

CUSTOMARY INTERNATIONAL LAW AS U.S. LAW:
 A CRITIQUE OF THE REVISIONIST AND
 INTERMEDIATE POSITIONS AND A
 DEFENSE OF THE MODERN POSITION

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INTRODUCTION	1496
I. THE MODERN POSITION: EXPLICATION AND PRELIMINARY DEFENSE	1515
A. <i>The Basic Case for the Modern Position</i>	1516
1. Constitutional Structure and Original Intent.....	1517
2. Pre- <i>Erie</i> Doctrine	1522
a. State Authority to Depart from Customary International Law	1523
b. Supreme Court Review of Customary International Law	1525
c. The General Law as an Intermediate Status...	1533
3. Post- <i>Erie</i> Doctrine	1535
B. <i>The Limits of the Modern Position</i>	1538
1. <i>Sabbatino</i> and the Inapplicability of Some Customary International Law Norms to Some Acts of Foreign States	1539
2. <i>The Paquete Habana</i> and the Applicability of Customary International Law to Federal Officials .	1544
C. <i>Sosa and the Modern Position</i>	1546

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II. THE INTERMEDIATE THEORIES	1554
A. <i>Ramsey's Position</i>	1555
1. Nonpreemptive Federal Law as State Law	1556
2. Ramsey's Textual and Historical Support	1563
B. <i>Young's Position</i>	1569
1. Young's Criticisms of the Modern Position	1570
2. Young's Intermediate Status for Customary International Law	1574
a. State Choice-of-Law Rules	1575
i. The Diversity and Indeterminacy of Existing Choice-of-Law Approaches	1576
ii. The Inappositeness of Choice-of-Law Rules	1577
iii. The Likelihood of Special Choice-of-Law Rules	1585
iv. The Role of the Federal Courts	1586
v. Summary	1588
b. Federal Choice-of-Law Rules	1589
C. <i>Aleinikoff's Position</i>	1592
D. <i>The Bellia-Clark Position</i>	1597
E. <i>The Bradley-Goldsmith-Moore Position</i>	1609
III. THE MODERN POSITION, REDUX	1617
A. <i>The New Ways of Making Customary International Law</i> ...	1617
B. <i>The New Topics Addressed by Customary International Law</i>	1623
IV. STATE INCORPORATION OF CUSTOMARY INTERNATIONAL LAW	1625
CONCLUSION	1633

INTRODUCTION

In a recent referendum, the citizens of Oklahoma overwhelmingly approved a State constitutional amendment providing that the courts of the State “shall not consider international law or Sharia law” in rendering their decisions.¹ The amendment’s exclusion of Sharia law has garnered most of the media attention,² but more consequent-

1 State Question No. 755, Legislative Referendum No. 355 (amending OKLA. CONST. art. 7, § 1.), available at <https://www.sos.ok.gov/documents/questions/755.pdf>; see Jess Bravin, *Oklahoma Shariah Ban Halted*, WALL ST. J., Nov. 9, 2010, at A6; Aaron Fellmeth, *International Law and Foreign Laws in the U.S. State Legislatures*, ASIL INSIGHTS (May 26, 2011), <http://www.asil.org/pdfs/insights/insight110526.pdf>.

2 See Jess Bravin, *Oklahoma Is Sued over Shariah Ban*, WALL ST. J., Nov. 5, 2010, at A5; Carla Hinton, *Measure Keeps Courts from Considering Sharia Law*, OKLAHOMAN, Nov. 5, 2010, at 1A; Donna Leinwand, *States Enter Debate on Sharia Law*, USA TODAY, Dec. 9, 2010, at 3A; James C. McKinley, Jr., *Oklahoma Surprise: Islam as an Election Issue*, N.Y. TIMES, Nov. 15, 2010, at A12; Darla Slipke, *English-Only, Health Care, Sharia Law Measures Pass*, OKLAHOMAN, Nov. 3, 2010, at 5A. This aspect of the amendment has been

ial by far is the measure's directive to the State courts to disregard international law. Similar measures have been proposed in other States, some of them merely barring consideration of Sharia law or foreign law,³ but others barring consideration of international law as well.⁴ These measures are clearly unconstitutional insofar as they would prohibit the State courts from enforcing one of the two main forms of international law—treaties—as the U.S. Constitution by its terms requires State courts to give effect to the nation's treaties, “any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”⁵ But the federal Constitution does not expressly address the status of the other principal form of international law—customary international law, or the unwritten law that governs the relations among states and “results from a general and consistent practice of states followed by them from a sense of legal obligation.”⁶ These proposed State laws thus starkly raise the question whether the States may prohibit their courts from giving effect to the United States' obligations under customary international law.⁷

The answer provided by the *Restatement (Third) of Foreign Relations Law* is a clear “no.” Reflecting the settled view regarding the status of customary international law in the U.S. legal system at the time that it was approved in 1987, the *Restatement* asserts that such law has the status of federal law.⁸ As such, it preempts inconsistent State law;

challenged on Establishment Clause grounds, *see* Complaint Seeking a Temporary Restraining Order & Preliminary Injunction at 6, *Awad v. Ziriax*, 754 F. Supp. 2d 1298 (W.D. Okla. 2010), and a federal court has stayed its enforcement, *see* *Awad*, 754 F. Supp. 2d at 1308 (issuing a preliminary injunction). An appeal is pending before the Tenth Circuit. *See* Fellmeth, *supra* note 1, at 3 & 6 n.27.

3 *See* Bill Raftery, *An Examination of 2011 Sharia Law & International Law Bans Before State Legislatures*, GAVEL TO GAVEL (Nat'l Ctr. for State Courts, Williamsburg, Va.), Jan. 27, 2011, <http://gaveltogavel.us/site/2011/01/27/an-examination-of-2011-sharia-law-international-law-bans-before-state-legislatures> (discussing proposed legislation in Arkansas, Georgia, Indiana, Kansas, Mississippi, South Carolina, and Texas).

4 *See id.* (discussing proposed constitutional amendments in Wyoming, Arizona, and South Dakota, proposed legislation in Nebraska that would expressly prohibit consideration of international law, and proposed legislation in Louisiana and Alaska that would prohibit the consideration of “foreign law,” defining that term in a way that appears to include international law).

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

6 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, § 102(1)(c)(2) (1987).

7 The term “state,” as used in international law, refers to a nation, such as the United States or France. In this Article, the term will be used in its international sense when it is not capitalized. When capitalized, it will refer to a State of the Union, such as New York or California.

8 *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111(1) & cmt. d (1987).

