history has been the progenitor of more lasting dissatisfaction and disharmony within a particular area of the law than... *Jensen*.”⁴⁶⁶ Nor are the immigration cases any more reassuring.⁴⁶⁷ The recognition in those cases of “powers inherent in sovereignty”—the basis of exclusive federal immigration rules—was intricately bound up with the Court’s doctrine that the government’s exercise of those powers was largely immune from ordinary constitutional restraints.⁴⁶⁸ These sorts of concerns about the arbitrary scope of federal “plenary powers” over immigration make it a singularly unappealing precedent for judicial federalization of international law.⁴⁶⁹

What about the more recent doctrine? The only cases directly to address the issue of customary law’s domestic status—the *Filartiga* line of human rights cases under the ATCA⁴⁷⁰—were not cited by the

international law in the federal scheme).

463. 244 U.S. 205 (1917).

464. See Stephens, *supra* note 3, at 426-27 & n. 176. But see PURCELL, *supra* note 203, at 248 (highlighting ways in which *Erie* and *Jensen* were contradictory).

465. David Currie’s influential article trying to sort out the Court’s attempts to define the border between state and federal law in admiralty under *Jensen* was aptly entitled “the Devil’s Own Mess.” See David P. Currie, *Federalism and the Admiralty: “The Devil’s Own Mess,”* 1960 SUP. CT. REV. 158; see also Young, *Preemption at Sea*, *supra* note 194, at 291-306 (arguing that *Jensen* has never produced a coherent doctrine and that, in light of the Supreme Court’s recent pronouncements, its days are numbered); David W. Robertson, *The Applicability of State Law in Maritime Cases after Yamaha Motor Corp. v. Calhoun*, 21 TUL. MAR. LAW. 81, 89-97 (1996) (reaching similar conclusions).

466. *Kossick v. United Fruit Co.*, 365 U.S. 731, 742 (1961) (Frankfurter, J., dissenting); see also *American Dredging Co. v. Miller*, 510 U.S. 443, 458 (1994) (Stevens, J., concurring in part and in the judgment) (observing that “*Jensen* is just as untrustworthy a guide in an admiralty case today as *Lochner v. New York* would be in a case under the Due Process Clause”).

467. Professor Stephens cites both the *Chinese Exclusion Case*, *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (finding inherent federal power to regulate immigration), and *Chy Lung v. Freeman*, 92 U.S. 275 (1875) (striking down a state statute regulating immigration). See Stephens, *supra* note 3, at 425-26.

468. See Sarah H. Cleveland, *The Plenary Power Background of Curtiss-Wright*, 70 U. COLO. L. REV. 1127, 1154 (1999) (explaining that the “authority inherent in sovereignty” recognized in cases like *Chinese Exclusion* “bore an uncertain relationship to the enumerated and reserved powers in the Constitution and [was] considered largely immune from judicial review”); see generally Cleveland, *Powers Inherent in Sovereignty*, *supra* note 307.

469. Louis Henkin—arguably the modern position’s leading advocate—has roundly condemned this line of cases, concluding that “*Chinese Exclusion* . . . must go.” Henkin, *Chinese Exclusion*, *supra* note 144, at 863.

470. Since the Second Circuit’s decision in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), the majority of lower courts that have considered the issue have adopted *Filartiga*’s

Restatement on the issue of supremacy. The reason may be that the *Filartiga* line considered only the jurisdictional aspect of the modern position—that is, the principle that customary international law creates “arising under” jurisdiction for purposes of Article III. Those cases had no occasion to consider the supremacy of customary norms over state law, and in fact no other decision has upheld that principle. In any event, the *Filartiga* line has never been endorsed by the Supreme Court. Moreover, to the extent that post-*Filartiga* courts have applied only a selective subset of customary international norms, those decisions do not support the categorical position that *all* customary norms are federal law.⁴⁷¹

Professor Neuman cites two other decisions, *Fiocconi v. Attorney General*⁴⁷² and *Republic of Argentina v. City of New York*,⁴⁷³ but these are also inconclusive. *Fiocconi* involved a claim that an indictment of individuals extradited from Italy on a charge other than the one presented to the Italian government for extradition violated international principles of “comity.” Although Judge Friendly’s opinion cited *The Paquete Habana*’s statement that “[i]nternational law is part of our law” in a footnote,⁴⁷⁴ the court had no occasion to decide whether that law was “federal” for supremacy and jurisdiction-creating purposes. The indictments, after all, were in federal court and could have been dismissed without any clash with state policy.⁴⁷⁵ *Republic of Argentina*, on the other hand, held that property in New York City owned and used by the Argentine consulate was immune from local taxation “as a matter of customary international law.”⁴⁷⁶ As Neuman acknowledges, the opinion “does not explicitly confirm that the law it applies is federal”;⁴⁷⁷ rather, the opinion is perfectly consistent with the notion that customary international law “bound” the state of New York in the same sense that the “general” law of nations “bound” the states in the nineteenth

reasoning. See Goodman & Jinks, *supra* note 3, at 467-68 n.21 (collecting decisions). But see *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 798-823 (D.C. Cir. 1984) (Bork, J., concurring) (rejecting *Filartiga*’s reasoning).

471. See *supra* text accompanying notes 72-74.

472. 462 F.2d 475 (2d Cir. 1972).

473. 250 N.E.2d 698 (N.Y. 1969).

474. *Fiocconi*, 462 F.2d at 479 n.7 (quoting 175 U.S. 677, 700 (1900)).

475. Professor Neuman cites *Fiocconi*’s suggestion that the extradition in an earlier case, *United States v. Rauscher*, 119 U.S. 407 (1886), had violated “a rule of what we would now call United States foreign relations law devised by the courts to implement [an extradition] treaty.” 462 F.2d at 479 (offering a “*cf.*” cite to *Sabbatino*). But all Judge Friendly’s statement endorses is interstitial federal common lawmaking to fill in the gaps in a federal treaty. Such interstitial lawmaking—by far the least controversial form of federal common law—is hardly the same as federalizing customary international law generally.

476. 250 N.E.2d at 699.

477. Neuman, *supra* note 3, at 377.

century.⁴⁷⁸ Neither decision, in my view, offers strong support for the modern position.⁴⁷⁹

Finally, internationalists point to executive and legislative practice in the post-*Erie* era to confirm the modern understanding. Professor Neuman, for example, highlights the Reagan administration's participation in the drafting of the *Restatement (Third)*; "the characterization of customary international law as federal law," he states, "excited no controversy" during that process.⁴⁸⁰ Similarly, the Executive has filed a number of *amicus* briefs in human rights litigation affirming the proposition that "[c]ustomary international law is federal law, to be enunciated authoritatively by the federal courts."⁴⁸¹ Internationalists also invoke the Alien Tort Claims Act⁴⁸² and the Torture Victim Protection Act⁴⁸³—statutes enacted by Congress over two hundred years apart which are said to confirm the mandate of federal courts to apply customary rules as federal law.⁴⁸⁴ The TVPA's Senate

478. See *supra* note 143. In fact, the tone of the opinion's only reference to a *federal* customary law indicates, to my mind, considerable skepticism:

On this appeal, the plaintiff argues that its immunity from taxation is established by the customs and practices of nations which are binding on state and local governments as a form of (to quote from the plaintiff's brief) "federal common law".

250 N.E.2d at 699. In any event, because the City did not dispute that it was bound by international law, *see id.*, the court had no occasion to delve more deeply into the nature of that obligation.

479. Neither of these cases is as unequivocal as a third case out of New York, *Bergman v. de Sieyes*, 170 F.2d 360 (2d Cir. 1948). *Bergman* involved a question of the extent of diplomatic immunity from service of process. "[S]ince the defendant was served while the cause was in the state court," Judge Learned Hand wrote, "the law of New York determines its validity, and, although the courts of that state look to international law as a source of New York law, their interpretation of international law is controlling upon us, and we are to follow them so far as they have declared themselves." *Id.* at 361. Professor Neuman does not discuss *Bergman*. Professor Koh, on the other hand, claims that it was "overruled sub silentio" by *Sabbatino* and that "Hand's own law clerk, Louis Henkin, characterizes *Bergman* as one of Hand's 'rare mistakes.'" Koh, *State Law?*, *supra* note 3, at 1833 n.46 (quoting HENKIN, FOREIGN AFFAIRS, *supra* note 155, at 410 n.21). *Sabbatino*, however, created a federal rule of *domestic* law; it did not rule on how federal courts were to interpret international law. And a clerk's disagreement with his former employer is hardly a persuasive argument on the merits. In any event, *Bergman* surely undermines the picture of a post-*Erie* consensus on the status of customary international law.

480. Neuman, *supra* note 3, at 377.

481. Brief for the United States as Amicus Curiae at 1, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090), *reprinted in* 19 I.L.M. 585, 606 n.49 (1980); *see also* Brief for the United States as Amicus Curiae at 2, *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (Nos. 94-9035, 94-9069); Brief for the United States as Amicus Curiae at 3-4, 34-36, *Republic of Argentina v. City of New York*, 250 N.E.2d 698 (N.Y. 1969). These submissions are discussed in Koh, *State Law?*, *supra* note 3, at 1842-43; Neuman, *supra* note 3, at 377-78.

482. 28 U.S.C. § 1350 (1994).

483. Pub. L. No. 102-256, 106 Stat. 73 (1992).

484. See Koh, *State Law?*, *supra* note 3, at 1843-45. Professor Koh argues that, by enacting the TVPA, "Congress expressly intended both to codify and to extend to citizens the Second Circuit's holding in *Filartiga*." *Id.* at 1845; *see also* Goodman & Jinks, *supra* note 3, at 513-27.

Report, for example, states that “[i]nternational human rights cases predictably raise legal issues—such as interpretations of international law—that are matters of Federal common law and within the particular expertise of Federal courts.”⁴⁸⁵

It is hard to make too much of this evidence, however. An Executive decision not to challenge the modern position may be evidence of nothing more than other priorities; moreover, the cases thus far do not appear to have required the Executive to take a position on the modern position’s more controversial implications.⁴⁸⁶ As for the ATCA, Judge Friendly called it “a kind of legal Lohengrin . . . no one seems to know whence it came”;⁴⁸⁷ its purposes—much less its assumptions—remain controversial,⁴⁸⁸ and its function may not depend on the modern position.⁴⁸⁹ Finally, the TVPA may cut in very different directions: While it seems to signal approval of the *Filartiga* line on the one hand, it also provides precisely the specific legislative authorization to incorporate customary norms that the revisionists have been demanding. Although internationalists point to legislative history suggesting that the Congress that enacted the TVPA accepted the modern position on customary law,⁴⁹⁰ they do so without even a nod to the profound difficulties raised by relying on such sources.⁴⁹¹

If the “hornbook rule” on customary international law were solidly grounded in history and practice, that would be a strong argument for its retention even if the modern position could not be squared with the broader doctrine and theory of *Erie*. The preceding discussion demonstrates, however, that the history and practice supporting the “conventional wisdom” on customary international law is thin, to say

485. S. REP. NO. 102-249, at 6 n.6 (1991).

486. Executive positions may change, moreover, with circumstances and the priorities of different administrations. See, e.g., Goodman & Jinks, *supra* note 3, at 491 n.147 (noting fluctuating positions on the act of state doctrine); Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 2, at 867 n.330 (noting changing positions on the ATCA).

487. *ITT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975).

488. See, e.g., Casto, *Protective Jurisdiction*, *supra* note 71; Burley, *supra* note 66. For helpful contributions in the present symposium, see Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT’L L. 587 (2002) [hereinafter Bradley, *Alien Tort Statute*]; Michael G. Collins, *The Diversity Theory of the Alien Tort Statute*, 42 VA. J. INT’L L. 649 (2002); William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 VA. J. INT’L L. 687 (2002).

489. See *supra* note 71 (discussing protective jurisdiction).

490. See Goodman & Jinks, *supra* note 3, at 521-23; Koh, *State Law?*, *supra* note 3, at 1824, 1845 & n.118.

491. See generally Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 61 (1994); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 686-89 (1997); Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833 (1998).

the least. I turn to the internationalists' forward-looking consequentialist arguments in the next section.

F. Consequences

The internationalists raise a final important set of arguments focused on the consequences of abandoning the modern position. "Incorporation [of customary international law] at the federal level," Professor Neuman argues, "respects the national character of foreign relations: the States are not entitled to adopt individual approaches to international law."⁴⁹² De-federalizing customary international law, the internationalists worry, would invite a cacophony of diverse state interpretations without any federal authority to police them.

Reasoning from this premise, the internationalists outline a range of consequences that stretch from the legitimately concerning to the wildly improbable. At the latter end of the scale, Professor Koh worries that state courts might fail to adhere to the "universal norm against genocide."⁴⁹³ This concern seems no less "bizarre"—Koh's term⁴⁹⁴—than the Bradley/Goldsmith proposal. After all, one would think that both the federal and state constitutions, not to mention the statutory law of each jurisdiction, might have something to say about acts that amount to genocide.⁴⁹⁵

A more legitimate set of concerns invokes both traditional "one voice" and uniformity arguments. International cases—particularly international human rights litigation filed against officers of foreign governments under the ATCA—often involve delicate diplomatic situations in which it may well be important for the United States to speak with "one voice." Similarly, Professor Koh legitimately asks "How would a foreign transnational corporation doing business in fifty

492. Neuman, *supra* note 3, at 376-77.

493. Koh, *State Law?*, *supra* note 3, at 1850.

494. *Id.* (describing the Bradley/Goldsmith position).

495. See Bradley & Goldsmith, *Federal Courts*, *supra* note 3, at 2274 (complaining that "the internationalist assumption leads Koh to sound at times as if our liberties depend on the world community and the federal courts"); compare Neuman, *supra* note 3, at 386 (asserting that "[m]ost if not all [customary human rights norms] . . . are redundant vis-à-vis the States because they mirror norms of domestic constitutional law"). Perhaps Professor Koh envisions an ATCA-type scenario in which a foreign national sues her government or another alien for a violation of customary law in state court. Domestic law forbidding genocide-like atrocities might not apply to such a case, and, if most versions of the revisionist position were adopted, the state court would not *have* to apply the customary norm (unless we were to adopt federal choice of law rules, see *infra* text accompanying note 578). But it is hard to see what reason the state court would have *not* to apply international law to that case, and it is unlikely that the plaintiff could not find *some* state forum willing to do so. See *infra* text accompanying notes 584-585. To assume otherwise would surely "denigrate the ability or impartiality of state court judges," which Koh assures us he is not out to do. Koh, *State Law?*, *supra* note 3, at 1849.

different states of the Union know, for example, what standard or valuation of compensation it would likely receive if its action for interference with property rights were heard in one state court rather than another?"⁴⁹⁶

These problems are particularly salient in the area of "old" customary international law—that is, customary norms that regulate the relationships of states to one another rather than of states to their citizens. Professor Neuman, for example, invokes the issue of consular immunity,⁴⁹⁷ while Professor Koh raises the related problem of head-of-state immunity.⁴⁹⁸ If the revisionist position were the law, Koh asks, "how would the President's lawyers advise a visiting head of state about her chances of civil immunity while traveling on a classic State visit from Hawaii, to Williamsburg, Virginia, to Washington, D.C., and to New York (and the U.N. headquarters district)?"⁴⁹⁹ Divergent state interpretations of customary rules on such subjects obviously have the potential to complicate American foreign relations and undermine the ability of the federal Executive to conduct foreign policy.

Professor Neuman also argues that the revisionist position would have untoward consequences within the federal government. Although he concedes that the President, in the exercise of his foreign affairs power, may violate (and therefore supercede) customary international law, he argues that customary law as federal common law would still operate to restrict "acts of federal officials whose violations lack specific higher authorization."⁵⁰⁰ "Reducing customary international law to State common law," on the other hand, "would free not only the President, but also federal officers at every level, to commit violations because State common law rules cannot authoritatively control the action of federal officers within the scope of their duties."⁵⁰¹ The revisionist proposal thus threatens not only the Federal Government's control over the States, but also its control over itself.

I have already expressed some skepticism about "one voice"

496. Koh, *State Law?*, *supra* note 3, at 1851. One answer to Professor Koh's property-rights hypothetical is that a foreign corporation could secure a uniform minimum standard of compensation in any U.S. jurisdiction simply by suing under the Takings Clause. If Koh is suggesting that customary international law would provide significantly broader protection from government interference with property rights, that prospect raises problems of its own. *Cf.* *Lochner v. New York*, 198 U.S. 45 (1905).