State courts must follow federal court interpretations of it; and State court interpretations of it are reviewable in the federal courts. A decade later, however, Professors Curtis Bradley and Jack Goldsmith published a critique of the *Restatement* view, which they denominated the “modern position.”⁹ While acknowledging that the modern position was “well-entrenched,” that almost every court that had considered the question in the previous twenty years had endorsed it, and that the view was widely regarded as “settled,”¹⁰ Bradley and Goldsmith argued that the modern position should now be rejected because it is based on a misinterpretation of pre-*Erie*¹¹ decisions and is inconsistent with “well-accepted notions of American representative democracy, federal common law, separation of powers, and federalism,”¹² and because modern customary international law is problematic in a number of respects.¹³ For most of the nation’s history, they argued, customary international law was regarded as “general common law,” not federal law.¹⁴ After *Erie* rejected the concept of general common law, customary international law could have the status of domestic law only if it was given such status by the federal political branches or by the States.¹⁵ Thus, according to the Bradley-Goldsmith critique, the Oklahoma amendment would not only validly bar the Oklahoma courts from considering customary international law that has not been incorporated as federal law, it would bar the federal courts from doing so as well.

In response to the revisionist challenge to the modern position, numerous scholars have defended the *Restatement* view.¹⁶ Other schol-

9 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*]; see also Curtis A. Bradley & Jack L. Goldsmith, III, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319 (1997) [hereinafter Bradley & Goldsmith, *Current Illegitimacy*] (expanding upon their critique of the modern position); Curtis A. Bradley & Jack L. Goldsmith, Commentary, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260 (1998) (responding to critics of their revisionist position).

10 See Bradley & Goldsmith, *Critique*, *supra* note 9, at 816–17.

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

12 Bradley & Goldsmith, *Critique*, *supra* note 9, at 821.

13 *Id.*

14 See *id.* at 850.

15 See *id.* at 863, 868, 870.

16 See, e.g., Ryan Goodman & Derek P. Jinks, *Filartiga’s Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463 (1997); Harold Hongju Koh, Commentary, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 (1997); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66

ars have advanced what they have characterized as intermediate positions, arguing that customary international law is properly understood to have a status in between federal and State law. Professor Michael Ramsey has argued that customary international law should be regarded as a form of nonpreemptive federal law.¹⁷ Professor Ernest Young, expanding upon an argument by Professor Arthur Weisburd,¹⁸ has argued that customary international law should continue to be understood as general law.¹⁹ He has proposed the use of choice-of-law rules to determine the applicability of customary international law in our courts. Dean Alexander Aleinikoff has argued that customary international law should be regarded as “nonpreemptive, nonfederal law” applicable in the federal courts but not the State courts.²⁰

More recently, Professors A.J. Bellia and Bradford Clark have advanced a different sort of intermediate proposal.²¹ Rather than propose an intermediate *status* for customary international law, Bellia and Clark argue that *some categories* of customary international law preempt State law and others do not.²² Their conclusion that State law is sometimes preempted by customary international law is particularly noteworthy because revisionists rely heavily on a textual and structural argument closely identified with Professor Clark²³—the view that the Supremacy Clause’s list of the categories of preemptive federal law is

FORDHAM L. REV. 393 (1997). Other scholars have sided with the revisionists. See, e.g., Julian G. Ku, *Customary International Law in State Courts*, 42 VA. J. INT’L L. 265 (2001) [hereinafter Ku, *State Courts*]; Julian G. Ku, *The State of New York Does Exist: How the States Control Compliance with International Law*, 82 N.C. L. REV. 457 (2004); Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153.

17 See MICHAEL D. RAMSEY, *THE CONSTITUTION’S TEXT IN FOREIGN AFFAIRS* 348–55 (2007); Michael D. Ramsey, *International Law as Non-Preemptive Federal Law*, 42 VA. J. INT’L L. 555, 577, 584 (2002).

18 See A.M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT’L L. 1, 29–35, 51 (1995).

19 Ernest A. Young, *Sorting Out the Debate over Customary International Law*, 42 VA. J. INT’L L. 365, 370 (2002). The idea that customary international law can continue to be regarded as general law seems to have been endorsed by Judge William A. Fletcher, *International Human Rights in American Courts*, 93 VA. L. REV. 653, 672 (2007).

20 See T. Alexander Aleinikoff, *International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate*, 98 AM. J. INT’L L. 91, 97–100 (2004).

21 See Anthony J. Bellia Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 1 (2009).

22 See *id.* at 5–6.

23 See Bradley & Goldsmith, *Critique*, *supra* note 9, at 855–59; Young, *supra* note 19, at 413.

exhaustive.²⁴ Bellia and Clark argue that the Constitution itself—specifically, its allocation of the war and foreign relations powers to the federal government—implicitly preempts State laws that conflict with a subset of customary international law.²⁵ They find support in nineteenth-century Supreme Court decisions for the claim that State law is preempted if it violates the “perfect rights” of foreign sovereigns under international law. Violation of perfect rights was regarded under international law as a justification for going to war.²⁶ State violation of such rights thus interfered with the federal government’s exclusive power to declare war and to conduct the nation’s foreign relations. The preemptive force of (some) customary international law, on this analysis, is an inference from the constitutional structure—specifically, the Constitution’s allocation of power over war and foreign affairs to the federal government.

Finally, Professors Bradley and Goldsmith themselves have advanced what might be regarded as an intermediate position. In their original critique, they insisted that customary international law lacked the status of federal law unless incorporated as such by the federal political branches.²⁷ The implication was that an act of federal lawmaking—a federal statute or a treaty—was required. Portions of their critique suggested that this was indeed what they contemplated.²⁸ Elsewhere, however, they stated that, “to some extent, the President [has] the authority to incorporate [customary international] law into domestic law,”²⁹ and they noted but did not endorse the possibility that the relevant authorization may be inferred from a jurisdictional statute.³⁰ More recently, writing after the Supreme

24 See Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1323–24, 1429 (2001),

25 See Bellia & Clark, *supra* note 21, at 8.

26 See *id.* at 5.

27 See Bradley & Goldsmith, *Critique*, *supra* note 9, at 868, 870.

28 See *id.* at 825–26 (stating that “[t]he Constitution ensured federal control over [customary international law] through two means,” both involving congressional action); *id.* at 858 (“There is . . . no mention of [customary international law] in the menu of supreme federal law in Article VI.”); *id.* at 868 (relying on “the thesis that the Constitution, by providing for the representation of [S]tate interests in Congress, entrusts the maintenance of the federal balance to ‘the internal safeguards of the political process’” (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1985))).

29 *Id.* at 871. *But cf. id.* at 868 (recognizing that the argument for a presidential power to incorporate customary international law is “less forceful[]” than for a congressional power).

30 See *id.* at 872–73.

Court in *Sosa v. Alvarez-Machain*³¹ endorsed the judicial creation of federal common law rights of action for damages for violations of some norms of customary international law,³² they embraced and elaborated on these earlier suggestions. Their post-*Sosa* article, written with Professor David Moore, endorses the propriety of reading jurisdictional statutes under certain circumstances as authorization for the incorporation of customary international law as federal law, and expands upon their earlier acceptance of a presidential power to incorporate customary international law as federal law.³³

This Article offers a critique of the intermediate positions and, in the process, explicates and defends the modern position. Critics of the modern position often describe it as the claim that customary international law has the force of federal law always and for all purposes. But this uncompromising conception of the modern position is a phantom. Adherents of the modern position have always accepted that not all of customary international law binds foreign states or the federal Executive as a matter of U.S. domestic law. The heart of the modern position is that customary international law binds State actors and thus preempts State law applicable to State officials and private parties. The basic case for the modern position relies on an inference from the constitutional structure very similar to the one advanced by Bellia and Clark: Violations of customary international law risk retaliation against the nation as a whole. Permitting States to violate it allows States to externalize the costs of such violations, thus likely producing excessive violations.

Part I explicates and offers a preliminary defense of the modern position. It sets forth the affirmative case for the modern position based on constitutional structure, original intent, and pre- and post-*Erie* doctrine, responding to arguments put forward in the initial wave of revisionist scholarship, but deferring to Part II responses to criticisms raised by scholars advancing intermediate positions. Part I shows that the basic structural case for the modern position was well understood by the Founders. Viewed in the light most favorable to the revisionist view, the evidence of original intent and the pre-*Erie* cases reflect two contending positions. The first is that the Constitution itself preempts State conduct that violates the state-to-state portion of the law of nations. The other is that customary international

31 542 U.S. 692 (2004).

32 See *id.* at 732.

33 See Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869, 919–24 (2007).

law had the status of general common law. Before *Erie*, the general common law was understood as different from either federal or State law, but was closer in operation to modern-day federal law than to modern-day State law. No one claimed that customary international law had a status comparable to modern-day State law.

Part II examines the intermediate positions and concludes that all but that of Bellia and Clark suffer from fundamental flaws. Ramsey's concept of "nonpreemptive federal law" is another name for State law. Thus, Ramsey's approach would replicate one of the problems that most concerned the Founders—the lack of federal judicial power to prevent or remedy violations of customary international law *by the States*. Young's proposal to employ choice-of-law rules to determine the applicability of customary international law satisfies *Erie's* requirement that all law applied in this country's courts be either State or federal, but only because choice-of-law rules are themselves creatures of either State or federal law. To the extent that Young would relegate the applicability of customary international law to State choice-of-law rules, his proposal would present severe difficulties stemming from the indeterminacy and inappositeness of such rules, and, like Ramsey's approach, would reproduce the problem that most concerned the Founders.³⁴ Young's approach would alleviate these problems by allowing for the use of federal choice-of-law rules in some contexts, but he emphasizes that such rules would be applicable very rarely. Aleinikoff's approach would violate the one principle that all agree *Erie* establishes: that the substantive law applied in the State and federal courts must be the same. The intermediate position of Bradley, Goldsmith, and Moore is problematic because it would place inapposite limits on the judiciary's ability to enforce customary international law as federal law.

The intermediate approach proposed by Bellia and Clark is thoroughly convincing, but it is not really intermediate. Their structural argument for according preemptive force to some customary interna-

34 Because the "intermediate" positions of Ramsey and Young turn out to be quite close to the revisionist position, I include those authors among the revisionists when I refer to the latter group (except when I distinguish revisionist scholars from those who purport to espouse intermediate views). Cf. Ernest A. Young, *Sosa and the Retail Incorporation of International Law*, 120 HARV. L. REV. F. 28, 28 (2007), <http://www.harvardlawreview.org/media/pdf/young.pdf> ("I consider myself at least a fellow traveler [with the revisionists]."); Michael D. Ramsey, *Customary International Law in the Supreme Court, 1901–1945*, in INTERNATIONAL LAW IN THE U.S. SUPREME COURT 225, 253 (David L. Sloss, Michael D. Ramsey & William S. Dodge eds., 2011) (recognizing that his position "resembles" the revisionist position and "is open to many of the same objections," including the objection that "it would allow deliberate [S]tate violations or misinterpretations of customary international law to be unredressed").

tional law is basically the same as the strongest argument for the modern position. The flaw in their argument is that they do not take it far enough. Their structural argument actually provides substantial support for most of the modern position.

Part III reconsiders the modern position in the light of the revisionists' argument that the customary international law of today differs in important respects from the state-to-state branch of the law of nations as known to the Founders and as it existed before *Erie*. The revisionists' concerns about the indeterminacy of customary international law and the loosening of the requirements for recognizing such law have some validity and relevance, but these concerns can be adequately addressed by restricting the range of customary norms having preemptive force to those that satisfy a heightened standard of clarity and acceptance. The revisionists' concerns about the new subjects addressed by customary international law—in particular, the fact that such law now addresses how a nation treats its own citizens—does not warrant any additional restriction.

The final Part of the Article addresses a seldom-analyzed aspect of the revisionist position—the claim that norms of customary international law that lack the force of preemptive federal law may be given the force of State law through incorporation by State legislatures or courts. I argue that, for straightforward reasons, the States lack the power to make norms of customary international law applicable to foreign states or officials or federal officials. A State's incorporation of such norms against its own officials or against private parties would pose a less obvious structural problem: because customary international law evolves through the accumulation of state practice and *opinio juris*, State court decisions regarding the content of such law could, in combination with the acts of other States and foreign states, eventually result in the crystallization of norms of customary international law that the federal government does not support, or the erosion of norms that the federal government does support. State court decisions regarding the content of customary international law thus interfere with the federal executive branch's recognized power to speak for the United States at the international plane regarding the content of such law. This structural problem can be addressed either by denying the States the power to incorporate norms of customary international law or by recognizing the Supreme Court's jurisdiction to review decisions of the State courts regarding the content of customary international law even when such law is relevant to the case only because it has been incorporated as State law. I conclude that the latter solution is preferable and that such review would be consistent with Article III.