497. Neuman, *supra* note 3, at 382.

498. Koh, *State Law?*, *supra* note 3, at 1850.

499. *Id.*

500. Neuman, *supra* note 3, at 381.

501. *Id.* at 382. *But see* *Idaho v. Horiuchi*, 253 F.3d 359 (9th Cir. 2001) (en banc) (holding that federal officers are not entirely immune from prosecution for violations of state criminal law, even when acting within the scope of their duties).

arguments,⁵⁰² but it is hard to write them off entirely. Likewise, Professor Neuman's point about federal officers demonstrates the virtues of making customary norms *available* to courts in situations where there may be no conflict with domestic rules. As I demonstrate in Part III, however, one need not accept the modern position to meet these more modest goals.

G. *An Assessment*

To sum up, I find the revisionist critique of the modern position fundamentally persuasive—at least in its negative project of demonstrating that the wholesale incorporation of customary international law as federal common law is inconsistent with constitutional principle. *Erie* held that “[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State.”⁵⁰³ The modern position is flatly inconsistent with that holding; it would allow courts to recognize federal norms that do not derive from any of the lawmaking procedures specified by the Constitution. To that extent, the modern position offends constitutional norms of federalism, separation of powers, and democracy.

Despite the efforts of Professor Koh and others, *Erie* cannot be persuasively distinguished. The existence of enumerated (and perhaps unenumerated) federal foreign affairs powers is immaterial to the principle of *judicial* federalism articulated in *Erie*; Congress, after all, would have had enumerated power to regulate on the facts of *Erie* itself. Nor is the allocation of federal/state power at the center of *Erie*'s holding irrelevant in foreign affairs. As globalization brings the world to our doorsteps, “international” concerns impinge on virtually every area of state regulation and, as a consequence, render intolerable any regime of federal exclusivity in all matters touching “foreign” affairs. The Framers never intended such a regime in any case. The original structure created by Article III and the first Judiciary Act demonstrates a concern for providing access to federal fora in many instances but also an awareness that state courts would retain a significant role in adjudicating and incorporating international law.

In any event, internationalists do not really want to distinguish *Erie* away. Rather, they wish to avail themselves of its implication, noted by Judge Friendly, that *legitimate* federal common law must be uniform and binding on the states. *Erie* is thus crucial to the internationalist

502. See *supra* text accompanying notes 423-426.

503. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

project because it paved the way—in their view—for strengthening the status of customary norms from “general law” in the nineteenth century to “new federal common law” in the twentieth. But the modern position does not fit comfortably with present doctrine governing this new federal common law. *Sabbatino* is strong precedent for rules of judicial restraint derived from the constitutional separation of powers in foreign affairs. Beyond those confines, however, broad federal common lawmaking in the foreign affairs area lacks the legislative authorization that even broad theories of judicial lawmaking require. Even worse, the modern position’s requirement that customary norms must *always* be incorporated into federal law is wholly inconsistent with the discretionary, rule-by-rule analysis of cases like *Kimbell Foods*. Those cases recognize the ever-present possibility, even in areas of unique federal interest, that a state rule that does not conflict with federal policy may be adopted in place of a federal norm.

The modern position thus envisions a category of federal law unknown to the Constitution. As such, federalized customary international law cannot be sustained. I discuss what might replace it in the next Part.

III. PRESCRIPTIONS

Internationalists often like to portray the revisionist critique discussed in the last Part as the work of a few radicals—a lunatic fringe, if you will, that “tilts at windmills” and operates on the periphery of respectable scholarship.⁵⁰⁴ The striking agreement among the members of this Symposium panel on the critique’s central elements, however, ought to dispel that impression.⁵⁰⁵ But all this still leaves us with Lenin’s

504. Goodman & Jinks, *supra* note 3, at 527; see also Harold Hongju Koh, *Bringing International Law Home*, 35 HOUS. L. REV. 623, 666 (1998) (“These surprising revisionist arguments have been almost universally criticized.”); Paust, *supra* note 43, at 306 (characterizing the Bradley/Goldsmith argument as “bizarre and unreal”).

505. See Daniel J. Meltzer, *Customary International Law, Foreign Affairs, and Federal Common Law*, 42 VA. J. INT’L L. 513, 519 (2002) [hereinafter Meltzer, *Customary International Law*]; Michael D. Ramsey, *International Law as Non-preemptive Federal Law*, 42 VA. J. INT’L L. 555, 557 (2002). For some fellow travelers, see, e.g., White, *supra* note 181, at 1123-25 (arguing that exceptionalist foreign affairs jurisprudence—including the effort to infuse customary human rights norms into domestic law—is on the way out); Spiro, *Foreign Relations Federalism*, *supra* note 16, at 1226 (urging that “[t]he three doctrinal components of the [principle of federal exclusivity in foreign affairs]—the dormant foreign affairs power, the dormant foreign commerce power, and the inclusion of customary international law as a part of federal common law . . . —should be abandoned” in a post-Cold War world); Stephan, *supra* note 10, at 1584 (suggesting that “courts end their flirtation with the notion that customary international law not otherwise incorporated into treaties operates as a kind of federal common law”).

famous question: "What is to be done?"⁵⁰⁶ On that point, as is so often the case, agreement tends to break down.

I consider three different answers to that question in this Part. Section A examines the Bradley/Goldsmith proposal—also largely endorsed by Professor Trimble—that customary norms should not be applied by American courts without specific authorization from either the federal or state government. In Section B, I advance my own proposal that we return to the nineteenth century view of customary norms as "general" law. Finally, Section C discusses Professor Ramsey's argument that customary norms should be treated as a non-preemptive form of federal law.

A. Express Authorization or Nothing: The Bradley/Goldsmith Proposal

Professor Trimble proposed in 1986 that "courts should never apply customary international law except pursuant to political branch direction."⁵⁰⁷ The prescription advanced by Professors Bradley and Goldsmith is much the same. Their view "is that CIL should not be a source of law for courts in the United States unless the appropriate sovereign—the federal political branches or the appropriate state entity—makes it so."⁵⁰⁸ This position, in their view, would have the following doctrinal consequences:

First, as a general matter, a case arising under CIL would not by that fact alone establish federal question jurisdiction. Second, federal court interpretations of CIL would not be binding on the federal political branches or the states. If a state chooses to incorporate CIL into state law, then the federal courts would be bound to apply the state interpretation of CIL on issues not otherwise governed by federal law. If a state did not, in fact, incorporate CIL into state law, the federal court would not be authorized to apply CIL as federal law⁵⁰⁹

Bradley and Goldsmith allow, however, that "Congress, and in limited circumstances the President, would still have the power to authorize the application of CIL as domestic federal law"⁵¹⁰; under those circumstances, presumably, Supreme Court interpretations of incorporated customary norms *would* bind state courts. Finally, "CIL would also continue to bind the United States on the international

506. See VLADIMIR ILYICH LENIN, WHAT IS TO BE DONE? (1902).

507. Trimble, *supra* note 6, at 716.

508. Bradley & Goldsmith, *Federal Courts*, *supra* note 3, at 2260.

509. Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 2, at 870.

510. *Id.* at 871.

plane.”⁵¹¹

The crucial issue with these proposals is what counts as authorization by the appropriate sovereign. This is a question of default rules. If political branch authorization at the federal level means, for example, an exercise by Congress of its “define and punish” power under Article I, then incorporations of customary norms in statutes like the Torture Victims’ Protection Act are likely to remain the exception rather than the rule. This might remain the case even in the absence of any significant conflict between customary norms and domestic policy at the federal or state level. Simply overcoming the burden of legislative inertia to authorize application of customary norms by statute may be prohibitively difficult at a time when many other issues press for attention. For this reason, internationalists seem right to suggest that the proposals of Trimble, Bradley, and Goldsmith would minimize the role of customary international law in our system.⁵¹²

This strikes me as an unsatisfactory resolution for several reasons. First, as Professors Neuman and Koh have pointed out, the existing positive law incorporating “old” customary norms—such as the norms governing consular or head of state immunity—has potentially important gaps.⁵¹³ Barring courts from using customary norms to fill those gaps may not meaningfully vindicate any state policies and may needlessly complicate American foreign relations. The second and related point is that the founding generation seems to have envisioned the possibility of such situations when they provided not only enumerated authority for Congress to incorporate the law of nations by statute, but also party-based jurisdiction over cases of potential diplomatic importance.⁵¹⁴ To the extent that the Founders expected the law of nations to be available as “general” law to resolve such cases, even in the absence of specific authorization in positive law, the revisionist proposal would make international norms *less* available than they were in the founding period.

A second important set of questions has to do with the status of customary international law when it *is* incorporated by the appropriate sovereign. Professors Bradley and Goldsmith do not, *contra* Professor Koh, suggest that international law is always *state* law. They allow for the possibility that the federal political branches will choose to

511. *Id.*

512. For the same reason, suggestions by internationalists that preemption of state policy by customary norms under the modern position is ‘just a default rule’ are unpersuasive. *See, e.g.*, Neuman, *supra* note 3, at 383.

513. *See* Neuman, *supra* note 3, at 376; Koh, *State Law?*, *supra* note 3, at 1839.

514. *See supra* Section II.C.3.

incorporate customary norms; indeed, they say that Congress did precisely that in the TVPA.⁵¹⁵ Failing such incorporation, Bradley and Goldsmith also allow for incorporation by particular state governments, and in these instances it seems clear that they would view the incorporated customary norms as state law. As a result, under *Erie*, federal courts would be required to defer to state decisions construing the content of those norms, and state decisions applying customary law would not be reviewable by the Supreme Court.⁵¹⁶ This reality gives traction to the internationalist worries about the “balkanization” of international law.⁵¹⁷

This situation also seems unsatisfactory. Professors Bradley and Goldsmith assert that “[b]alkanization’ never occurred during the 175 years when CIL was not viewed as federal law and states were legally entitled, in the absence of a preemptive federal enactment, to interpret or violate CIL.”⁵¹⁸ They attribute this successful history “primarily” to the fact that “the political branches federalized those aspects of CIL that required uniform national treatment.”⁵¹⁹ We should not necessarily be so sanguine about the future, however. Putting aside the gaps that may exist in codification of the “old” customary law, the “new” customary law is likely to come up in a much broader range of contexts and therefore increase the likelihood of divergent interpretations.⁵²⁰ The absence of “balkanization” in the nineteenth century may also be attributable to the law of nations’ treatment as “general” law during that period. Although each state had the *power* to interpret general law by its own lights, Judge Fletcher has documented the extent to which both state and federal participants in that system viewed themselves as participants in a common enterprise and, accordingly, put a strong

515. See Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 2, at 873; see also Bradley & Goldsmith, *Federal Courts*, *supra* note 3, at 2271 & n.54.

516. Indeed, the Supreme Court would be unlikely to review even lower *federal* court decisions applying customary law to the extent that the state courts would have the final word on the content of that law. See, e.g., *Thomas v. American Home Products, Inc.* 519 U.S. 913, 917 (1986) (Rehnquist, C.J., dissenting) (“I do not believe that this Court has a stake in the correctness of discrete state-law decisions by federal courts”).

517. See, e.g., Koh, *State Law?*, *supra* note 3, at 1840-41; *supra* text accompanying notes 496-499.

518. Bradley & Goldsmith, *Federal Courts*, *supra* note 3, at 2273. It would be hard to verify the “never” in this claim, and it seems safer to say that state interpretations of customary law never diverged to a sufficient degree to have left an impression on our history.

519. *Id.*

520. *Cf. supra* text accompanying notes 10-11 (discussing the increasing likelihood of conflict between customary international norms and state law). Likewise, the interpenetration of customary law and areas of traditional state authority makes it more likely that some states will adopt customary norms and some will not.

emphasis on mutual deference and uniformity.⁵²¹ The revisionist view that a state choosing to apply customary international norms necessarily incorporates those norms as *state* law would eliminate that sort of imperative.

Such treatment might also make it more difficult, as a practical matter, to build up a “critical mass” of case law interpreting international norms in any given case. Consulting the international human rights law of, say, Virginia might be much like consulting the West digests of a very small state on many domestic subjects: One finds many subject headings, but frequently very few decided cases listed under them.⁵²² This problem might have the practical effect of encouraging the generalization of customary law whether or not it is considered state law as a formal matter; a Virginia court might have little choice but to consult the decisions of other states on particular issues that it has not itself faced before. Such cross-fertilization seems less likely under the Bradley/Goldsmith/Trimble regime, however, than under a regime of “general” law where all courts see themselves as engaged in a common interpretive venture.

B. Customary International Law as General Law

My own view is that customary international law should be viewed as “general” law, just as it was in the nineteenth century under *Swift v. Tyson*.⁵²³ The essential elements of this “back to the future” approach were first advanced by Arthur Weisburd in 1995. Professor Weisburd urged courts “to treat customary international law as neither state nor federal law, but rather as *international* law, that is, law made, not by American states or the federal government, but collectively by the world’s nations and available to American courts in appropriate cases.”⁵²⁴ This approach differs from the modern position primarily in that the place of customary law in American jurisprudence is guaranteed not by a rule of federal supremacy but rather by principles of the conflict of laws. Professor Weisburd explains that “[i]n the same way that courts will, when required by relevant conflicts rules, apply the law

521. See Fletcher, *supra* note 27, at 1575; see also *infra* Section IV.B.1.

522. See, e.g., 24B WEST’S ATLANTIC DIGEST 2d 349-67 (listing only four New Hampshire cases on the civil liability of government officers from 1943 to 2000).

523. 41 U.S. (16 Pet.) 1 (1842). See, e.g., Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 2, at 820 (“Prior to *Erie*, CIL was viewed as part of the general common law most famously identified with *Swift v. Tyson*. During this period, CIL, like all general common law, lacked the supremacy, jurisdictional, and other consequences of federal law.”); Jay, *supra* note 143, at 832; see also *supra* note 43 (demonstrating agreement of most scholars on the pre-*Erie* status of customary law).

524. Weisburd, *State Courts*, *supra* note 6, at 48-49.

of some foreign nation, so they would apply international law in proper cases.”⁵²⁵

Professor Weisburd would probably resist the “general law” label. He insisted that his position “is *not* a return to the pre-positivistic conception of law as a ‘discoverable’ body of doctrine that somehow binds human activity without reference to human agency; nor is it an effort to resurrect the concept of general law as enunciated in *Swift v. Tyson*.”⁵²⁶ I will argue in Part IV, however, that *Swift* itself did not depend on any “pre-positivistic conception of law” and that nothing in *Erie* forecloses the use of “general” law under appropriate circumstances. Weisburd’s concept of “international” law, moreover, has the same essential attributes of “general” law under *Swift*: It is neither state nor federal, but rather “the product of joint lawmaking activities of many sovereigns”;⁵²⁷ it has no supremacy over state law; it presumably would not create federal “arising under” jurisdiction; and it is available for application by both state and federal courts pursuant to appropriate choice of law principles.⁵²⁸

The general law proposal differs from the position taken by most revisionists in two respects. First, while it acknowledges the possibility that state or federal actors may affirmatively incorporate customary norms by positive enactment, my proposed default rule is more generous to the incorporation of customary international law. I would allow courts to employ customary norms so long as they can point to an otherwise valid choice of law rule that would permit application of customary law in the circumstances at issue.⁵²⁹ Further, I would apply something like the *Charming Betsy* canon⁵³⁰—a presumption that political actors do not intend to depart from or abrogate rules of international law—to the construction and application of federal and state choice of law rules as well as to the underlying state and federal rules of decision.

These aspects of the general law proposal would likely result in customary law being applied considerably more broadly than most revisionists seem to envision. That result is more consistent than the

525. *Id.* at 49.

526. *Id.*

527. *Id.*

528. *See id.*; *see also infra* note 617 and accompanying text (discussing Weisburd’s view associating *Swift* with “pre-positivistic” notions of law).

529. *See* Weisburd, *State Courts*, *supra* note 6, at 49 (“In the same way that courts will, when required by relevant conflicts rules, apply the law of some foreign nation, so they would apply international law in proper cases.”).

530. *See* *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (stating that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains”); *see also supra* Section I.B.3.

revisionist position with the Framers' concern that the judiciary be designed in such a way as to enhance American compliance with international norms,⁵³¹ as well as with their expectation that the law of nations would be available as general law in the absence of affirmative congressional incorporation.⁵³² Choice of law rules, which focus on potential conflicts between foreign law and state policy, provide a more supple means than either the modern or revisionist position for sorting out the cases in which compliance with international norms does not significantly intrude on state autonomy from those that pose real federalism problems.