Before proceeding, a few explanations and clarifications are in order. First, unlike much revisionist scholarship, my analysis will not focus on litigation under the alien tort provision of the First Judiciary Act. This provision, currently codified as § 1350 of Title 28, and known variously as the Alien Tort Claims Act and the Alien Tort Statute, confers jurisdiction on the federal district courts 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.”³⁵ Although it lay dormant for much of our history, the statute was invigorated in 1980 by the Second Circuit’s decision in *Filartiga v. Pena-Irala*,³⁶ which held that the provision conferred jurisdiction over a claim brought by a Paraguayan citizen against a Paraguayan official based on torture that occurred in Paraguay.³⁷ Since then, § 1350 has served as the jurisdictional basis for much human rights litigation, most of it alleging violations of customary international law committed abroad by foreign officials.³⁸

Cases under § 1350 do not shed much light on the status of customary international law as federal law because a conclusion that customary international law is federal law is neither necessary nor sufficient to resolve the issues that arise in such cases. Most of these cases seek damages from the individual officials who committed the violation, and the most contested legal issue in these cases has been the source of the right of action for damages. A showing that customary international law is federal law is insufficient to establish a right of action in the typical § 1350 case because international law generally does not establish a right to recover damages against individuals who violate international law. In general, international law applies to the conduct of state actors, and, when violated, it typically places responsibility on the state, not the individual state official.³⁹ In some circumstances, international law does impose individual responsibility, but this is almost always in the form of criminal responsibility.⁴⁰ Thus,

35 28 U.S.C. § 1350 (2006).

36 630 F.2d 876 (2d Cir. 1980).

37 *Id.* at 878–79, 889.

38 *See, e.g.,* *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467 (9th Cir. 1994); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995).

39 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 207 (1987).

40 *See* LORI F. DAMROSCH ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 1037–45 (2009) (listing criminal sanctions against individuals, but not civil damages, as a human rights compliance mechanism under international law). There is a sense in which international law may be said to require that the victim be compensated. If conduct of an individual attributable to the state has caused injury to a citizen of another state, then the other state’s right to pursue a claim against the first state at

when the question is the existence of a cause of action for damages, the issue is not whether international law is to be accorded the force of federal law, but, rather, whether international law is to be supplemented with a cause of action for damages under domestic law.⁴¹ A conclusion that a cause of action for damages does not exist under U.S. law for violation of a norm of customary international law does not establish that the norm lacks the status of federal law any more than the lack of a private right of action to enforce a federal statute⁴² means that the federal statute lacks the force of federal law.

Nor is it *necessary* to establish that customary international law has the status of federal law in order to prevail in these cases. The Second Circuit in *Filartiga* relied on the federal status of customary international law in finding § 1350's grant of jurisdiction to be within the scope of Article III.⁴³ Since Article III does not authorize diversity jurisdiction in suits between aliens, the court had to find that the action "arose under" federal law. But § 1350 could be upheld under Article III's Arising Under Clause even if customary international law were not considered federal law. First, federal jurisdiction would be consistent with Article III if the cause of action were created by federal

the international plane is sometimes subject to the precondition that the individual have sought and been denied remedies through procedures available in the organs of the first state (including its courts). RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 713 cmt. f. Thus, to avoid potential international responsibility, the offending state is required to provide the individual with a remedy. But the remedy need not be in the form of a damage judgment against the individual who inflicted the injury. For example, a direct payment by the state to the injured party might suffice. *See id.* § 901 cmts. d, e; *id.* § 902 cmts. d–i. Thus, even if one understood international law to require the offending state to provide to the victim the compensation that would avert its international responsibility to the state of the victim's nationality, it could not be said that international law of its own force entitled the victim to damages from the individual whose actions gave rise to the violation. In any event, this theory for finding a right of action for damages in international law would support a damage action only for suits challenging conduct that would be attributable to the United States. The conduct giving rise to the claim in *Filartiga* was not attributable to the United States.

41 *But cf.* Anthony J. Bellia Jr., & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445 (2011) (arguing that, at the time of the enactment of § 1350, the law of nations required nations to remedy injuries caused by their citizens to citizens of other nations and that, therefore, a U.S. citizen's tortious injury to an alien would have been a "tort . . . in violation of the law of nations"). Compare the similar argument discussed *supra* note 40 that international law under certain circumstances indirectly obligates persons who have injured an alien to compensate the alien.

42 *See, e.g.,* *Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001).

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

statute or treaty or federal common law.⁴⁴ Second, jurisdiction could satisfy Article III even if the cause of action were not conferred by federal law (for example, if it came from the law of the forum State or of the state in which the conduct took place). The Supreme Court interpreted Article III's "arising under" provision very broadly in *Osborn v. Bank of the United States*,⁴⁵ which has been read to permit grants of jurisdiction over cases in which there is even a remote possibility that an issue of federal law might arise.⁴⁶ The possibility that an issue of federal law will arise in a suit involving customary international law (even assuming that customary international law is not itself federal)—for example, issues about the allocation of powers relating to foreign relations⁴⁷—is hardly remote.

It is true that the Court has distanced itself from this broad reading of *Osborn*,⁴⁸ and scholars have challenged it.⁴⁹ But § 1350 could be upheld under narrower interpretations of Article III's Arising Under Clause even without recognizing a federal common law cause of action. Professor Wechsler argued that Congress may confer jurisdiction under this clause over a category of cases if it has the power to legislate substantively over that category, even without actually legislating substantively.⁵⁰ This test is easily satisfied by § 1350, since Article I gives Congress the power to legislate with respect to customary inter-

44 See *American Well Works Co. v. Lane & Bowler Co.*, 241 U.S. 257, 260 (1916) ("A suit arises under the law that creates the cause of action."). The Supreme Court eventually held that the cause of action in cases within the scope of § 1350 comes from federal common law. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004).

45 22 U.S. (9 Wheat.) 738, 759–63 (1824).

46 See *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 492–93 (1983); *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 481–82 (1957) (Frankfurter, J., dissenting).

47 Bellia and Clark argue, and I agree, that the preemptive force of at least some norms of customary international law derives from the constitutional allocation of powers regarding foreign relations. See *infra* Part II.D. My point here is that, even if this argument were rejected, the likelihood that a case involving customary international law will raise constitutional questions is enough to validate § 1350 under the *Osborn* interpretation of Article III.

48 See *Mesa v. California*, 489 U.S. 121, 136–37 (1989); *Verlinden*, 461 U.S. at 492–93; see also *Lincoln Mills*, 353 U.S. at 481–82 (Frankfurter, J., dissenting).

49 See Anthony J. Bellia Jr., *The Origins of Article III "Arising Under" Jurisdiction*, 57 DUKE L.J. 263, 334–37 (2007); Ernest A. Young, *Stalking the Yeti: Protective Jurisdiction, Foreign Affairs Removal, and Complete Preemption*, 95 CALIF. L. REV. 1775, 1820 (2007).

50 See Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216, 224–25 (1948). For a defense of Wechsler's reasoning, see Carlos M. Vázquez, *The Federal "Claim" in the District Courts: Osborn, Verlinden, and Protective Jurisdiction*, 95 CALIF. L. REV. 1731 (2007).

national law.⁵¹ Even more narrowly, Professor Mishkin has argued that Congress may grant jurisdiction over all cases arising in an area of the law in which the federal government has an “articulated and active . . . policy.”⁵² This standard too is easily satisfied by § 1350.⁵³ Although scholars have rejected even these narrower theories of protective jurisdiction,⁵⁴ Supreme Court decisions upholding certain grants of jurisdiction are hard to explain without resort to them,⁵⁵ and the Court itself has never rejected them.⁵⁶ In short, even without a federal cause of action, the Article III question would turn on the status of customary international law as federal law (a) only with respect to a subset of § 1350 cases (those between aliens) and (b) only if the Court were to reject a range of theories of Article III “arising under” jurisdiction proffered by jurists of the caliber of John Marshall, Herbert Wechsler, and Paul Mishkin. The relevance of the status of customary international law to the Article III question in litigation under § 1350 thus has always had a distinctly hypothetical cast.

In sum, because the status of customary international law as federal law is neither necessary nor sufficient to resolve the key issues in cases under § 1350, a focus on this statute is unhelpful. I will focus instead on cases that present the status issue more directly. Perhaps the best test case is a claim under State law against an individual who claims an immunity under international law. Some international law immunities are now addressed by statute⁵⁷ or treaty,⁵⁸ but the immu-

51 See U.S. CONST. art. I, § 8, cl. 10 (“The Congress shall have Power . . . [t]o define and punish . . . Offences against the Law of Nations.”).

52 Paul J. Mishkin, *The Federal “Question” in the District Courts*, 53 COLUM. L. REV. 157, 192 (1953).

53 See Carlos M. Vazquez, Comment, *Verlinden B.V. v. Central Bank of Nigeria: Federal Jurisdiction over Cases Between Aliens and Foreign States*, 82 COLUM. L. REV. 1057, 1081 (1982).

54 See Young, *supra* note 49, at 1779–81. *But see* Vázquez, *supra* note 50 (defending protective jurisdiction).

55 See RICHARD H. FALLON, JR. ET AL., *HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 765–68 (6th ed. 2009) (discussing bankruptcy cases) [hereinafter *HART & WECHSLER*].

56 *Cf.* *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 460 (1957) (Burton, J., concurring) (endorsing protective jurisdiction).

57 See Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified in scattered sections of 28 U.S.C.).

58 See Vienna Convention on Diplomatic Relations arts. 29–40, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95; Vienna Convention on Consular Relations arts. 41, 43, 53, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

nity of heads of state and foreign state officials is not.⁵⁹ When an immunity applies, international law itself requires domestic courts to refrain from exercising jurisdiction. Customary international law does all of the necessary work, and the only questions are whether international law has the status of domestic law, and, if so, whether it is federal or State law.⁶⁰

Second, for related reasons, I shall not address what revisionists regard as one of the key tenets of the modern position: that customary international law is self-executing federal law for purposes of the federal courts' "arising under" jurisdiction.⁶¹ The jurisdiction of the lower federal courts is itself always non-self-executing in the sense that Congress must confer it by statute. As we have seen, under current doctrine, the Arising Under Clause permits Congress to confer such jurisdiction over cases involving customary international law even if such law is not federal.⁶² Whether customary international law has the status of federal law might determine whether a lower federal court possesses jurisdiction under the current general federal question statute, but that statute would deny jurisdiction over many cases implicating customary international law even if such law were deemed federal,⁶³ and it would authorize jurisdiction in certain circumstances even if such law were not deemed federal.⁶⁴ The more important

59 See *Samantar v. Yousef*, 130 S. Ct. 2278 (2010); Michael A. Tunks, *Diplomats or Defendants? Defining the Future of Head-of-State Immunity*, 52 DUKE L.J. 651, 666–73 (2002).

60 Of course, as discussed below, the answers to these questions may be quite complex. See *infra* text accompanying notes 195–205, 538–557.

61 See, e.g., Bradley & Goldsmith, *Critique, supra* note 9, at 858.

62 Bradley and Goldsmith recognize this possibility. See *id.* at 873 & n.354.

63 Since international law rarely establishes a remedy except against the state itself, which will often be immune, customary international law will usually enter the case as a defense, or as a basis for a particular construction of a State or federal statute. In such circumstances, federal jurisdiction cannot be based on the existence of an issue of customary international law because of the well-pleaded complaint rule. See *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152–54 (1908).

64 For example, jurisdiction would exist if the cause of action were conferred by federal statute, or by federal common law. Cf. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004) (recognizing a federal common law cause of action for violation of some norms of customary international law). The Court in *Sosa* denied that its holding implied that § 1331 could support the creation of federal common law in the same way that § 1350 can. See *id.* at 731 n.19. This does not mean, however, that jurisdiction under § 1331 would be lacking over the federal common law cause of action that the Court recognized in *Sosa*. It is well established that § 1331 confers jurisdiction over federal common law causes of action. See *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972) ("We . . . conclude that § 1331 jurisdiction will support claims founded upon federal common law as well as those of a statutory origin."); 13D CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §3563 (3d ed. 2008) ("[C]laims

question is whether the Supreme Court may review the State courts' interpretations of customary international law. But here, again, the answer does not turn on Article III. The Supreme Court may be given appellate jurisdiction over some cases involving customary international law under the diversity clauses of Article III,⁶⁵ and perhaps over all such cases under a protective jurisdiction interpretation of the "arising under" clause, but that does not tell us whether the Court may review and reverse a State court's application of such law. The latter question is governed by Article VI, not Article III. If customary international law were purely a matter of State law, the federal courts (including the Supreme Court) would presumably have to treat the State courts' interpretations of it as authoritative.⁶⁶ My analysis accordingly focuses on whether, and to what extent, federal law limits State discretion to violate or depart from customary international law.