The general law proposal may also encourage the application of international law by domestic courts precisely because it deprives that law of its preemptive effect. As I have suggested, the modern position proves too much;⁵³³ courts cannot acknowledge the potential applicability of international norms to traditionally domestic issues without threatening to preempt whole fields of state regulation. A choice of law regime, on the other hand, would permit application of particular international norms whenever there is no "actual conflict" with state law.⁵³⁴ To the extent that state and federal courts apply such norms more frequently—even if they reject those norms that are inconsistent with state law on a given question—customary international rules are bound to have more influence on the development of domestic law in the long run.

Obviously, choice of law rules have to do a great deal of work in this scheme. I flesh out the way in which such rules would work in the remainder of this Section. Subsection One discusses the interaction of state and federal choice of law principles under my proposal. Subsection Two then offers some examples of how the proposal might work in some representative cases implicating customary international law.

531. See Stephens, *supra* note 3, at 405. One does not have to accept the internationalists' claim that such compliance was an overriding concern of the Framers to believe that it was an important desideratum.

532. See *supra* text accompanying notes 143-144.

533. See *supra* Sections II.C.2, D.2.

534. See, e.g., EUGENE F. SCOLES & PETER HAY, *CONFLICT OF LAWS* § 2.6, at 17 (2d ed. 1992) (discussing "true" and "false" conflicts); Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 311 (1990) [hereinafter Kramer, *Choice of Law*] ("[T]he court's first tasks in addressing a choice of law problem is to determine whether there is [a "true"] conflict; special principles of conflict resolution are needed only if more than one law applies to the same facts."); Louise Weinberg, *The Federal-State Conflict of Laws: "Actual" Conflicts*, 70 TEX. L. REV. 1743, 1747 n.14 (1992) [hereinafter Weinberg, *Conflicts*] ("Most American courts today . . . will identify true conflicts by construing the law of the forum and other concerned states to see whether the likely policy purposes of the laws at issue would support application on the particular facts.").

1. *The Role of Choice of Law*

In formulating the general law proposal, I said that a state or federal court may apply customary international law if an “otherwise valid” choice of law rule would permit it to do so. I put it this way because I do not want to take a firm position on whether that rule should be state or federal. It seems fairly well established that Congress *could* legislate a set a federal choice of law rules,⁵³⁵ and it might have particularly strong incentives to do so for customary international law cases that will often (if not always) have some bearing on foreign policy. My colleague Doug Laycock, moreover, has proffered strong arguments based on the text and structure of the Constitution that choice of law rules *must* be federal, and that the federal courts have power, under the Full Faith and Credit Clause and its implementing statute,⁵³⁶ to prescribe such rules where Congress fails to act.⁵³⁷ Yet current law holds that federal courts must generally apply the conflicts rules of the state in which they sit,⁵³⁸ and I do not believe that abrogation of state conflicts rules is necessary to make the general law proposal viable.

The use of state conflicts rules would not, moreover, wholly foreclose federal review of decisions not to apply customary international law in particular cases. It is well established that the Constitution applies at least some constraints on the choice of law rules that a state may apply, although the precise content and extent of such limits is subject to dispute.⁵³⁹ The Court has said, for example, that “the choice of law of a State which has had no significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction” would violate the Due Process Clause.⁵⁴⁰ As Professor

535. See, e.g., Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1 (1991).

536. See U.S. CONST. art. IV, § 1; 28 U.S.C. § 1738 (2001).

537. See Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 331-36 (1992); see also Hart, *supra* note 357, at 513-15 (arguing that because federal courts sitting in diversity are a disinterested forum, they have a unique ability to work out solutions to problems of the interstate conflict of laws). But see Donald W. Trautman, *Toward Federalizing Choice of Law*, 70 TEX. L. REV. 1715, 1718-19 (1992) (arguing that choice of law is best federalized on a very incremental basis).

538. See *Klaxon Co. v. Stentor Electric Mfg. Co., Inc.*, 313 U.S. 487 (1941); see generally HART & WECHSLER, *supra* note 71, at 698-701 (collecting arguments for and against the *Klaxon* rule).

539. Compare, e.g., Laycock, *supra* note 537, at 310-15 (arguing that the Full Faith and Credit Clause forecloses many widely-used theories of choice of law), with HART & WECHSLER, *supra* note 71, at 701 (stating that “[t]he Due Process and Full Faith and Credit Clauses have been held to place some limits on the free choice of law by state courts, though recent decisions indicate that those limits are quite expansive”).

540. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981); see also *Phillips Petroleum Co. v.*

Weisburd suggested,⁵⁴¹ these federal restrictions on state choice of law rules provide at least some basis for Supreme Court review of a state's decision not to apply customary international law. Obviously, that review will be more searching the more strictly the constitutional limits on choice of law are construed.

In developing the nature and extent of those limits, courts will need to confront the possibility that the constitutional constraints on *international* choice of law differ significantly from those on domestic choice of law. Professor Laycock has argued that “[h]ow U.S. courts treat foreign law is a matter of comity and diplomacy, the voluntary choice of a sovereign power. How Texas courts treat the law of a sister state is a matter of law, not comity, and the choice is no longer voluntary.”⁵⁴² That may be so, yet the differences between international and domestic law do not all cut in the direction of less restrictions. State court refusals to apply international law may, as the internationalists point out, undermine the ability of the federal political branches to conduct foreign policy and therefore raise significant constitutional issues not present in the domestic context. Although my reading of *Sabbatino* would not permit adoption of a categorical rule like the modern position, it would hardly foreclose the articulation of constitutional or federal common law limits on state choice of law that respond to these concerns.⁵⁴³

The second way in which the general law proposal diverges from the Bradley/Goldsmith/Trimble position is in the status that it would accord to customary norms that a state chooses to incorporate. In my view, that status depends on the way in which the state chooses to incorporate international law. Where a state chooses to adopt a rule originating in the international community as part of state law, for example by writing the substance of the rule into a state statute,⁵⁴⁴ then the rule would be interpreted as a rule of state law going forward and all the normal *Erie*

Shutts, 472 U.S. 797 (1985). Professor Laycock has described the Court's decision in *Hague* as “[t]he apparent end of all meaningful limits” on state choice of law. See Laycock, *supra* note 537, at 257. Nonetheless, *Hague* at least makes clear that the permissibility of a state's choice of law is a federal question, and *Shutts* may impose a significant limit where, as is true in many ATCA cases, neither the plaintiff nor the defendant is a state resident. See *id.* at 258 (observing that, in light of *Shutts*, “a state cannot apply its own law when it has neither a territorial contact nor a resident litigant”).

541. See Weisburd, *State Courts*, *supra* note 6, at 54-55.

542. See Laycock, *supra* note 537, at 259.

543. See *supra* Section II.D.1 (discussing *Sabbatino*); *infra* Section IV.C. (discussing federal common law limits on state choice of law).

544. This is what the TVPA has done at the federal level by incorporating the customary international law definitions of “torture” and “extrajudicial killing” directly into the statutory text. See TVPA, *supra* note 76, § 3.

rules of deference would apply. But a state might also conceivably choose simply to “follow” customary international rules in particular areas or across the board. I would read that sort of choice of law rule as a directive that state judges “find” customary law; since those judges would not “make” such law, federal courts sitting in diversity would owe them no deference in interpreting the content of it.

This last point is, I believe, fully consistent with *Erie*. Although *Erie* is generally thought to have abolished the “myth” that judges find rather than make law,⁵⁴⁵ scholars have recognized in other contexts that both law-finding and law-making are part of the judicial enterprise. Discussing one common mode of statutory interpretation, for example, Colin Diver has observed that “Courts attempt to find the meaning of the statutory text as intended by the enacting legislature. Yet, by adopting conventions to guide and constrain the search for that meaning, courts necessarily create meaning as well.”⁵⁴⁶ Given the persistence of both law-finding and law-making in judicial practice, we should not be surprised if judicial activity in different legal contexts involves relatively more of one and less of the other. It is analytically worthwhile to distinguish between situations that emphasize law-finding versus law-making, even if the distinction is ultimately one of degree.

Erie itself, for example, created a frequently occurring set of situations in which federal judges *must* try to find the law rather than make it. A federal judge sitting in diversity, after all, is not supposed to be “making” state law; instead she has an obligation to “find” what the state courts would do in the same circumstances and do likewise in the case before her. As Brad Clark has observed, “federal courts have largely abandoned any claim that they are entitled to use independent judgment to generate rules of decision on behalf of the states.”⁵⁴⁷ The existence of some cases in which federal courts are simply bound to “follow” established state law demonstrates that law-finding is not a myth; even in situations where “existing sources of state law do not yield a determinate answer to a particular legal question,” moreover, “most federal courts today employ a predictive approach—that is, they attempt to forecast how the state’s highest court would decide the

545. See, e.g., William R. Casto, *The Erie Doctrine and the Structure of Constitutional Revolutions*, 62 TUL. L. REV. 907, 927-30 (1988) [hereinafter Casto, *Constitutional Revolutions*].

546. Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 559 (1985); see also *id.* at 573 (observing that “courts have not cast their lot exclusively with either [the lawfinding or lawmaking] conception, but rather have adopted a composite approach that incorporates both”).

547. Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism after Erie*, 145 U. PA. L. REV. 1459, 1495 (1997).

question were the case before it.”⁵⁴⁸ Whether or not we believe that there is really no element of lawmaking in such a situation,⁵⁴⁹ there seems to be a clear qualitative difference between the classic diversity situation and a case like *Sabbatino* or *Clearfield Trust*,⁵⁵⁰ in which the federal court views itself as endowed with authority to creatively fashion a new rule of federal law.

The law-finding function of federal courts in diversity cases is only one of many contemporary instances of judicial deference to other interpreters. Under the *Chevron* doctrine in administrative law,⁵⁵¹ a court must defer to an administrative agency’s interpretation of a statute that it administers if (1) the statute is ambiguous and (2) the agency’s interpretation is reasonable. This deference has been justified on the ground that “[t]he process of statutory interpretation inevitably involves some lawmaking, as well as law finding, component,” and that that lawmaking power is appropriately allocated to agencies rather than the courts.⁵⁵² A court proceeding under *Chevron* can thus—at least in cases of statutory ambiguity—be characterized as attempting to “find” the law that the agency has made.⁵⁵³

As these examples demonstrate, one need not view law as “a brooding omnipresence in the sky”⁵⁵⁴ in order to believe that courts sometimes primarily find law rather than make it. As long as we can distinguish these two sorts of cases, it is meaningful to posit a state choice of law rule that would direct state judges—and federal courts sitting in diversity—to make their best judgment as to the content of customary international law on a given point. While individual courts would be bound, as a practical matter, by the prior interpretations of

548. *Id.*

549. Professor Clark argues that “the predictive model raises judicial federalism concerns because it permits federal courts to exercise lawmaking power on behalf of the states.” *Id.* He would instead have federal courts certify unsettled questions of state law to the state courts. *See id.* at 1544.

550. *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943) (fashioning a federal common law rule to govern the issue of notice of a forgery in commercial paper cases involving the United States government).

551. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992).

552. Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 466 (1989) (describing this argument but ultimately rejecting the conclusion that interpretive power should generally be allocated to agencies).

553. Courts do review whether the agency’s interpretation is “reasonable,” and sometimes they conclude that it is not. *See, e.g., Whitman v. American Trucking Ass’ns*, 531 U.S. 457, 485-86 (2001). But the reasonableness standard indicates that the *agency*, not the court, is the primary lawmaker when statutory ambiguity is viewed as a delegation of power.

554. *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

their superiors in the appellate hierarchy,⁵⁵⁵ we need not view the customary international norms applied by those courts as becoming “part” of state law. For cases in which the state has little direct interest in regulating the outcome, such as much international human rights litigation, this sort of rule may well be the most sensible approach to adopt.

2. *Some Examples*

The advantage of the general law approach’s heavy reliance on choice of law rules is that those rules should generally shake out in a way that conforms to our intuitive notions of when international law ought to govern and when it should not. In some of the areas that frequently preoccupy the customary law literature, moreover, use of international norms as an interpretive consideration may obviate the need to resort to more aggressive understandings of customary international law.

a. The Juvenile Death Penalty

As I have already discussed, proponents of the modern position frequently argue that customary international norms should supersede contrary state practices. The juvenile death penalty—thought by many to be proscribed by customary law but still practiced in a number of American states—is a frequently cited example.⁵⁵⁶ Treating the relevant customary norms as “general” law would most likely leave state law in place. My proposal would, however, permit a potentially influential role for international norms in cases where state law is unclear.

As Professor Ramsey rightly notes, there is no single agreed-upon set of conflicts rules.⁵⁵⁷ For this example, however, I think that each of the widely accepted approaches to conflicts would point toward applying state law.⁵⁵⁸ Under the most widely used form of interest analysis, for example, the forum presumptively may apply its own law so long as it

555. See, e.g., Fletcher, *supra* note 27, at 1575 (explaining that the lower federal courts were bound in this way by Supreme Court interpretations of general common law under *Swift*).

556. See *supra* Section I.B.2.

557. See Ramsey, *supra* note 505, at 566; see also Kramer, *Choice of Law*, *supra* note 534, at 279 (observing that “there is probably less consensus about the choice of law process than ever before”); William Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953) (“The realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon.”).

558. The three primary alternatives are territorial rules, interest analysis, and the hybrid approach of the *Second Restatements*. See Gottesman, *supra* note 535, at 3-9; Laycock, *supra* note 537, at 256-57.

has a legitimate interest in the case.⁵⁵⁹ In the death penalty case, the state's interest in enforcing its criminal laws against a capital defendant convicted of a heinous crime within the state plainly satisfies that criterion. Similarly, any set of territorial conflicts rule would likewise require application of state law in the paradigm case, where the murder has been committed within the state's own territory.

The *Restatement* approach would surely reach the same result, but walking through its elements will help illustrate the relevant considerations. Section 6 of the *Restatement (Second) of Conflicts of Laws* sets out the following general principles:

- (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
- (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
 - (a) the needs of the interstate and international systems,
 - (b) the relevant policies of the forum,
 - (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
 - (d) the protection of justified expectations,
 - (e) the basic policies underlying the particular field of law,
 - (f) certainty, predictability and uniformity of result, and
 - (g) ease in the determination and application of the law to be applied.⁵⁶⁰

The first of these principles—that state statutory conflicts rules control—reaffirms the ability of state governments to choose to incorporate customary norms or not, so long as that choice is not

559. See, e.g., Larry Kramer, *Interest Analysis and the Presumption of Forum Law*, 56 U. CHI. L. REV. 1301, 1303 (1989) (“The precept that there is a rebuttable presumption in favor of forum law is fundamental to interest analysis.”).

560. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971) [hereinafter CONFLICTS RESTATEMENT]. Section 10 states that these rules “are generally applicable to cases with elements in one or more foreign nations.” See also *id.* cmt. c (observing that “similar values and considerations are involved in both interstate and international cases”). Although § 10 also notes that special factors may exist in international cases, the considerations laid out in § 6 should generally be open-ended enough to accommodate these factors.

preempted by a valid federal rule.⁵⁶¹ Absent such a statutory directive, however, the court will need to balance the factors set forth in section two.

It may be that the “needs of the interstate and international systems” will always include some imperative to comply with international law, but these sorts of generic interests seem unlikely to take us far. After all, one might fit a countervailing generic policy of self-determination under the same heading, especially in areas like the enforcement of criminal law in local cases. To resolve this sort of conflict, a court might look to the United States’ practice of attaching reservations to multilateral human rights treaties as a political judgment that, in the death penalty area, the need for self-determination is more important than the need to comply with international norms.⁵⁶² Such a judgment would also be relevant to the third factor—“the relevant policies of other interested states”—since the federal government is surely an interested party in any case implicating national compliance with international law.