Third, unlike revisionists and defenders of the modern position alike, I shall not refer to the modern position as the claim that customary international law has the status of federal *common law*, as I think that that label is unhelpful and potentially misleading. Instead, I shall describe the modern position as according to customary international law (or some subset thereof) the status of preemptive federal law. The canonical definition of federal common law is found in *Hart & Wechsler's The Federal Courts and the Federal System*, which defines it as

based upon federal common law invoke federal-question jurisdiction under [§ 1331]."). For the same reason, I disagree with scholars who have read Justice Souter's opinion in *Sosa* as denying that customary international law is federal law for purposes of § 1331. See Bellia & Clark, *supra* note 41, at 549; David J. Bederman, *Law of the Land, Law of the Sea: The Lost Link Between Customary International Law and General Maritime Law*, 51 VA. J. INT'L L. 299, 345 (2010).

65 See Bradford R. Clark, *The Supremacy Clause as a Constraint on Federal Power*, 71 GEO. WASH. L. REV. 91, 103–04 (2003); Clark, *supra* note 24, at 1333–34.

66 Under current doctrine, the Supreme Court would be able to review a State court's application of State law to determine if it had "fair or substantial support," but only if the State court's interpretation of such law was antecedent to the court's denial of a federal right. See HART & WECHSLER, *supra* note 55, at 462–63. The general rule barring Supreme Court review of State law reflects a constitutional recognition of the State courts as the authoritative interpreters of their own laws. See, e.g., *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) ("This Court . . . repeatedly has held that [S]tate courts are the ultimate expositors of [S]tate law, and that we are bound by their constructions except in extreme circumstances" (citations omitted)). The limited exception for antecedent State law grounds is based on the Supremacy Clause and ensures that the State courts are not manipulating their laws to defeat federal rights. See HART & WECHSLER, *supra* note 55, at 462–63. *But cf.* Jonathan F. Mitchell, *Reconsidering Murdock: State-Law Reversals as Constitutional Avoidance*, 77 U. CHI. L. REV. 1335 (2010) (arguing that Article III permits broader Supreme Court review of State court judgments based on State law).

“federal rules of decision whose content cannot be traced directly by traditional methods of interpretation to federal statutory or constitutional commands.”⁶⁷ If customary international law were accorded the status of federal law, then it would qualify as federal common law under this definition because the content of its norms would not be directly traceable to the Constitution or federal statutes or treaties. But, as Hart and Wechsler’s successors recognize, federal common law is not a unitary category.⁶⁸ Norms might be accorded the force of federal common law for different reasons, and the effect of norms given that label may well differ. The concept of federal common law is thus unhelpful in justifying the federal status of any given set of norms. Use of the “federal common law” label in examining the status of customary international law invites unreflective and inappropriate application to customary international law of doctrine developed for quite different sorts of “federal common law.” For example, Bradley, Goldsmith, Young, and others criticize the modern position as inconsistent with the established notion that federal common law is proper only if applied in an interstitial way and hews closely to legislatively articulated policy.⁶⁹ But, while the application of such limits in other areas may be warranted, these limits are inapposite to the structural constitutional rationale defended here for according preemptive force to customary international law.

The term “federal common law” is also misleading in that it suggests a more creative role for the courts than the modern position contemplates. The term “federal common law” evokes the role that State courts are now understood to play in elaborating the common law of their respective States—a creative process in which the substance of the law evolves based on the courts’ views of sound policy. Revisionists’ frequent description of the modern position as contemplating “federal common *lawmaking*”⁷⁰ suggests that courts applying customary international law are similarly making the law up as they go along. But that is not what the *Restatement* and its defenders envision. International law contains its own rules about how to identify customary international law. Under these rules, the content of such law is a result of the consistent practice of states performed out of a sense of

67 HART & WECHSLER, *supra* note 55, at 607.

68 *See id.* (noting the topic of federal common law “has a miscellaneous quality”).

69 *See* Bradley, Goldsmith & Moore, *supra* note 33, at 902, 926; Ramsey, *supra* note 17, at 558; Young, *supra* note 19, at 413–14.

70 *See* Bradley & Goldsmith, *Critique*, *supra* note 9, at 857, 872 & n.352 (emphasis added); Young, *supra* note 19, at 413 (emphasis added).

legal obligation (*opinio juris*).⁷¹ The role of U.S. courts applying customary international law is to ascertain those norms based on state practice and *opinio juris*, not to elaborate the norms on the basis of their views of good policy.

Bradley and Goldsmith deride the claim that the courts would be “finding” or “discovering” the norms of customary international law, rather than “making” them, as hopelessly naïve. “This argument,” they say in rejecting a point by Professor Henkin similar to mine here, “assumes a sharp distinction between law-interpretation and lawmaking that cannot survive even the mildest of legal realist critiques.”⁷² But the point is not that customary international law is highly determinate; the point is that the courts will be resolving the indeterminacies by reference to the actions and statements *of others*, not their own views of good policy. In fact, as Young reminds us, *Erie* itself calls for such a process to be followed by the federal courts in applying State law.⁷³ As we do not regard the federal courts’ role in applying State

71 For a recent study on this topic by the International Law Association, see COMM. ON FORMATION OF CUSTOMARY (GENERAL) INT’L LAW, INT’L LAW ASS’N, STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW (2000) [hereinafter ILA STATEMENT OF PRINCIPLES], available at <http://www.ila-hq.org/en/committees/index.cfm/cid/30> (follow “Conference Report London 2000” hyperlink).

72 Bradley & Goldsmith, *Critique*, *supra* note 9, at 855. They continue:

More importantly, it ignores the character of [customary international law] lawmaking: [Customary international law] is often unwritten, the necessary scope and appropriate sources of “state practice” are unsettled, and the requirement that states follow customary norms from a “sense of legal obligation” is difficult to verify. Given what Professor Henkin himself refers to as [customary international law]’s “soft, indeterminate character,” it makes no sense to say that judges “discover” an objectively identifiable [customary international law]. In fact, the process of identifying and applying [customary international law] is at least as subjective as the domestic common law process. This is particularly true of the new [customary international law], which is less tied than traditional [customary international law] to “objective” evidence of state practice.

Id. (footnotes omitted) (quoting LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 29 (1995)).

73 Additionally, as discussed in Part III, if the indeterminacy of customary international law were a concern, the problem could be addressed by according the force of preemptive federal law only to norms of customary international law that satisfy a higher standard of clarity and breadth of acceptance. The Court has taken this approach in two discrete areas, *see infra* notes 184–204, 237–242 and accompanying text, and it could defensibly extend it to other contexts, *see infra* notes 558–587 and accompanying text.

law as “lawmaking,” neither should we view their role in applying customary international law that way.⁷⁴

Even if the norms themselves are not “made” by the courts that apply them, one might say that the decision to accord customary international law the force of preemptive federal law is itself an act of judicial lawmaking. But, as explained by Bellia and Clark, and elaborated herein, the preemptive force of (at least some) customary international law can be understood as a valid implication from the constitutional structure.⁷⁵ Revisionists might reject the inference on the merits, but presumably they do not deny that inference from structure is a valid approach to constitutional interpretation.⁷⁶ If the decision to accord norms of international law the status of federal law were made at retail, as Young proposes,⁷⁷ the resulting regime would in fact resemble one of judicial lawmaking. In theory, a retail approach could turn on the factors made relevant by the structural approach defended here, such as the danger of interference with the political branches’ conduct of foreign relations likely to result from the States’ violation of particular norms. But, because courts lack the relevant norm-specific information and expertise, a retail approach would likely degenerate into ad hoc decisionmaking reflecting the particular judges’ views of the merits of particular norms.⁷⁸ Concerns about

74 This is not to deny that indeterminacy of norms leaves judges with wider interpretive discretion. Cf. *infra* Part III (discussing possible responses to increased indeterminacy of customary international law).

75 Some defenders of the modern position advance originalist arguments regarding the meaning of the term “laws of the United States” in Article III and/or Article VI. See, e.g., Jordan J. Paust, *International Law Before the Supreme Court: A Mixed Record of Recognition*, 45 SANTA CLARA L. REV. 829, 832–33 (2005) (“[V]arious Founders, Supreme Court Justices, and other federal judges have long recognized more generally that . . . the phrase ‘laws of the United States,’ encompasses the law of nations or what we term ‘customary international law.’”). I do not pursue those arguments here. Although I argue below that the constitutional text does not establish the revisionist position, see *infra* text accompanying notes 324–342, I also do not think that the text alone clinches the modern position, given the possibility that some Founders may have understood the law of nations to have the status of general common law. I do, however, advance an originalist argument regarding the constitutional structure, which I think provides stronger support for the modern position. See *infra* text accompanying notes 117, 341–352 (discussing *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796) and *Rutgers v. Waddington*). And structural arguments are necessary to support the argument that, to the extent that customary international law was understood as pre-*Erie* general common law, it should now be regarded as preemptive federal law.

76 See CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 7–32 (1969).

77 See Young, *supra* note 34, at 29–30.

78 Note that we are assuming here that the norm exists under international law and that the court is deciding whether to accord it the status of U.S. law.

judicial lawmaking thus cut in favor of an approach that reads the Constitution as according federal status to customary international law as a whole, or to some substantial subset determined by generally applicable standards, such as the degree of clarity or the breadth of its acceptance as a norm of customary international law. That, in any event, is the version of the modern position that I shall defend here. Under such a scheme, the norms themselves are not made by the courts,⁷⁹ and the determination whether the norms have the force of federal law is no more an act of judicial lawmaking than is the resolution of any other constitutional question on structural grounds.⁸⁰

Finally, even though the status of customary international law is a constitutional question in important respects, it is proper to place a heavy burden of persuasion on those seeking to depart from the “well-entrenched”⁸¹ modern position. It is true that the Supreme Court applies a weaker version of *stare decisis* to constitutional questions.⁸² But the reason for the Court’s greater (though still limited⁸³) willingness to reject settled law on constitutional questions is that the courts’ errors cannot be corrected by Congress.⁸⁴ For *stare decisis* purposes, the status of customary international law should be treated as a sub-

79 As discussed in Part IV, decisions of domestic courts interpreting customary international law do, over time and in conjunction with the acts of many others, contribute to the formation of new rules or the dissolution of old rules of customary international law. But this phenomenon hardly rises to the level of “lawmaking” by those courts. In any event, it is not the sort of lawmaking that concerns the revisionists.

80 For related reasons, I quibble with the locution of some revisionists and defenders of the modern position who say that, under the modern position, *the courts* incorporate customary international law as U.S. law, either at retail or wholesale. See, e.g., Koh, *supra* note 16, at 1827. As I defend the modern position here, the courts do not incorporate such norms into U.S. law; rather, they read the Constitution as according such norms (or some subset thereof) the force of preemptive federal law. Again, I do not suggest that the act of constitutional interpretation is mechanical, but I do think it is useful to distinguish the courts’ exercise of judgment from their exercise of will.

81 Bradley & Goldsmith, *Critique*, *supra* note 9, at 816.

82 See *Payne v. Tennessee*, 501 U.S. 808, 828 (1991); Christopher P. Banks, *The Supreme Court and Precedent: An Analysis of Natural Courts and Reversal Trends*, 75 JUDICATURE 262, 263 tbl.1 (1992) (showing that 60.5 percent of overturned precedent from 1789 to 1991 was constitutional and 27 percent statutory); David S. Cohen, *The Precedent-Based Voting Paradox*, 90 B.U. L. REV. 183, 220–21 (2010).

83 See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844, 860–61 (1992).

84 See *Payne*, 501 U.S. at 828 (“*Stare decisis* is not an inexorable command . . . particularly . . . in constitutional cases, because in such cases ‘correction through legislative action is practically impossible.’” (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting))).

constitutional issue. Both the modern and the revisionist positions are merely default rules. With limited exceptions, whichever rule were adopted would be subject to revision, either at retail or wholesale, by statute or treaty or even sometimes by the Executive alone.⁸⁵ Since the issue is within the control of the federal political branches, the stronger version of *stare decisis* that is applied to statutory issues is the pertinent one.⁸⁶

85 One possible exception would be where the federal government's power to act turns on customary international law, as may be the case when Congress legislates under the Offenses Clause. Compare Michael Stokes Paulsen, *The Constitutional Power to Interpret International Law*, 118 YALE L.J. 1762, 1808 (2009) (arguing that the Offenses Clause empowers Congress to enact its own interpretation of international law as a matter of federal law), with Stephen I. Vladeck, *The Laws of War as a Constitutional Limit on Military Jurisdiction*, 4 J. NAT'L SECURITY L. & POL'Y 295, 299 & n.27 (2010) (arguing that customary international law functions as a limit on Congress's power to legislate pursuant to the Offenses Clause). A possible exception to Congress's power to repeal customary international law would be where such repeal would constitute an unconstitutional interference with the President's exclusive powers. See Lewis Yelin, *Head of State Immunity as Sole Executive Lawmaking*, 45 VAND. J. TRANSNAT'L L. (forthcoming 2011) (on file with author) (arguing on this ground that Congress would lack the power to repeal the customary international law of head-of-state immunity).