The “policies of the forum” should weigh heavily where the state is regulating serious criminal activity occurring within its own borders and, in many instances, injuring its own citizens. Likewise, the more general policies underlying the criminal law—retribution, deterrence, incapacitation⁵⁶³—seem best served by applying local law to local crimes. That result allows the community to express its own moral judgment and increases the certainty of punishment by avoiding the

561. Professor Ramsey seems to take the first principle in § 6 to stand for a broader proposition that “if a statute specifies that it applies (and the state law is constitutional), that is the end of the matter.” Ramsey, *supra* note 505, at 569 (footnotes omitted). In order to make sense of this proposition, we need to distinguish between a statute that (a) merely defines a substantive right and (b) one that both defines the substantive right and specifies the scope of its application as a matter of choice of law. An example of the first would be a typical guest statute, which states that the driver of an automobile shall not be liable to his passenger for negligence that results in a crash. Merely defining the right by statute, however, hardly resolves the choice of law issue; determining whether a guest statute applies to a collision with multistate elements is notoriously difficult. See, e.g., *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279 (1963); Alfred Hill, *The Judicial Function in Choice of Law*, 85 COLUM. L. REV. 1585, 1623-25 (1985). The *Restatement*—and the “first principle of conflicts-of-law” to which Professor Ramsey refers, see Ramsey, *supra* note 505, at 569—is talking only about type (b) statutes. Such a statute might say, for example, “a guest in any automobile accident occurring in this state shall not recover from the driver,” and this pronouncement would obviously be binding on the courts of that state. Most state juvenile death penalty statutes, however, will simply say something like “a person convicted of capital murder committed prior to the age of 18 may nonetheless be punishable by death” without stating a specific choice of law rule.

562. See, e.g., Edward F. Sherman, Jr., Note & Comment, *The U.S. Death Penalty Reservation to the International Covenant on Civil and Political Rights: Exposing the Limitations of the Flexible System Governing Treaty Formation*, 29 TEX. INT’L L.J. 69 (1994) (describing the U.S. reservations).

563. See, e.g., *Developments in the Law: Alternatives to Incarceration*, 111 HARV. L. REV. 1967, 1970 (1998) (identifying these purposes as central).

complications introduced by the potential applicability of foreign law. Since customary international norms are likely to be argued only by defendants with fairly sophisticated representation, applying local law will also enhance the “uniformity of result” in capital cases. Finally, “ease in the determination and application of the law to be applied” will most likely cut in favor of local law, given the uncertain and contested nature of international norms concerning the death penalty and the difficulty of evaluating state practice and *opinio juris*.⁵⁶⁴

It thus seems likely that, under virtually any plausible choice of law analysis, local law would govern capital punishment for local crimes absent an affirmative legislative decision by the state to incorporate customary international norms.⁵⁶⁵ That result, in my view, accords with basic intuitions about how fundamental social and moral disputes ought to be resolved in our constitutional democracy. If, after years of moral and constitutional debate, we cannot say that capital punishment is inconsistent with “evolving standards of decency” under the Eighth Amendment, then it would be shocking to see the controversy resolved through the *deus ex machina* of international law. Recourse to international law is surely least appealing when it represents an end-run around the results of popular deliberation over domestic constitutional matters that has reached results inconsistent with the desires of many in legal academia.⁵⁶⁶

Customary international norms might nonetheless prove influential in cases where state law is unclear through application of the *Charming Betsy* canon. If state law is ambiguous as to whether a capital defendant may be executed for crimes committed as a juvenile, a presumption favoring compliance with international norms would push against death. Both state and federal judges may well be more comfortable employing international law as persuasive authority than in the heavy-handed preemptive mode required by the modern position.

The *Charming Betsy* canon is generally thought of as a principle of federal law, and Professor Ramsey legitimately asks why it should be applied in interpreting *state* rules of decision.⁵⁶⁷ At least two answers are possible. First, to the extent that *Charming Betsy* is a “descriptive”

564. See *supra* Section I.C.

565. See Weisburd, *State Courts*, *supra* note 6, at 49-50.

566. This is not to say, of course, that “evolving standards of decency” in this country may not be headed in the direction of abolishing or significantly limiting the death penalty. See, e.g., Jim Yardley, *Of All Places: Texas Wavering on Death Penalty*, N.Y. TIMES, Aug. 19, 2001, § 4, at 4. I simply insist that this is a choice that Americans—and preferably the citizens of individual American states—need to make for themselves. They are unlikely to accept any resolution imposed on them from a source outside domestic law.

567. See Ramsey, *supra* note 505, at 578.

canon, it rests on a prediction that, all things equal, legislators intend to comply with international law.⁵⁶⁸ There is no obvious reason to think that state legislators are less respectful of the United States' international obligations than federal legislators, and therefore no reason to find *Charming Betsy* a less reliable guide to legislative intent in one context than the other.⁵⁶⁹ A state court might thus choose to apply the canon in interpreting a state's capital punishment regime.⁵⁷⁰

"Descriptive" canons often have a fictional air about them, and it may be more satisfying to think of *Charming Betsy* as a "normative" canon that simply pushes interpretation in the direction of compliance with international law. Normative canons are controversial, and I cannot undertake a comprehensive defense of the *Charming Betsy* canon here.⁵⁷¹ Briefly, I see *Charming Betsy* as a less intrusive means of enforcing the *Zschernig* principle that the states may not interfere with the conduct of foreign affairs. I have argued elsewhere that normative canons are appropriate means of enforcing constitutional principles where it is difficult to draw bright lines between permissible and impermissible conduct and where we can expect "political safeguards" to play a major role.⁵⁷² That is surely the case with *Zschernig*: As many critics have noted, *Zschernig*'s principle is extremely difficult to cabin in any workable way.⁵⁷³ Moreover, the states have traditionally deferred to federal judgments about foreign policy imperatives, and one can expect political pressure to head off most *Zschernig*-type conflicts.⁵⁷⁴

By requiring a clear statement of a state's intent to violate international norms, the *Charming Betsy* canon gives some force to the *Zschernig* principle without attempting to state categorically what a state may or may not do. The canon likewise facilitates the federal

568. See, e.g., Daniel B. Rodriguez, *The Presumption of Reviewability: A Study in Canonical Construction and Its Consequences*, 45 VAND. L. REV. 743, 749 (1992) (comparing "descriptive" and "normative" canons of statutory construction); *infra* note 704 and accompanying text.

569. I suppose that if the state supreme court ruled that the *Charming Betsy* canon is *not* a reliable guide to the intent of its particular legislature, a federal court would be obligated to respect that view and eschew the canon when interpreting state statutes. But such a holding seems unlikely.

570. A claim that a capital sentence violates state law will generally be presented to the state courts; federal courts will be bound, in any event, by the state courts' decision as to what state law requires.

571. For one such defense, see Bradley, *Charming Betsy*, *supra* note 100. Although Professor Bradley approves of the canon, he might not sanction its role in my proposal.

572. See Young, *Constitutional Avoidance*, *supra* note 195, at 1603-09.

573. See, e.g., Goldsmith, *supra* note 272, at 1632-33.

574. See Trimble, *supra* note 6, at 670-71 (demonstrating that state and federal courts have generally deferred to the position of the Executive in cases involving customary international law). In *Zschernig* itself, the federal government took the position that Oregon's policy did *not* pose a threat to the United States foreign policy.

government's ability to bring political pressure to bear in areas that it cares about. And because the principle is constitutional in origin, it is appropriate to apply it to the construction of both state and federal statutes.

b. Diplomatic Immunities

The case of diplomatic immunities—e.g., head of state, consular immunities for non-signatories to the relevant treaties—is somewhat more difficult. Consider Professor Koh's example, in which the Queen of England is sued for a tort while visiting the Commonwealth of Massachusetts.⁵⁷⁵ In Koh's hypothetical, the Queen is sued for torts arising out of events in Northern Ireland—a case that would most likely be brought under the ATCA and is thus best considered in the next section. A more relevant variant—and a harder one for the general law proposal—arises if the Queen is alleged to have committed the tort while in Massachusetts against a Massachusetts resident. In that case, as Professor Meltzer points out, the Commonwealth has a strong interest in applying its tort law to the case.⁵⁷⁶ Under an interest-based or territorial choice of law regime, there is a strong case for applying state law.

The *Restatement* factors may counsel a different result. This case implicates a much more specific “need of the international system” than did the juvenile death penalty example; foreign diplomats and dignitaries need to be able to travel freely, and the customary norms of immunity have grown up for precisely that reason. The state does have a strong interest in applying its tort law, but the federal government—treated here as another “interested state”—has a strong interest in avoiding a diplomatic incident. Given the entrenchment of customary norms in this area, traveling dignitaries may have “justified expectations” that they will be immune under most circumstances. The incidence of such cases may be sufficiently infrequent that we are more worried about uniform treatment of foreign dignitaries from state to state than about the impact of immunity on the uniformity of tort results *within* the state. Finally, norms of diplomatic immunity may be sufficiently well established to minimize the problems ordinarily associated with finding customary norms.⁵⁷⁷

575. See Koh, *State Law?*, *supra* note 3, at 1829.

576. See Meltzer, *Customary International Law*, *supra* note 505, at 526-27; see also *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 543 (1995) (recognizing that, even in admiralty cases, “[s]tates have a strong interest in applying their own tort law” to incidents within their territorial waters); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984) (recognizing states’ “traditional authority to provide tort remedies to their citizens”).

577. See Kelly, *supra* note 34, at 480-81 (conceding that these rules are considerably more

At first glance, then, it may matter what sort of choice of law regime the Commonwealth has in place. To the extent that some conflicts approaches—such as interest balancing or territorial rules—may pose a threat to the ability of the federal political branches to conduct foreign affairs, this may be an appropriate case for the formulation of a federal common law constraint on state choice of law.⁵⁷⁸ Just as *Sabbatino* required American courts in effect to apply foreign law—rather than customary international law—to cases challenging the validity of certain foreign governmental acts, federal common law might constrain the ability of states to apply their own law to cases involving visiting dignitaries or diplomats. This would require a careful evaluation of how great a threat such cases pose to our foreign policy, but a uniform national rule does not seem implausible.

I want to question, however, whether such a rule would really be necessary to head off the application of state law in such cases. In immunity cases, the question is not whether the basic tort law of a state will be supplanted by different tort principles drawn from the law of nations; rather, customary norms arise as a potential affirmative defense specific to a narrow class of defendants. We might ask, then, whether the Commonwealth of Massachusetts has a deliberate policy to *deny* immunity to foreign dignitaries and diplomats. If—as seems likely—state law has no principle of immunity simply because the question has never come up, then there is no “actual conflict” between state and customary international law on the issue of immunity.⁵⁷⁹ Indeed, since principles of “old” customary international law were generally thought to be incorporated into the English common law,⁵⁸⁰ any state that has “received” the common law by statute or judicial decision could be presumed to have incorporated diplomatic immunities into state law.⁵⁸¹ Finally, the *Charming Betsy* principle would bolster a

well-established than most).

578. Judge Learned Hand suggested as much in *Bergman v. De Sieyes*, 170 F.2d 360 (2d Cir. 1948), in which he applied New York law recognizing the immunity of a French diplomat. Judge Hand acknowledged that “an avowed refusal to accept a well-established doctrine of international law” might “present a federal question”; because New York law recognized the immunity, however, he did not need to consider the case for a federal common law rule. *Id.* at 361.

579. See generally Kramer, *Choice of Law*, *supra* note 534, at 291-311 (describing the process of identifying actual conflicts).

580. See, e.g., Neuman, *supra* note 3, at 373.

581. See, e.g., Act of May 6, 1776, ch. V, § VI, in HENING'S STATUTES AT LARGE 9 (1821) (“[T]he common law of England . . . shall be the rule of decision, and shall be considered as in full force, until the same shall be altered by the Legislative power of this colony.”) (Virginia); TEX. CIV. PRAC. & REM. CODE § 5.001 (2000) (“The rule of decision in this state consists of those portions of the common law of England that are not inconsistent with the constitution or the laws of this state, the constitution of this state, and the laws of this state.”). Professor Ramsey notes this possibility. See Ramsey, *supra* note 505, at 569 n.57.

requirement that state departures from longstanding customary international norms be indicated by clear legislation or judicial precedents, and it could serve as a tiebreaker in construing the relevant conflicts principles. In the absence of an “actual conflict” with state law, of course, a state or federal court would be free to apply the customary international law of immunity.

c. Human Rights Litigation

Finally, I want to consider the fate of the *Filartiga* line of international human rights cases under a “general law” approach. These cases, as I have discussed, generally involve alien plaintiffs, alien defendants, and events that took place in foreign lands.⁵⁸² If such litigation is brought in an American state court, or in a federal court applying state choice of law rules under *Klaxon*, will state law supplant customary human rights norms absent some express incorporation of customary norms into state law?

In most cases, the answer should be “no.” Although constitutional constraints on state choice of law rules are generally thought to be minimal, the one constraint that seems to have emerged with some clarity is that a state may not apply its own law without some legitimate interest in the case.⁵⁸³ If Virginia, for example, were to assert that its own law must govern a suit for torts committed in violation of international law in the former Yugoslavia, that assertion would probably be invalid under the Due Process Clause. Such an assertion, in any event, seems unlikely.

As Professor Meltzer points out, however, the real question in these cases “is likely to be whether Virginia will permit its courts to adjudicate any right of action under CIL”—not whether the state will insist on applying its own law to the case.⁵⁸⁴ In that case, Meltzer seems largely correct in suggesting that no constitutional requirement would forbid a Virginia court from simply dismissing the case outright.⁵⁸⁵ It is

582. See *supra* Section I.B.1.

583. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822-23 (1985) (holding that Kansas courts could not apply forum law to claims that had only minimal contacts with the state); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981) (“[F]or a State’s substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.”) (plurality opinion); *Home Ins. Co. v. Dick*, 281 U.S. 397, 410 (1930) (holding that a state “may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them”).

584. Meltzer, *Customary International Law*, *supra* note 505, at 526 n.61.

585. See *id.* The only caveat is that if we read the ATCA to create a federal cause of action for violations of customary international law, then a state court’s refusal to hear the case might be unconstitutional. The relevant precedent would then be not *Hughes v. Fetter*, 341 U.S. 609 (1951)

less clear, however, why this is a problem as long as *some* United States jurisdictions are willing to entertain these claims. In fact, internationalists concerned about the uniform interpretation of customary norms by state courts should probably prefer an equilibrium where human rights claims are concentrated in a few receptive jurisdictions.

The ATCA itself, moreover, may be read as incorporating a choice of law rule of its own. By limiting its coverage to "a tort only, committed in violation of the law of nations,"⁵⁸⁶ the statute strongly suggests that international law is to govern claims brought under its auspices. That reading would be even stronger if the ATCA is read to create a federal cause of action for torts in violation of customary international law; in federal question cases, federal courts have tended to either disregard *Klaxon* altogether or to apply only such state conflicts rules as would effectuate Congress's intent in creating the underlying right.⁵⁸⁷ Whether or not the ATCA creates a federal cause of action is, of course, a much-debated question that I cannot explore here.⁵⁸⁸ The more important point for contemporary human rights claims, however, is that the TVPA clearly *does* create such a federal right of action.⁵⁸⁹ Since the TVPA incorporates the customary international definition of torture and extrajudicial killing directly into the statute, no choice of law problem arises.

Despite the uncertainty that often plagues choice of law inquiries, the paradigm customary international law cases I have discussed seem to

(addressing a state court's refusal to adjudicate a foreign state cause of action), but *Testa v. Katt*, 330 U.S. 386 (1947) (holding that state courts must ordinarily entertain federal causes of action). The question under *Testa* would be whether the state courts were discriminating against the federal cause of action when they were willing to entertain analogous claims under state law. See *id.* at 389.

586. 28 U.S.C. § 1350.

587. Compare *Edelmann v. Chase Manhattan Bank, N.A.*, 861 F.2d 1291, 1294 n.14 (1st Cir. 1988) (observing that "[w]hen jurisdiction is not based on diversity of citizenship, choice of law questions are appropriately resolved as matters of federal common law"), with *Barkanic v. Admin. of Civil Aviation of the Peoples Republic of China*, 923 F.2d 957, 959-60 (2d Cir. 1991) (looking to Congress's intent before incorporating state choice of law rule in Foreign Sovereign Immunities Act case); see generally *Recent Case*, 109 HARV. L. REV. 1156, 1159-61 (1996) (noting conflicting approaches).

588. See, e.g., Bradley, *Alien Tort Statute*, *supra* note 488, at 597 (concluding that the ATCA does *not* create a federal cause of action); Casto, *Protective Jurisdiction*, *supra* note 71, at 478-80 (same); Anthony D'Amato, *What Does Tel-Oren Tell Lawyers? Judge Bork's Concept of the Law of Nations is Seriously Mistaken*, 79 AM. J. INT'L L. 92 (1985) (arguing that ATCA plaintiffs have a "cause of action" as that term was originally understood); Weintraub, *supra* note 71, at 766-67 (arguing that the ATCA should be read in light of the TVPA to create a federal cause of action).

589. See Torture Victim Protection Act of 1991 § 2(a), Pub. L. No. 102-256, 106 Stat. 73 (providing that anyone who subjects an individual to torture or extrajudicial killing "shall, in a civil action, be liable for damages").

come out in accord with our fairly intuitive judgments, regardless of the particular conflicts approach employed. Those results also tend to accord with the case law: Courts have generally applied customary norms in ATCA and diplomatic immunity cases, but have not gone so far as to employ them to preempt state law. This equilibrium has been in place for a long time; the general law approach simply allows us to explain it in a principled way.

C. *A Non-Preemptive Federal Law?*

Towards the end of his comments on this Article, Professor Ramsey suggests that the pitfalls of an approach relying on horizontal conflicts principles may be avoided by classifying customary international law “as nonpreemptive federal law—that is, law that can provide independently a rule of decision in federal court, but cannot override inconsistent state law.”⁵⁹⁰ It is hard to know exactly what to make of this proposal, as Professor Ramsey does not have occasion to flesh out many examples of its application. A few observations, however, do seem in order.

First, it is unclear where the constitutional authority to recognize such a hybrid form of “federal” law comes from: *Erie* held that “[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State.”⁵⁹¹ As I have said, this does not foreclose the application of foreign or general law, but the mechanism for admitting that law into American courts is choice of law rules, which are themselves either creatures of state or federal law. The whole point of Professor Ramsey’s proposal, however, is to avoid choice of law. *Erie* also did not foreclose Judge Friendly’s “new federal common law,” but the defining characteristic of that law is that it is truly federal in the sense that it *does* preempt state law.⁵⁹² Professor Ramsey’s proposal is more like the “spurious” federal common law that applied only in federal courts prior to *Erie*.⁵⁹³

Second, Professor Ramsey focuses on the preemptive aspect of international law under the modern position while ducking the question

590. Ramsey, *supra* note 505, at 585.

591. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

592. See Friendly, *supra* note 46, at 405 (“[B]y banishing the spurious uniformity of *Swift v. Tyson*. . . *Erie* led to the emergence of a federal decisional law in areas of national concern that is truly uniform because, under the supremacy clause, it is binding in every forum. . . .”). See also Merrill, *supra* note 126, at 6-7.

593. This law was “federal”—rather than “general”—in the sense that it applied in federal court regardless of state efforts to articulate their own rules on the subject. This “spurious” federal common law was thus a product of the breakdown of the *Swift* regime in the late nineteenth and early twentieth centuries. See *supra* notes 446-454 and accompanying text.

whether such law is “federal” for jurisdictional purposes. His suggestion that Article III confers power to hear international claims on the federal courts, however, must mean that international law does confer “arising under” jurisdiction; otherwise, jurisdiction to hear international claims would be dependent on the citizenship of the parties.⁵⁹⁴ This opens the door to a preemptive effect for international law in at least one important respect. When the state courts interpret international law for themselves—as Professor Ramsey’s proposal would seem to leave them authority to do—they could be overruled by the United States Supreme Court. Supreme Court constructions of international law would thus be binding on the state courts.⁵⁹⁵

Finally, Professor Ramsey’s view seems to be that international law can be used only in circumstances in which it would not supplant contrary state law rules. It is hard, however, to know what this means. Consider, for example, a suit brought in federal court in Virginia by an alien against an alien defendant for tortious violations of human rights in the former Yugoslavia. (For present purposes, assume that the suit is brought prior to the enactment of the TVPA.) Professor Ramsey would allow the federal court to apply customary international law in such a case—as would I. But this cannot be because there is no conflict with state law on the subject of the suit. In a case of torture, for instance, Virginia law will have readily applicable concepts of battery, assault, false imprisonment, and the like. If these concepts do not govern, it is because Virginia’s interests in the suit are too tenuous to support application of its own law⁵⁹⁶—not because there is no conflict.

Professor Ramsey’s proposal seems to draw a sharp line between “preemption” on the one hand and “choice of law” on the other. But as my colleague Louise Weinberg has shown, “preemption” is simply an instance of “vertical” choice of law.⁵⁹⁷ In other words, the Supremacy Clause provides a blanket choice of law rule governing “actual conflicts” between federal and state law: Federal law wins.⁵⁹⁸ Take away this lexical rule—as Professor Ramsey would—and one is left with horizontal rules to govern any conflicts that arise between state and international law. One cannot dispense with the need for such rules by simply assuming that these conflicts will not exist.

594. See, e.g., Bradley, *Alien Tort Statute*, *supra* note 488, at 591 (arguing that federal courts may hear ATCA claims only when the suit fits under one of the party-based heads of jurisdiction).

595. This result highlights the inconsistency of Professor Ramsey’s approach with the pre-*Erie* treatment of customary international law.

596. See *supra* note 583 and accompanying text.

597. See Weinberg, *Conflicts*, *supra* note 534, at 1748-50.

598. See *id.* at 1753.

IV. OBJECTIONS

This Part considers three possible objections to the general law proposal developed in the preceding section. The objections come from quite different directions. The first, advanced by revisionists, holds that “general” law no longer exists as a legitimate legal category after the Supreme Court’s decision in *Erie*.⁵⁹⁹ On this view, customary international norms must be either federal law, state law, or no law at all. I argue in Section A that this objection relies upon an unpersuasive reading of *Erie*, and that all that decision requires is a valid state or federal choice of law rule allowing the application of “general” norms in the relevant court.

The second objection comes from the internationalist camp. Proponents of the modern position have argued that only incorporation of customary norms into federal law can guarantee a level of uniform interpretation and application necessary to protect national foreign policy interests.⁶⁰⁰ Although this argument has been most often directed at arguments that customary law can be incorporated, if at all, only as state law, the objection might also be leveled at the general law proposal. I consider this potential objection in Section B. Although I reject the objection’s implicit premise—that a departure from constitutional lawmaking procedures can be justified if the need is sufficiently great—I also argue that the general law proposal would retain ample safeguards for uniformity.

The third charge is one of “schizophrenia” and “backsliding.” I have inveighed at patience-trying length against the evils of treating customary international law as federal common law, yet I am willing to countenance substantial federal common law restraints on state choice of law. Both Professor Meltzer and Professor Ramsey, in their thoughtful comments on this Article, suggest that these two positions are inconsistent.⁶⁰¹ I argue in Section C that there are important differences between what I have criticized and what I have advocated. While my proposal is unlikely to make either revisionists or internationalists entirely happy, that may simply be the best evidence that I am on the right track.

A. Two Readings of Erie

I have argued that my general law proposal is fundamentally similar

599. See Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 2, at 852-53.

600. See *supra* Section II.F.

601. See Meltzer, *Customary International Law*, *supra* note 505, at 527-31; Ramsey, *supra* note 505, at 567-71.

to Professor Weisburd's argument that customary international law should be treated "as neither state nor federal law."⁶⁰² Professors Bradley and Goldsmith have rejected this argument, suggesting that *Erie* makes state and federal law the only two options for law applied in American courts.⁶⁰³ Professor Weisburd himself has been similarly leery of any "effort to resurrect the concept of general law as enunciated in *Swift v. Tyson*."⁶⁰⁴ He has preferred instead to say that customary law is "analogous to the law of a foreign country."⁶⁰⁵

I argue in this section that Professor Weisburd's caution was misplaced. The argument turns, of course, on the proper reading of *Erie Railroad v. Tompkins*—an opinion which has been described (by a *fan*, no less) as "flawed, abstract, oblique, and misleading."⁶⁰⁶ I have already rejected one possible reading, that *Swift* was unconstitutional because it allowed federal courts to make laws in cases outside the legislative jurisdiction of Congress.⁶⁰⁷ Two other possibilities remain. One holds that *Erie* is fundamentally about the nature of law, that is, that its key feature is the adoption of the positivist view that law must always be attached to the authority of a particular sovereign. The other reads *Erie* as being about the power of courts; on this view, the critical element is the lack of federal judicial authority to supplant state law in the absence of an authoritative pronouncement from Congress. The latter reading, which I favor, permits the application of general law by either state or federal courts so long as an otherwise valid choice of law rule permits courts to "choose" general law.

1. *Erie and the Nature of Law*

Professors Bradley and Goldsmith base their rejection of general law on *Erie*'s "embrace of legal positivism":⁶⁰⁸

In rejecting the notion of a general common law in the federal courts, the Court explained that "law in the sense in which courts speak of it today does not exist without some definite authority

602. See *supra* text accompanying notes 524-528; Weisburd, *State Courts*, *supra* note 6, at 49.

603. See Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 2, at 852-54; see also Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1044 (1967) ("A third theoretical possibility—that the state and federal courts are competent to decide [international law] question independently—is one that cannot be considered seriously after *Erie Railroad Co. v. Tompkins*.").

604. Weisburd, *State Courts*, *supra* note 6, at 49.

605. *Id.*

606. PURCELL, *supra* note 203, at 163.

607. See *supra* Section II.C.1.

608. Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 2, at 852.

behind it.” This strand of *Erie* requires federal courts to identify the sovereign source for every rule of decision. Because the appropriate “sovereigns” under the U.S. Constitution are the federal government and the states, *all* law applied by federal courts must be either federal law or state law.⁶⁰⁹

Louise Weinberg has agreed with this point: “At the heart of [*Erie*] was the positivistic insight that American law must be either federal or state law. There could be no overarching or hybrid third option.”⁶¹⁰

The ambiguous nature of legal positivism makes this argument somewhat difficult to evaluate. As Robin West has observed, “English legal positivists from Austin and Jeremy Bentham through to H.L.A. Hart and Joseph Raz, and American contemporary positivists as well—Jules Coleman, Fred Schauer, and others—have argued for a bewilderingly wide range of views that have only, or at best, a family resemblance.”⁶¹¹ A second factor, moreover, makes it even more difficult to assess the relationship between positivism and *Erie*. What many seem to take to be the core commitment of legal positivism—the “separation thesis” that “there is an analytic ‘separation,’ or distinction, that must be drawn between legal and moral norms, or between law and morality”⁶¹²—is only indirectly related to the choice of law problem posed by *Erie*. The courts confronting the *Erie* litigation were not asked to choose between a rule of decision grounded in moral principle and one grounded only in “positive” law; rather, they were asked to choose between the rule adopted by the courts of Pennsylvania and that derived by the federal courts in the exercise of their independent judgment.⁶¹³

Erie seems more directly concerned with positivism’s “Social Thesis,” which holds that “what counts as law in any society is fundamentally a matter of social fact.”⁶¹⁴ Justice Holmes seems to have

609. *Id.* (quoting *Erie*, 304 U.S. at 79); see also Bradley, *Charming Betsy*, *supra* note 100, at 523 (“*Erie* requires that all law applied by the federal courts be either federal or state law, which means that federal courts can no longer apply international law of its own force.”).

610. Weinberg, *Federal Common Law*, *supra* note 221, at 820.

611. Robin West, *Three Positivisms*, 78 B.U. L. REV. 791, 792 (1998); see also, e.g., Brian Leiter, *Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis*, in HART’S POSTSCRIPT 355, 356-57 (2001) (distinguishing between “hard” and “soft” positivism); Jules L. Coleman, *Negative and Positive Positivism*, 11 J. LEG. STUD. 139, 163 (1982) (distinguishing among three different sorts of legal positivism). Professor West discerns three different kinds of positivism at work in Justice Holmes’s *The Path of the Law* alone. See West, *supra*, at 792.

612. West, *supra* note 611, at 792; see also Coleman, *supra* note 611, at 140-41 (“Positivism denies what natural law theory asserts: namely, a necessary connection between law and morality.”). Both Professors West and Coleman treat the separability thesis as central to the meaning of legal positivism.

613. See generally PURCELL, *supra* note 203, at 96-101 (describing the arguments advanced by the parties in *Erie*).

614. Leiter, *supra* note 611, at 356. Professor Leiter states that “[a]ll positivists accept . . .

had something like this in mind in the following well-known passage from *The Western Maid*:

In deciding this question we must realize that however ancient may be the traditions of maritime law, however diverse the sources from which it has been drawn, it derives its whole and only power in this country from its having been accepted and adopted by the United States. There is no mystic over-law to which even the United States must bow. When a case is said to be governed by foreign law or by general maritime law that is only a short way of saying that for this purpose the sovereign power takes up a rule suggested from without and makes it part of its own rules.⁶¹⁵

One might contrast this view—that law derives its authority from acceptance and adoption by a particular community—with the conventional account of the pre-*Erie* law. Under that account, judges “deduced” principles of, say, contract law as a matter of right reason rather than looking to “social facts” to establish the acceptance of those principles in the relevant legal community.⁶¹⁶ Professor Weisburd seems to have had something like this dichotomy in mind when he distanced his own proposal from “the pre-positivistic conception of law as a ‘discoverable’ body of doctrine that somehow binds human activity without reference to human agency.”⁶¹⁷

Is a general law regime really inconsistent with positivism? In answering this question, it will help to distinguish between “hard” and “soft” versions of positivism’s “social thesis.”⁶¹⁸ According to Brian Leiter, “Soft Positivists interpret the Social Thesis as saying only that a society’s rule of recognition is constituted by the social facts about how officials actually decide disputes.”⁶¹⁹ Depending on what the social facts are, Soft Positivists can accept the application of all sorts of norms as “law.” For instance, “if it is the ‘practice’ or ‘convention’ of officials to

the Separation Thesis . . . and the Social Thesis.” *Id.*

615. 257 U.S. 419, 432 (1922).

616. See, e.g., Casto, *Constitutional Revolutions*, *supra* note 545, at 912-14.

617. Weisburd, *State Courts*, *supra* note 6, at 49.

618. See, e.g., Jack Goldsmith & Steven Walt, *Erie and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673, 678 (1998) (“‘Hard’ positivism makes the existence and content of law depend only on social practices; ‘soft’ positivism allows the identification of law to depend on matters independent of social practices as well.”).

619. Leiter, *supra* note 611, at 357; see also Coleman, *supra* note 611, at 140 (discussing “[t]he claim that the authority of the rule of recognition is a matter of its acceptance by officials, rather than its truth as a normative principle, and the related claim that judicial duty under a rule of recognition is one of conventional practice rather than critical morality”). The “rule of recognition” in positivist theory is the fundamental principle that allows us to identify which norms have the status of law. See H.L.A. HART, *THE CONCEPT OF LAW* 92 (1961).

decide disputes by reference to morality, then morality, in that society, is a criterion of legality.”⁶²⁰ If we adopt this version of positivism, then it is hard to see why *Swift* would have been inconsistent with it. So long as the application of “general” common law can be grounded in social practices—that is, in the sort of convention of deciding commercial cases according to a set of general principles shared by a number of different jurisdictions that Judge Fletcher and others have described⁶²¹—then the *Swift* regime is perfectly consistent with Soft Positivism. Just as obviously, a regime providing for the application of customary international norms as “general” law would be consistent with Soft Positivism so long as it rests on a convention of applying customary norms in this way.

Of course, the problem with Soft Positivism generally is that it seems to let most of its jurisprudential opponents in through the back door. What about “hard” positivism? Professor Leiter writes that

for Hard Positivists the Social Thesis says not only that a rule of recognition is constituted by social facts (e.g., facts about the conventional practice among officials in resolving disputes) but also that the criteria of legal validity set out by any society’s rule of recognition must *consist* in social facts (e.g., facts about pedigree or sources).⁶²²

“General law” might appear to fail this test; Justice Story’s opinion in *Swift*, after all, is usually thought to have derived the principles of general common law from “general reasoning and legal analogies,”⁶²³ that were not tied to social facts.⁶²⁴ Others have argued, however, that the general common law in cases like *Swift* was derived not from abstract principles but from prevailing customs and practices of merchants engaged in interstate or international commerce.⁶²⁵ Prevailing customs and practices are social facts; even hard positivists, then,

620. Leiter, *supra* note 611, at 357.

621. See Fletcher, *supra* note 27, at 1515-16; FREYER, *supra* note 348, at 37.

622. Leiter, *supra* note 611, at 357; see also Coleman, *supra* note 611, at 140 (discussing the view that “for a rule specifying the conditions of legality in any society to constitute a rule of recognition in the positivist sense, legal normativity under it must be determined, for example, by a norm’s being enacted in the requisite fashion by a proper authority”).

623. *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 19 (1842).

624. See, e.g., Casto, *Constitutional Revolutions*, *supra* note 545, at 911 (describing *Swift* as the exemplar of “the oracular model of judicial decision making”).

625. See RANDALL BRIDWELL & RALPH U. WHITTEN, *THE CONSTITUTION AND THE COMMON LAW* 90 (1977); Lessig, *supra* note 145, at 1791 (arguing that the customary law applied in *Swift* “was constituted by the usual or ordinary understandings of parties to a commercial transaction”); see also Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643 (1996) (discussing the nature and development of customary law).

should be able to live with a rule of recognition that tells courts to look to such sources in ascertaining the law applicable in commercial cases. Customary international norms—which derive from the observed practice of nations⁶²⁶—are likewise grounded in social facts. Applying those norms in international cases is thus consistent with hard positivism, even if those norms are not further incorporated into either “state” or “federal” law.⁶²⁷

Erie’s positivist language may suggest a narrower version still, however. Justice Brandeis’s opinion in *Erie* included several nods to Justice Holmes; in particular, Brandeis quotes Holmes’s insistence that

law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State . . . is not the common law generally but the law of that State existing by the authority of that State⁶²⁸

The emphasis on the imprimatur of the state—as opposed to the origins of common law rules in, say, the custom of merchants—suggests a position under which the legal status of a rule consists primarily or exclusively in its governmental pedigree. As Jack Goldsmith and Steven Walt have observed, “[m]ost positivists in the late nineteenth century and early twentieth century understood positivism in its narrow, Austinian version. Positions which based law on features of a social practice other than a sovereign’s coercive orders were not considered positivist.”⁶²⁹

Justice Holmes thus argued strenuously that the decisions of state courts on common law matters had the same authoritative pedigree as state statutes recognized as binding on the federal courts:

If a state constitution should declare that on all matters of general law the decisions of the highest Court should establish the law until modified by statute or by a later decision of the same Court, I do not perceive how it would be possible for a Court of the

626. *But see* Section I.C. (surveying debates about the extent to which modern customary law really is derived from state practice).

627. *See* Weisburd, *State Courts*, *supra* note 6, at 51 (arguing that “the human authority that creates customary international law is the collective international community,” and that “[t]hat community makes law . . . as positivistic as those the states employ”); Kelly, *supra* note 34, at 458 (observing that “[c]ustomary law is empirical The positive acts of states provide evidence of the underlying social fact of what the members of a society believe they are required to do”).

628. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

629. Goldsmith & Walt, *supra* note 618, at 679.

United States to refuse to follow what the State Court decided in that domain. But when the constitution of a State establishes a Supreme Court it by implication does make that declaration as clearly as if it had said it in express words, so far as it is not interfered with by the superior power of the United States. The Supreme Court of a State does something more than make a scientific inquiry into a fact outside of and independent of it. It says, with an authority that no one denies . . . that thus the law is and shall be. Whether it be said to make or to declare the law, it deals with the law of the State with equal authority however its function may be described.⁶³⁰

By adopting Holmes's position, *Erie* endorsed two important propositions: (1) that law has no force apart from its pedigree; and (2) that state constitutions—the positivist “rule of recognition” for state law—must be read to impart authoritative status to rules announced in decisions of the state courts. The first indicates a commitment to Austinian positivism; the second adds a “realist gloss” based on the insight that judges generally “make” law rather than “find” it.⁶³¹

This strictest view would exclude the application of any form of customary law by its own force. As Patrick Kelly has observed, “[c]ustomary law’s authority comes from the internalized normative belief of the political community and not from a defined process or ritual through which law is determined.”⁶³² To say this, however, is not to foreclose a legal system from adopting a rule—with the proper governmental pedigree—that would permit the application of customary norms. *Erie*’s positivist reasoning, in other words, does not itself require rejection of *Swift* or foreclose the notion of “general” law.

As Professors Goldsmith and Walt have demonstrated, the connection between positivism and the holding of *Erie* is dubious, whether that connection is considered in historical, conceptual, or normative terms.⁶³³ Justice Story was himself a positivist in many respects, and *Swift*’s subsequent defenders tended to emphasize practical and constitutional arguments rather than an anti-positivist notion of law.⁶³⁴ Moreover, one might advance any number of positivist

630. *Black & White Taxicab*, 276 U.S. at 534-35 (Holmes, J., dissenting); see also *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting) (“The law of a State does not become something outside of the state court and independent of it by being called the common law. Whatever it is called it is the law as declared by the state judges and nothing else.”).

631. Goldsmith & Walt, *supra* note 618, at 678.

632. Kelly, *supra* note 34, at 465; see also *id.* at 465 n.72 (noting that customary law is consistent with the softer positivism of H.L.A. Hart).

633. Goldsmith & Walt, *supra* note 618, at 675-76.

634. See *id.* at 682-83; see also FREYER, *supra* note 348, at 97-98; PURCELL, *supra* note 203,

justifications for the *Swift* rule. As Goldsmith and Walt point out, many of *Swift*'s defenders saw the application of general common law by federal courts sitting in diversity as directly authorized by Article III.⁶³⁵ Because "any number of constitutional arrangements are consistent with legal positivism"—that is, it rules out neither *Swift* nor *Erie*—"legal positivism by itself does not provide a reason to pick and choose among them."⁶³⁶

The problem in *Erie* was that these positivist accounts of *Swift* as authorized by Article III were held to be incorrect on the merits. "Congress has no power to declare substantive rules of common law applicable in a State," Justice Brandeis said, "[a]nd no clause in the Constitution purports to confer such a power upon the federal courts."⁶³⁷ *Erie* thus rested on a claim about the content of our particular rule of recognition—in other words, about the powers that the Constitution confers on the federal courts—rather than on a general theory about the nature of law. The crucial question for my general law proposal, then, is whether *Erie*'s constitutional understanding of federal judicial power forecloses the incorporation of customary international norms as neither state nor federal law.

2. *Erie and the Power of Courts*

Professors Bradley and Goldsmith read *Erie* as holding that "[b]ecause the appropriate 'sovereigns' under the U.S. Constitution are the federal government and the states, *all* law applied by federal courts must be either federal law or state law."⁶³⁸ I have argued in the previous subsection that this claim, if it is to succeed at all, must be regarded as stemming from *Erie*'s constitutional holding rather than from its embrace of legal positivism. The argument might be fleshed out this way: The Constitution specifies procedures for making federal law in the form of statutes, treaties, and constitutional amendments. Absent compliance with those procedures, state law applies by negative

at 69.

635. See Goldsmith & Walt, *supra* note 618, at 695 (arguing that "the truth of legal positivism" is consistent "with the view that the sovereign in the form of the Constitution's Article III authorizes federal courts to make an independent judgment about the content of state law" or "with the view that the sovereign requires federal courts to develop a national common law that is based on similar sources as state common law but that is neither state law nor federal law within the meaning of Article VI"); see also PURCELL, *supra* note 203, at 69 (observing that *Swift* retained defenders on pragmatic grounds even after positivism had carried the day intellectually).

636. Goldsmith & Walt, *supra* note 618, at 701.

637. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

638. Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 2, at 852.

implication of the Supremacy Clause.⁶³⁹ State and federal law are thus the only two valid categories in American courts.

Stated this way, the argument stands in serious need of qualification. It suggests that American courts can never apply foreign law. And yet we know that if, for example, the parties to a contract agree that disputes arising under that contract will be governed by the law of France, then both federal and state courts will generally apply French law in disputes covered by the agreement.⁶⁴⁰ Have courts in such a case acted outside their constitutional warrant? Surely not.

In the situation I have hypothesized, the American court will apply French law because it has a choice of law rule that enables and requires it to do so. That rule may be something as simple as a rule that law-selection clauses in contracts are enforceable⁶⁴¹ or, in a different situation where no such agreement exists, as complicated as a doctrine that the applicable law must be chosen based on the contacts and interests arising out of the dispute.⁶⁴² The important point is that while the choice of law rule will always be state or federal, the law *chosen* need not be. If the relevant sovereign is really sovereign, after all, it ought to be able to choose whatever choice of law rules it likes. Some versions of positivism require that the choice of law rule itself have the requisite governmental pedigree,⁶⁴³ and *Erie*'s principle of judicial federalism will govern whether the choice of law rule must be state or federal.⁶⁴⁴ But neither of these principles forbid ultimately choosing to apply norms originating outside our legal system altogether.

Professors Bradley and Goldsmith seem to recognize this at other points in their discussion. They observe that "[a]fter *Erie* . . . a federal court can no longer apply CIL in the absence of some domestic authorization to do so, as it could under the regime of general common law."⁶⁴⁵ If "some domestic authorization" is read to include general choice of law rules, then their understanding would seem to be wholly consistent with the view I have advanced here. It would then be unclear,

639. See Clark, *Separation of Powers*, *supra* note 60, at 1330.

640. See, e.g., *Societe Generale de Surveillance, S.A. v. Raytheon European Mgt. & Sys. Co.*, 643 F.2d 868 (1st Cir. 1981) (applying French law pursuant to contractual agreement); see also *Curran v. Kwon*, 153 F.3d 481, 488-89 (7th Cir. 1998) (federal court, following Illinois choice of law rules, applied French law to validity of release executed in France).

641. See, e.g., CONFLICTS RESTATEMENT, *supra* note 560, § 187.

642. See, e.g., CONFLICTS RESTATEMENT, *supra* note 560, § 6 (quoted in text accompanying note 560 *supra*); *Curran*, 153 F.3d at 488-89 (applying such a rule).

643. See *supra* text accompanying notes 628-629.

644. See *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941). One need not agree with the holding of *Klaxon* or think that *Klaxon* is constitutionally mandated to say that the decision between state or federal choice of law rules is a function of judicial federalism.

645. Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 2, at 852-53.

however, why they should have opposed Professor Weisburd's argument that federal courts may apply customary norms as "neither state nor federal law."⁶⁴⁶ While it is true that, as Bradley and Goldsmith argue, "*Erie* still requires a domestic source of authority (the federal government or a state government) before federal courts can apply [customary] law,"⁶⁴⁷ they need an explanation why a domestic choice of law rule cannot provide the requisite authorization.

Professors Bradley and Goldsmith attempt to provide such an explanation by suggesting that a state choice of law authorization for applying customary law would be inconsistent with the position that such law is really neither state nor federal.⁶⁴⁸ The objection seems to assume that when a state court applies foreign law⁶⁴⁹ it simply incorporates the foreign rule into its own law. There is some support for this view. In *Nolan v. Transocean Air Lines*,⁶⁵⁰ for example, New York's borrowing statute provided for the application of California substantive law; that law, however, was unclear. The Supreme Court held that the federal court of appeals on remand should ascertain how the *New York* courts would go about determining the content of California law and proceed accordingly.⁶⁵¹ *Nolan* has been read to stand for the proposition that federal courts sitting in diversity are bound not only by the forum state's choice of law rules, but also by the forum state's view of the *content* of the foreign law to be applied.⁶⁵² As Judge Friendly had written for the Second Circuit in *Nolan*, "Our principal task, in this diversity of citizenship case, is to determine what the New York courts would think the California courts would think on an issue about which neither has thought."⁶⁵³ To the extent that *Nolan* means that a federal court sitting in New York is bound by the New York courts' views on California law, that suggests that California law has really been incorporated into New York law.⁶⁵⁴ That would suggest, in turn, that a federal court applying customary international law by virtue of a state choice of law rule should view that international norm as a creature

646. See *id.* at 853 (quoting Weisburd, *State Courts*, *supra* note 6, at 49).

647. *Id.* at 853.

648. See *id.* at 853 n.249.

649. By "foreign" in this context I mean law that originates outside the state in question. This might include the law of a sister state.

650. 365 U.S. 293 (1961).

651. See *id.* at 295-96.

652. CHARLES ALAN WRIGHT, *LAW OF FEDERAL COURTS* 390 (5th ed. 1994).

653. *Nolan v. Transocean Air Lines*, 276 F.2d 280, 281 (2d Cir. 1960), *vacated on other grounds*, 365 U.S. 293 (1961).

654. After all, the New York courts have no power to make authoritative pronouncements about the content of *California* law.

of state law and defer to state court interpretations of that norm.⁶⁵⁵

Such an argument cannot rest on *Nolan* alone. As Professor Weisburd has explained, that decision is best read as holding only “that a federal court applying the forum’s choice of law rules because of *Klaxon* must also employ the forum’s method for determining the law of another state as long as the method is reasonable.”⁶⁵⁶ As Weisburd points out, the Supreme Court’s development of due process constraints on the ability of one state to misconstrue another’s law suggests some federal limit on the obligation to defer to state court readings of customary law.⁶⁵⁷ More importantly, *Nolan*’s holding that the method of ascertaining foreign law is bound up with the choice of law rules themselves hardly establishes that the effect of applying a choice of law rule is to “adopt” or “incorporate” foreign law into forum law.⁶⁵⁸ As I have already suggested, there is a meaningful distinction between “finding” and “making” law even if that distinction is ultimately a question of degree.⁶⁵⁹ When a Virginia court applies French law pursuant to a law-selection clause in a contract, that court does not view its job as “making” a Virginia version of French law in any meaningful sense. My proposal here is that both state and federal courts should treat

655. See Weisburd, *State Courts*, *supra* note 6, at 53 (noting that, under this reading, “a federal court could apply customary international law only when the state would do so (*Klaxon*), and only according to the state’s version of customary international law (*Nolan*)”); Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 2, at 870 (“If a state chooses to incorporate CIL into state law, then the federal courts would be bound to apply the state interpretation of CIL on issues not otherwise governed by federal law.”).

656. Weisburd, *State Courts*, *supra* note 6, at 53. As Professor Weisburd explains, the precise issue in *Nolan* was whether a recent California Supreme Court dictum should be construed to override the holdings of two California intermediate appellate courts on the interpretation of the California statute at issue. *Nolan* held simply that on this question—the relative weight to be given the two competing sources of California law—the federal court should follow the lead of the New York courts. See *id.*

657. See *id.* at 53-54 (citing *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988)).

658. This issue is reminiscent of an issue in federal common law doctrine concerning a federal court’s discretion to employ a state rule of decision even in areas of uniquely federal interest. In a case involving the commercial relations of the United States, for example, *Kimbell Foods* holds that state law will still apply absent a significant conflict with federal policy. See *supra* text accompanying notes 363-367. The question is whether state law applies *of its own force*, or whether the state law rule has been *adopted or incorporated* into federal law. Although Justice Scalia has expressed doubt whether this distinction makes much difference in the ordinary case, see *Boyle v. United Tech. Corp.*, 487 U.S. 500, 507 n.3 (1988), it might have implications for such issues as the choice of *which* state law governs or the Supreme Court’s ability to review a dispute about the content of the state rule. See, e.g., HART & WECHSLER, *supra* note 71, at 767-68. The important point for present purposes is that the Supreme Court has never pressed *Kimbell Foods*’ incorporation metaphor to the limit of its logical implications for these other issues. We should be similarly wary of drawing overly sweeping implications from a case like *Nolan*, decided *per curiam* and without any explanation of the relevant point.

659. See *supra* text accompanying notes 545-554.

the application of customary norms in much the same way.⁶⁶⁰

To sum up, *Erie* held that federal courts lack the power to make federal law on their own initiative, unless that law can be tied to an enactment—a statute, treaty, or constitutional provision—that has complied with the lawmaking procedures set out in the Constitution.⁶⁶¹ Nothing in that holding, however, forecloses the application of customary international law as “general law,” so long as an otherwise valid choice of law rule provides for the application of such law. That rule will ordinarily be a state law rule under *Klaxon*. Nonetheless, it remains possible that Congress could enact a federal statute setting forth choice of law rules covering the application of customary norms, or that judicial construction of such federal choice of law rules might be justified under the federalism and separation of powers concerns identified in *Sabbatino*.⁶⁶² The critical point is that the state or federal choice of law rule satisfies both the positivist imperative that law be grounded in the command of a sovereign and the constitutional imperative that judges not make law without authorization.

B. *The Problem of Uniformity*

The second objection I consider in this Part is likely to come from internationalists rather than revisionists. Although my general law proposal would probably result in customary international norms being applied in more cases than would the Bradley/Goldsmith/Trimble view, customary norms would still lack the force and status of federal law afforded by the modern position. International norms would thus be vulnerable to two sorts of disuniformity. First, some states might choose to depart from international norms in particular instances; where they did so, both the state and federal courts sitting within that jurisdiction

660. Professors Bradley and Goldsmith also argue that application of general law is inconsistent with *Erie*'s mandate that, “except for matters governed by federal law, ‘the law to be applied in any case is the law of the State.’” Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 2, at 854 n.249 (quoting *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)). That statement hardly forecloses the possibility that state law, in the form of a choice of law rule, may then refer the federal court to another source of law for the substantive rule of decision. Indeed, in *Erie* itself, everyone assumed that the federal district judge sitting in New York would ultimately end up applying Pennsylvania law, *see Erie*, 304 U.S. at 80, although it is unclear—given that *Klaxon* had not yet been decided—whether this would have been pursuant to federal or New York choice of law rules. Bradley and Goldsmith have not explained why, given that the state in which the district court sits authorizes choice of some other law than the forum state's, the chosen law must *also* be either federal or state. Such a rule would be hard to square with the common practice of applying the law of other countries in appropriate cases.

661. *See* Clark, *Separation of Powers*, *supra* note 60, at 1414-15; *see also supra* Section II.A.

662. *See supra* Section II.D.1.

would be required to apply state law. Even where states did not choose to depart from customary norms, those norms would be subject to a second sort of disuniformity arising from the lack of a single appellate authority whose interpretations of customary norms would bind the state courts. Divergent interpretations might thus develop, without any easy means of restoring uniformity.

It is impossible to deny the force of these objections altogether. Nonetheless, I believe that concerns about uniformity are overblown for a variety of reasons. At the outset, it is important to insist on an appropriate frame of reference. Internationalists sometimes write as if the federal courts regularly applied and enforced customary international law against recalcitrant states and the Supreme Court regularly accepted review to police the uniformity of federal court interpretations. This is hardly the case. To my knowledge, the preemptive force of customary international law has *never* been applied to supplant an otherwise valid state law rule.⁶⁶³ Nor is it likely to be in the future. Does anyone really think, for example, that juvenile death penalty laws in the states will be struck down on *international* grounds? To the extent that internationalists predict dire consequences arising from state freedom to make deliberate departures from customary norms, we should already be seeing those consequences.

Nor is the Supreme Court actively engaged in ensuring the unity of a federalized set of customary international norms. The volume of litigation under these norms is relatively low, and the most important area (torture) has been federalized by the TVPA. In the absence of Supreme Court review—and there has been *none* in the post-*Erie* era—one would expect the thirteen federal circuits to behave much like independent state jurisdictions, with all the concomitant problems of uniformity that that status is generally thought to encourage. Yet we do not see deep circuit splits over the proper definition of torture, for example. The Supreme Court has basically left the lower federal courts on their own in this area, and chaos has not ensued.

One might object to this last point by insisting that thirteen federal circuits *are* different from 50 states, not simply because they are less numerous but because—under the modern position, at least—they are engaged in applying the same body of law. Even in the absence of

663. See, e.g., Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 2, at 874 (noting that “*Filartiga*’s conclusion generally has not spread beyond the Article III [subject matter jurisdiction] context, contrary to what the modern position would suggest”). Indeed, in *Sabbatino*—the Supreme Court decision that internationalists cite as coming closest to adopting the modern position—the Court conceded that the state law version of the act of state doctrine was virtually identical to the federal version announced by the decision. See *supra* note 389.

frequent Supreme Court review, it would probably be fair to say that the federal circuits applying, say, the Sherman Act feel a greater sense of common venture and an accordingly greater incentive to maintain uniformity than do the courts of fifty states exercising their sovereign prerogative over contract or tort law. But this objection has no traction against the general law proposal. The defining characteristic of the “law merchant” under *Swift* was that it purported to be a single, shared body of law applicable in all American jurisdictions even though no single tribunal had power to bind the others.⁶⁶⁴ The general law proposal would accord a similar status to customary international norms; they would be available for application in any jurisdiction as part of a unified body of law, even though no single court would have ultimate jurisdiction over the whole system.

I discuss the prospects for uniformity in a general law system of customary international norms in the next subsection. I then turn to other mechanisms that are available to enhance the uniformity of customary law in ways that are not inconsistent with the general law proposal.

1. *Uniformity in General Law Systems: Lessons from the Swift Regime*

William Fletcher’s classic study of the workings of the *Swift* regime has revealed that, in certain areas and for a finite period of time, the general law system was remarkably successful in maintaining the uniformity of the general commercial law across American jurisdictions.⁶⁶⁵ Judge Fletcher surveyed the general common law of marine insurance, as applied in the federal and state courts between 1803 and 1840.⁶⁶⁶ According to Fletcher,

[t]he federal courts were always conscious in marine insurance cases that they were developing and administering a system of general common law that they shared with the state courts. No court, federal or state, was the necessarily authoritative expositor of what the common law rule on a particular point was or should be.⁶⁶⁷

664. See Fletcher, *supra* note 27, at 1562.

665. See Fletcher, *supra* note 27, at 1514-16.

666. Judge Fletcher explained his choice of subject matter on the grounds that “[t]hese cases not only constituted the single most important category of commercial litigation from about 1800 to 1820, but they also produced the most uniform—and therefore the most successful—system of commercial law in the American states.” *Id.* at 1515.

667. *Id.* at 1539; see also *id.* at 1549 (observing that “[t]he state courts regarded the decisions of the federal courts in marine insurance cases in the same way the federal courts

Nonetheless, Fletcher found a surprising degree of uniformity in the decisions; indeed, he found no reported circuit court case indicating a square conflict between state and federal rulings in the field until 1838, thirty-five years into his study.⁶⁶⁸ “This late date,” he concluded, “is eloquent testimony to the success of the federal and state courts in creating and maintaining a general law merchant of marine insurance that belonged simultaneously to all the courts and to none of the courts in particular.”⁶⁶⁹

The general common law regime of *Swift* was vulnerable to the same centrifugal pressures that internationalists have raised in the context of customary international law. States were free to depart from it by statute, and it lacked a single appellate tribunal with the power to unify the law on disputed points.⁶⁷⁰ Nonetheless, based on the experience of the marine insurance cases, Judge Fletcher concluded that the *Swift* regime was far more uniform and stable than has generally been thought:

Despite its obvious vulnerability to local variation, the judicial system created by the Judiciary Act of 1789 was, at the outset, relatively sensible and coherent. When the Constitution was adopted and the Judiciary Act passed, there was a large body of general law held in common by the states. The judicial system created by the Judiciary Act, although awkward, was workable as long as the state and federal courts felt that they were administering a system of general common law in whose uniformity and stability they all had an important stake. Section 34 [the Rules of Decision Act] and the *lex loci* principle it embodied remained irrelevant as long as the common law remained a system of general law.⁶⁷¹

This experience suggests at least the possibility that a regime of general law might survive in the area of customary international law without collapsing into a welter of discordant decisions.

The interesting questions, of course, concern why the *Swift* regime succeeded in the area of marine insurance, what caused the general common law system to break down in the late nineteenth century, and

themselves did—as decisions under the general law of marine insurance that the federal and state courts jointly administered”).

668. *Id.* at 1549. Judge Fletcher concedes that the fragmentary circuit court reports may hide other conflicts, but concludes that the low number of such conflicts is “remarkable,” “even considering the inadequacy of the reports.” *Id.*

669. *Id.*

670. *Id.* at 1560.

671. *Id.* at 1562.

whether those same pressures would doom a general law approach to customary international norms. Judge Fletcher cited several forces that promoted cohesion in marine insurance law. First, the decisions indicate “a strong desire to establish clear rules of law in marine insurance cases and a great reluctance to depart from precedents established in other jurisdictions,” based primarily on the principle that it was more important to have matters settled than that they be settled *right*.⁶⁷² Second, the American courts inherited a body of marine insurance law that had recently been consolidated in England.⁶⁷³ Finally, coordination problems among American jurisdictions were eased by the prominence of only a few state courts involved in marine insurance litigation as well as the status of the United States Supreme Court as the first among equals.⁶⁷⁴

Some of these forces that promoted cohesion in the law of marine insurance have analogs in the context of modern customary international law and some do not. The economic incentives to promote clarity and stability over other concerns that are present in commercial law are not so obviously primary in many areas of customary international law; nonetheless, the widely held view that the nation ought to “speak with one voice” on these matters to the greatest extent possible may play a comparable role. Customary international law, on the other hand, notoriously lacks the well-organized and largely agreed-upon corpus that Lord Mansfield bequeathed to American practitioners of marine insurance law.⁶⁷⁵

Finally, the coordination issues seem to favor uniformity, although they do not all point in the same direction. It is hard to predict whether certain American jurisdictions would achieve special prominence in customary international law cases, although it is not inconceivable that the courts of, say, New York might achieve a similar role in international human rights litigation that Delaware has achieved in corporation law. The coordinating role of the Supreme Court seems likely to be less prominent than in the nineteenth century. Although nothing would forbid the Court from taking “general law” cases if some other basis of jurisdiction (such as diversity) were available, it is hard to see the modern Court devoting a great deal of space on its docket to cases in which its pronouncements would not bind the state courts.⁶⁷⁶

672. *Id.* at 1562-63.

673. *See id.* at 1565-66.

674. *See id.* at 1566, 1575; *see also id.* at 1569-70 (stating that the state courts of Massachusetts and Pennsylvania tended to follow the New York courts on commercial matters).

675. *See supra* Section I.C.

676. The potential importance of customary international law issues to foreign policy might offset this disincentive, however. This would be particularly true where the Government argued

These uncertainties are more than offset, in my view, by the potential role of the Executive branch in facilitating coordination among different jurisdictions. As Professor Trimble has demonstrated, the position of the Executive is the most powerful explanatory factor for federal court results in international cases.⁶⁷⁷ Needless to say, the Executive would have a far greater incentive to play this role in international cases than in the run of private commercial disputes under *Swift*.⁶⁷⁸

The forces that caused the *Swift* regime to fall apart are of even greater potential interest. Judge Fletcher's study does not focus on these forces, but other students of the general common law have suggested a number of factors. One problem was that, as Larry Lessig has observed, "federal general common law came to include a much broader range of law. Although at the start its scope was essentially contract, by the end it reached far beyond contract, even to the law of torts."⁶⁷⁹ One would expect this change in and of itself to substantially increase the coordination problems associated with maintaining a uniform set of rules shared among many coequal jurisdictions. But the expansion in scope was accompanied by a shift in the perceived *nature* of the general common law. As Professor Lessig explains, "federal general common law was less the practice of gap-filling for parties to a commercial transaction, and more a practice of norm-enforcement, covering a substantial scope of sovereign authority. The common law was no longer reflective, or mirroring of private understandings; it had become directive, or normative over those private understandings."⁶⁸⁰ To the

that an individual case was of unique foreign policy importance. See generally H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 253 (1991) (discussing the importance of particular cases to the government as an argument for certworthiness).

677. See Trimble, *supra* note 6, at 687 ("Courts avoid using customary international law except when the government intercedes."); see also Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 2, at 871 (observing that "states rarely consider issues of CIL, and when they do, they tend to adopt a very deferential attitude toward the federal government's views").

678. Other coordinating mechanisms that were unavailable in the nineteenth century have achieved prominence in the modern era. The American Law Institute's Restatements of American Foreign Relations Law have already been influential in securing the incorporation of at least some principles of customary international law by American courts. Given the infrequency with which most courts deal with international law and the lack of extensive training that most lawyers and judges receive in that field, one would expect a relatively greater reluctance to second-guess the ALI than in more familiar areas like contracts or torts. Similarly, the Commission on Uniform State Laws has had some success in achieving uniformity in particular areas. Indeed, the Uniform Commercial Code may be seen as the direct successor to reliance on principles of customary international law, embodied in the law merchant, to bring uniformity to commercial disputes across jurisdictional lines.

679. Lessig, *supra* note 145, at 1792; see also FREYER, *supra* note 348, at 58 (noting that "[b]y the 1880s the general law included 26 distinct doctrines").

680. Lessig, *supra* note 145, at 1792.

extent that the common law became an instrument of normative policy choices, it is not surprising that the choices made across jurisdictions came to differ. As Tony Freyer and Edward Purcell have both recounted, the general common law applied by the federal courts ultimately became, in many areas, a tool for national corporate interests to receive more favorable rules of decision than they might be subject to in the state courts.⁶⁸¹

As with the roots of *Swift*'s initial success, it is hard to be certain what these causes of its ultimate failure bode for a "general" system of customary international law. Like the general common law of the late nineteenth century, modern customary international law has grown to cover a wide array of subject matter, and it seems likely that the coordination problems arising from that fact would be as great or greater than those engendered by the expansion of the law merchant to encompass torts and other subjects. Similarly, there is a sense in which modern customary international law has become normative rather than simply reflective of the general practice and "custom" of nations.⁶⁸² To the extent that such law is increasingly derived from more aspirational sources—such as General Assembly resolutions, unratified treaties, and the work of international law scholars—this normative element is likely to become more pronounced. As under *Swift*, that normative element is likely to undermine efforts to achieve consensus and uniformity.

Nonetheless, these problems do not necessarily counsel against attempting to incorporate customary rules into American law as "general" norms. The broad scope and normative thrust of modern customary international law are also obstacles, after all, to the acceptance of such norms as binding federal common law. These problems may thus militate instead for a set of choice of law rules that would tend to result in the application of a narrower and less normative subset of customary international norms.⁶⁸³ A simple acknowledgement that states may legitimately depart from customary law where they wish to do so, for example, would tend to decrease the normative component of customary law by confining its applications to areas in which the state has made no deliberate policy choice.⁶⁸⁴ One would not expect the

681. See FREYER, *supra* note 348, at xii-xiii; PURCELL, *supra* note 203, at 65-67.

682. See *supra* Section I.C.

683. This is arguably what the federal courts have in fact done in ATCA cases. See *supra* text accompanying notes 72-74.

684. As I discuss further *infra* at text accompanying notes 702-705, customary norms might nonetheless influence the content of state law through the application of canons of construction. That sort of influence, however, is far less intrusive on state prerogatives—and hence less likely to undermine the consensus necessary to sustain a general law regime—than outright preemption of state choices. Rules of construction, after all, leave the final say to the state legislature. Cf.

states to take positions, for example, on issues like head-of-state immunity, and this sort of narrow and specialized body of rules was the sort of thing that the general common law historically did well. Similarly, the more customary norms tend to be applied in cases where the state lacks an appreciable interest—such as human rights litigation over events taking place between aliens in foreign jurisdiction⁶⁸⁵—the less difficult it should be to maintain those norms as a coherent body of specialized law.

In my view, the *Swift* experience provides some reason to believe that a general law approach to customary international law would not degenerate into chaos, particularly if the purview of that law can be restricted to a somewhat narrower compass than is sometimes claimed for it. Fortunately, there are other mechanisms that substantially bolster the prospects for uniformity under such a regime.

2. *Other Mechanisms to Promote Uniformity*

The debate about customary international law is generally about default rules. Whatever the usual status of customary norms in the hierarchy of American law, Congress retains the power under Article I to federalize them or, in the exercise of its other powers, to relieve the states of any obligation of compliance. A default rule that customary norms are “general” in nature, moreover, must interact with other default rules bearing on the role of international law and the limits of state autonomy. The mechanisms for promoting uniformity thus fall into two main categories: instruments for overcoming the presumption that customary law does not bind the states, and other default rules that tend to promote uniformity even in the absence of such action. Taken together, these mechanisms ought to inspire substantial confidence that disuniformity in a general law system would not be markedly greater than the disuniformities that exist today.

The most important instrument for promoting uniform observance and incorporation of customary international norms is obviously Congress’s power to federalize those norms by statute. Congress may use this power both to identify particular norms that it wishes to ensure are enforceable in American courts, as it did in the TVPA, and to preempt particular state departures from customary norms when the departures would pose a threat to national foreign relations policy. To be sure, the substantial burden of legislative inertia will probably render

Young, *Constitutional Avoidance*, *supra* note 195, at 1594-96.

685. See *supra* Section III.B.2.

congressional action on these issues infrequent.⁶⁸⁶ As Professors Bradley and Goldsmith have pointed out, however, congressional action has the offsetting advantage that “CIL norms incorporated into federal statutes possess the virtues of being clearer, more concrete, and more democratic than uncodified CIL.”⁶⁸⁷ As a result, “the requirement of political branch authorization may actually enhance the enforceability of these norms.”⁶⁸⁸

Congress may also choose to delegate some of its authority to require compliance with international norms to the Executive Branch. Such delegations would be particularly attractive in situations where a quick response to an individual state’s refusal to enforce (or state’s divergent interpretation of) customary international law is necessary to head off a potential foreign policy crisis. The federal Burma law, for example, not only set forth federal sanctions on the present government of Burma but also empowered the President to preempt state provisions that went further than the federal statute.⁶⁸⁹ A similar provision might expressly grant executive power to preempt state positions on customary international law that threaten to interfere with federal policy in particular areas.⁶⁹⁰ In some areas, moreover, no such new delegation

686. These burdens should not be exaggerated, however. William Eskridge’s empirical work on the legislative overruling of Supreme Court statutory interpretation decisions suggests that Congress manages to overcome burdens of inertia to act in response to judicial rulings more often than has sometimes been thought. See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 334 (1991). One would expect congressional action to be particularly likely if an individual state court issued a ruling departing from customary international law in a way that actually threatened national foreign policy interests.

687. Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 2, at 871.

688. *Id.*

689. See Foreign Operations, Export Financing, and Related Programs Appropriations Act, § 570, 110 Stat. 2009-166 to 3009-167 (1997) (enacted in the Omnibus Consolidated Appropriations Act, § 101(c), 110 Stat. 3009-121 to 3009-17 (1997)); *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 368-70 (2000) (explaining the workings of the federal provision). In *Crosby*, the Court held—improperly, in my view—that the mere delegation of this power to the President was sufficient to preempt state sanctions, even though the President had not exercised that power. See *id.* at 2298; Young, *Dual Federalism*, *supra* note 181, at 171-72 (criticizing this aspect of the Court’s decision).

690. To the extent that we still have a nondelegation doctrine, *cf.* *Whitman v. American Trucking Ass’ns*, 121 S. Ct. 903 (2001), it might impose some limits on this approach. Moreover, I have suggested elsewhere that preemption by executive agencies may raise federalism concerns not present when Congress itself moves to preempt state law. See Young, *Two Cheers*, *supra* note 193, at 1365. Nonetheless, it has long been established that the usual limits on delegation are eased when the President acts in foreign affairs, due to the significant powers granted directly to the President in that area. See *United States v. Curtiss-Wright Corp.*, 299 U.S. 304 (1936). And while one hates to rely on Justice Sutherland’s flawed opinion in *Curtiss-Wright* for much of anything, this aspect of its holding—as opposed to its broader historical and theoretical dicta—has been relatively uncontroversial. See, e.g., *Loving v. United States*, 517 U.S. 748, 769 (1996) (accepting broader delegations to the President in military affairs, but relying on the

may be necessary. Where the Executive already possesses broad delegated powers—such as in environmental policy—Executive agencies may be able to preempt troublesome state positions under existing delegations of authority.

Finally, the third branch of the federal government would also retain power, under certain circumstances, to impose uniform rules as a matter of federal common law. My reading of *Sabbatino*, while narrower than that espoused by most internationalists, did not wholly reject the notion of federal common law in foreign affairs. The question, rather, is whether the particular federal common law rule to be articulated can be legitimately derived from federal statutes or from constitutional provisions providing order for the federal relationship in the international sphere.⁶⁹¹ I would expect those instances to be rather few and far between. But the circumstances most often cited in which state autonomy might pose a threat to American foreign relations—such as a particular state's refusal to recognize head-of-state immunity⁶⁹²—would be the best candidates for the exercise of this limited power.

This said, I am not sure that I have much in the way of significant disagreement with Professor Meltzer when he advocates preserving a role for federal common law in cases with foreign affairs overtones.⁶⁹³ I do suggest, however, that federal common law should most often take the form of federal choice of law rules—or, even more narrowly, federal constraints on *state* choice of law rules⁶⁹⁴—rather than actual federal rules of decision. As Louis Henkin and others have noted,⁶⁹⁵ the act of state doctrine in *Sabbatino*—the most prominent example by far of federal common lawmaking in foreign affairs cases—can itself be understood as a conflicts rule. The Reporter's Note to the *Restatement (Third)* explains that

[i]n most cases, the act of state doctrine may be seen as a special rule of conflict of laws. The normal rule of choice of law in most act of state cases would point to application of the law of the state where the act took place; that rule may be disregarded in certain instances where the law thus chosen would violate the

specific Commander in Chief power).

691. See *supra* Section II.D.1.

692. See Koh, *State Law?*, *supra* note 3, at 1850.

693. See Meltzer, *Customary International Law*, *supra* note 505, at 536-37.

694. See Trautman, *supra* note 537, at 1733.

695. See Henkin, *Act of State*, *supra* note 412, at 178 ("Act of state is a special rule modifying the ordinary rules of conflict of laws. . . . [I]t says that the foreign 'law' (i.e., the act of state) must govern certain transactions and that no public policy of the forum may stand in the way."); Frederick L. Kirgis, *Understanding the Act of State Doctrine's Effect*, 82 AM. J. INT'L L. 58 (1988).

strong public policy of the forum, *e.g.*, a policy against expropriation without compensation. . . . The act of state doctrine requires a court to disregard that public policy and to give effect to the foreign law.⁶⁹⁶

Although this reading of the doctrine is not uncontroversial,⁶⁹⁷ its ability to describe at least a substantial subset of the act of state cases suggests the viability of an approach that emphasizes choice of law.

The primary advantage of dealing in choice of law rules rather than rules of decision is that the former are designed to pick among pre-existing bodies of law. Professor Meltzer's suggestion, by contrast, would invite courts to fashion new rules of decision. That approach is most feasible when the court is filling in gaps in existing federal statutes or treaties; in those cases, the surrounding statutory fabric should provide a helpful guide to determining the content of the federal rule of decision. Meltzer acknowledges, however, that in the foreign affairs area federal common lawmaking must often be defended as grounded in raw federal interests rather than statutory gaps.⁶⁹⁸ Such interests may be considerably less helpful to the court in giving content to a federal rule of decision.⁶⁹⁹

Articulating a federal choice of law rule in these circumstances should avoid some of these difficulties. The court need only determine whether federal interests will be best served by recourse to state law, foreign law, or international law in the relevant circumstances; from that point on, the source of law chosen will provide the underlying rule of decision. Accepting this point need not rule out formulation of federal substantive rules where the content that such a rule should have is clear from policies adopted by the federal political branches. My point is simply that such clarity may often be lacking, and in those circumstances the relevant federal interests may best be served by formulating federal common law in the form of a conflicts rule.

A number of default rules should also help maintain the uniformity of

696. RESTATEMENT (THIRD), *supra* note 32, § 443, Reporter's Note 1. As Michael Gruson has demonstrated, in many cases the act of state doctrine will generate the same result as would occur under ordinary conflicts principles. See Michael Gruson, *The Act of State Doctrine in Contract Cases as a Conflict-of-Laws Rule*, 1988 U. ILL. L. REV. 520, 539.

697. See Anne-Marie Burley, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUM. L. REV. 1907 (1992) (recounting controversy over the conflicts reading of the act of state doctrine).

698. See Meltzer, *Customary International Law*, *supra* note 505, at 539-41.

699. See, *e.g.*, *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 465 (1957) (Frankfurter, J., dissenting) (observing that the problem with broader versions of federal common lawmaking power is that courts cannot look to legislative enactments for guidance in determining the substantive context of the new federal rule)

customary norms even in the absence of affirmative action by the federal government. Some of these default rules are constitutional in nature. While I have my doubts about the legitimacy of *Zschernig's* doctrine of dormant foreign affairs preemption,⁷⁰⁰ the Supreme Court has not yet overruled it, and it may, in the most egregious instances, serve to prevent state departures from or interpretations of customary international law that pose serious threats to federal foreign policy. Similarly, the dormant Foreign Commerce Clause will foreclose most state positions on customary law that have the effect of discriminating against foreign nationals or corporations.⁷⁰¹ And, of course, to the extent that customary norms are duplicative of rights already protected by federal law, the states have no option of departing from them.

The more important default rule, however, may be the *Charming Betsy* canon of statutory interpretation.⁷⁰² Although the traditional form of that canon holds that “an *act of Congress* ought never to be construed to violate the law of nations if any other possible construction remains,”⁷⁰³ a similar rule might be applied in construing state law bearing on customary international norms. As I have said, such a rule could be justified either as an empirical judgment that state governments do not generally intend to violate international norms or as a substantive canon protecting the federal interest in compliance with international law.⁷⁰⁴ Given that state law often will not directly address many issues implicating customary international norms—such as head-of-state immunity, for example—there should be ample room for such a canon to have a homogenizing impact.⁷⁰⁵

Moreover, the *Charming Betsy* canon provides a means by which customary norms can shape the evolution of state law without preempting everything in sight. Given that broad preemption of state law by customary international norms is unlikely to be approved by the courts, this milder sort of influence might well be a good “second best” alternative from an internationalist perspective. The potentially broad preemptive impact of the modern position may have had the perverse effect of encouraging both federal and state judges to ignore

700. See, e.g., Young, *Dual Federalism*, *supra* note 181, at 175-76; see also Goldsmith, *supra* note 272 (offering a comprehensive critique of the doctrine).

701. See, e.g., *Wardair Canada Inc. v. Florida Dept. of Revenue*, 477 U.S. 1, 8 (1986).

702. See *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

703. *Id.* at 118 (emphasis added).

704. See *supra* text accompanying notes 568-574; see also Young, *Constitutional Avoidance*, *supra* note 195, at 1585-93 (discussing descriptive and normative canons of construction); Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?* 45 VAND. L. REV. 561, 563 (1992); Bradley, *Charming Betsy*, *supra* note 100, at 507.

705. See *supra* Section III.B.2.

international law entirely; by backing off that position a bit, internationalists may achieve a wider influence than they could previously have expected.

C. Choice of Law Schizophrenia?

Professor Meltzer detects “a bit of schizophrenia” in my use of choice of law rules to regulate the applicability of “general” norms of customary law in American courts.⁷⁰⁶ On the one hand, I have argued strenuously that the broad federal common lawmaking authority assumed by the modern position cannot be justified; on the other, I have suggested that federal common law and federal constitutional rules may limit the ability of states to refuse to apply customary norms under a general law regime.⁷⁰⁷ The latter set of arguments, Professor Meltzer says,

sound to me just like the kind of arguments for real federal common lawmaking—that is, for making judge-made substantive rules—that Professor Young rejected. But they are being deployed now . . . to establish a regime of federal choice of law whose result will be to displace state law and require instead application of CIL on the ground that it provides a better fit with federal interests.⁷⁰⁸

Professor Ramsey has similarly suggested that my general law approach “slides back into preemption, although not so broad a preemption as is sometimes advocated.”⁷⁰⁹

One man’s schizophrenia, however, may be another man’s moderation. The modern position is an extreme view, and one may sensibly oppose it while still acknowledging the considerable importance of customary international norms and the need for a substantial measure of uniformity in their construction and application. The general law proposal thus preserves a substantial role for international law in our domestic system and works to prevent the “balkanization” of that law that the internationalists fear. Nonetheless, it is important to emphasize several respects in which the regime I have advocated preserves a greater degree of state autonomy than does the modern position.

First, although I am willing to contemplate the development of federal common law rules to limit state choice of law in cases raising

706. Meltzer, *Customary International Law*, *supra* note 505, at 527.

707. *See id.* at 527-31 (summarizing these arguments).

708. *Id.* at 530.

709. Ramsey, *supra* note 505, at 567.

international issues, it is important to emphasize what this does and does not entail. Such rules must be tied closely—as the choice of law rule in *Sabbatino* was—to specific concerns about preserving political branch control over foreign policy. Even more important, they must be developed under the flexible *Kimbell Foods* approach to federal common law, which will apply state rules unless those rules pose a significant conflict with specific federal interests.⁷¹⁰ This sort of federal common law regime is a far cry from the modern position that I have criticized. That position, after all, holds categorically that *all* customary international norms are supreme federal law, at least in the absence of a controlling or legislative act. It does not leave room for the possibility that state law may apply in the absence of specific separation of powers concerns or conflicts with federal policy in a given case.

Second, the general law proposal should work to protect state regulatory autonomy in areas where it has traditionally existed. As the juvenile death penalty example demonstrated,⁷¹¹ most plausible conflicts approaches will choose state law in cases where customary international norms are urged to supplant a state's regulation of its own citizens and/or territory. Moreover, such cases are unlikely either to implicate constitutional restrictions on state choice of law or the sort of foreign policy and separation of powers concerns that might justify federal common lawmaking. My approach tends to explain and justify the general *failure* of American courts to adopt the preemptive implications of the modern position. Given the increasing overlap of customary international norms with core state regulatory concerns, that is no small advantage.

Finally, even where traditional conflicts principles or federal common law rules require courts to apply customary international law, a state court would retain independent interpretive authority over that law. Because customary norms are “general,” they do not confer appellate jurisdiction on the United States Supreme Court. While I have argued that such a general law regime might nonetheless maintain a significant level of uniformity due to mutual deference among courts, the state courts would retain the ability to act as an autonomous force in developing the meaning of customary norms. To the extent that customary norms increasingly embody our basic aspirational ideals concerning human rights and welfare, it is important that state courts be

710. If *Sabbatino* had been decided after *Kimbell Foods*, for example, it seems likely that the Court would simply have adopted the New York act of state doctrine for purposes of that litigation. *See supra* note 389. There was, after all, no conflict between New York's version of the act of state doctrine and the federal interests identified by the Court.

711. *See supra* Section III.B.2.a.

able to participate in their development.⁷¹²

CONCLUSION

The dispute about the domestic status of customary international law is hard precisely because it implicates so many longstanding and potentially intractable debates in so many different fields. Do judges “make” or “find” the law? What is the proper allocation of foreign affairs powers at the federal level? What role can the states play, especially in a time of globalization? What makes a particular lawmaking practice “democratic”? How should courts respond to legislative silence and legislative inertia? To what extent should a federal system be governed by uniform rules? How do we translate constitutional arrangements predicated on particular eighteenth century views of the world and the law into answers to present questions? How do we promote basic human rights in a world where they are sometimes disputed in principle and more often dishonored in practice? One would like to think, coming to the end of an inordinately long article, that *something* had been put to rest. But these questions tend to defy simple answers.

My own assessment is that one thing, at least, is clear. The modern position, insofar as it amounts to a categorical statement that customary international law just *is* federal common law, is unsustainable. The modern answer is too easy: It fails to account for the complexity of the ways in which the Constitution and early judiciary acts provided for a federal judicial in international cases; for the difficulties of distinguishing between “foreign” and “domestic” matters under modern conditions of globalization; and for the flexibility of modern rules on federal common lawmaking authority. And by creating the potential for broad preemption of state policies by means outside the political processes designed to protect federalism, the modern position proves too much.

But the revisionist prescription—that customary international law is simply out of court unless Congress enacts it by statute or a state chooses to adopt it as part of its own law—is also too simple. The founding generation expected that the law of nations would be available in U.S. courts. The application of some traditional customary norms—such as the immunities of diplomats—would be called into

712. Cf. William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 548-49 (1986) (emphasizing the creative role of state courts in developing the individual rights provisions of state constitutions as a complement to the individual rights decisions of the U.S. Supreme Court).

question under the revisionist prescription. And the idea that federal and state courts would be sealed off, in most circumstances, from the normative influence of customary law presents an unattractive prospect.

We are thus left, in my view, with a complex answer to a complex question. I have proposed that we return to the nineteenth century concept of "general law." That notion held that the law of nations in the nineteenth century was neither state nor federal, but shared among and available to courts in both judicial systems. Under present conditions, the application of such law to a particular case would turn on principles of the conflict of laws. I have endeavored to demonstrate that most choice of law approaches, as applied to several paradigm cases involving customary international law, would yield results that generally accord with fairly intuitive judgments. In areas where the application of customary norms is particularly important to national interests, the federal courts could formulate federal conflicts rules or federal constraints on state choice of law.

This approach is unlikely to wholly satisfy either revisionists or internationalists; that, in fact, may be the best evidence of its virtue. It does, however, respond to the core concerns of each camp. It preserves the primacy of the political branches at the federal level and the sovereignty of the states. And it provides a means for both federal and state courts to apply, incorporate, and be influenced by customary norms that is meaningful but not so preemptive as to tempt those courts to reject customary norms outright. The general law approach, in other words, offers customary law a place in our system that is sustainable over the long term.

That would be an important development. Despite the apparent suspicions of some internationalists, revisionists have no reason to be hostile to the idea of customary norms *per se*. Surely those norms offer an important means of both stabilizing the international system—through principles like diplomatic immunity—and improving the human condition through the recognition and expansion of international human rights. But just as surely those norms ought not to be received into our own law in such a way as to destabilize the fundamental rules of federalism and separation of powers or to undermine the individual liberties that those structural principles are designed to protect. The way forward—for internationalists and revisionists alike—must be predicated on respect for *both* sets of concerns.