86 I have made this point with respect to the related doctrine relating to the dormant foreign affairs power. See Carlos Manuel Vázquez, *W(h)ither Zschernig?*, 46 VILL. L. REV. 1259, 1308 (2001) [hereinafter Vázquez, *W(h)ither Zschernig?*]. Because Congress retains control, the question discussed herein might be regarded as one of constitutional common law, rather than of constitutional law proper. See Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 2–3 (1975); see also Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1025 (1967).

A brief word on the Court's recent decision in *Medellín v. Texas*, 552 U.S. 491 (2008), is also warranted. The Court in *Medellín* found that the treaty before it was not self-executing and accordingly did not preempt an inconsistent State law. Exactly why the Court found that the treaty was not self-executing has been the subject of much debate. According to some commentators, the Court found that the treaty imposed a firm obligation on the United States but was non-self-executing because it did not clearly and affirmatively state that it was intended to have the force of domestic law. See, e.g., Julian G. Ku, *Medellín's Clear Statement Rule: A Solution for International Delegations*, 77 FORDHAM L. REV. 609, 609 (2008). If this is what the Court held, then *Medellín* may be thought to have rejected the modern position by implication. If a treaty that imposes a firm international obligation does not preempt inconsistent State law unless it also affirmatively provides that it has the force of domestic law, even though the Constitution declares treaties to be "the supreme Law of the Land," U.S. CONST., art. VI, cl. 2, then it may follow that customary international law does not preempt State law in the absence of an act of domestic lawmaking giving it preemptive effect. This reading of *Medellín*, however, is highly contested. Even scholars who agree with the Court's holding do not read *Medellín* to have held that treaties that are silent as to their domestic effect are for that reason alone non-self-executing. See Cur-

I. THE MODERN POSITION: EXPLICATION AND PRELIMINARY DEFENSE

Critics of the modern position describe it as the claim that “customary international law is *always* federal law,”⁸⁷ or that “all of [customary international law], ‘whatever [it] requires,’ is automatically incorporated wholesale into post-*Erie* federal common law.”⁸⁸ As discussed more fully below, the modern position has never been so uncompromising.⁸⁹ Specifically, the modern position has never maintained that all of customary international law is federal law insofar as it is sought to be applied to invalidate the acts of foreign states or of the federal government. Adherents of the modern position take varying positions regarding the circumstances in which customary international law is federal law binding on such actors. What unites them is the claim that customary international law is binding *upon the States* and that State laws and conduct that would violate customary international law are thus invalid. The version of the modern position that I defend here is that customary international law preempts State law insofar as it imposes obligations on State officials and private parties. Insofar as it is preemptive federal law, moreover, the lower federal courts may be given jurisdiction over cases “arising under” it, and the

tis A. Bradley, *Self-Execution and Treaty Duality*, 2008 SUP. CT. REV. 131, 178–79; David H. Moore, *Law(makers) of the Land: The Doctrine of Treaty Non-Self-Execution*, 122 HARV. L. REV. F. 32, 46–47 (2009), <http://www.harvardlawreview.org/media/pdf/moore.pdf>; Ernest A. Young, *Treaties as “Part of Our Law,”* 88 TEX. L. REV. 91, 118, 123 (2009); see also John T. Parry, Response, *Rewriting the Roberts Court’s Law of Treaties*, 88 TEX. L. REV. SEE ALSO 65 (2010), <http://www.texaslrev.com/sites/default/files/seealso/vol88/pdf/88TexasLRevSeeAlso65.pdf> (noting that very few defenders of *Medellín* adopt the broad reading noted above). I have offered two alternative readings of *Medellín*. See Carlos M. Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 662–63 (2008) (arguing that *Medellín* is best read to have interpreted the relevant treaty as not imposing a firm obligation under international law) [hereinafter Vázquez, *Treaties as Law of the Land*]; Carlos Manuel Vázquez, *Less than Zero?*, 102 AM. J. INT’L L. 563, 572 (2008) [hereinafter Vázquez, *Less than Zero?*] (arguing that *Medellín* could be read to hold that treaties are non-self-executing only if they affirmatively provide that they are subject to legislative implementation). Either reading is consistent with the modern position. Rather than read *Medellín* as ruling out the modern position, I regard the authorities cited in this Article for treating customary international law as preemptive of State law as additional reasons for rejecting the broad reading of *Medellín* described above.

87 Young, *supra* note 19, at 437.

88 Bradley, Goldsmith & Moore, *supra* note 33, at 902 (second alteration in original) (quoting Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295, 324).

89 See *infra* text accompanying notes 206–233.

Supreme Court may be given jurisdiction to review State court applications and interpretations of it.⁹⁰

A. *The Basic Case for the Modern Position*

The canonical expression of the modern position is the statement in *The Paquete Habana*⁹¹ 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.”⁹² Revisionists dismiss this and many similar statements by the Supreme Court in its many cases applying customary international law⁹³ as merely reflecting a pre-*Erie* consensus that customary international law was part of the general common law. Since *Erie* overthrew the concept of general common law, this status is no longer available. Like the rest of the common law, they contend, customary international law should now be regarded as, at best, State law.

This subpart sets forth the basic case for treating customary international law, post-*Erie*, as preemptive of State law. I respond here to some of the arguments advanced by the first wave of revisionists, but I defer to Part II my responses to the arguments of the proponents of the intermediate positions. In this Part, I defend the broad view that all of customary international law is binding on State actors as the better modern translation of the constitutional structure as understood by the Founders, as well as of pre-*Erie* doctrine. In Part III, I consider whether recent developments in the nature or content of customary international law justify a shift in our approach to such law.

90 The Supreme Court’s jurisdiction is conferred directly by Article III of the Constitution, but Congress has the power to make “exceptions and regulations” with respect to such jurisdiction, and Section 25 of the Judiciary Act of 1789 has been interpreted to exclude from the Supreme Court’s appellate jurisdiction any cases not authorized by that section. *Ex Parte McCordle*, 74 U.S. (7 Wall.) 506, 512–13 (1868). “The principle that the affirmation of appellate jurisdiction implies the negation of all such jurisdiction not affirmed having been thus established, it was an almost necessary consequence that acts of Congress, providing for the exercise of jurisdiction, should come to be spoken of as acts granting jurisdiction, and not as acts making exceptions to the constitutional grant of it.” *Id.* at 513.

91 175 U.S. 677 (1900).

92 *Id.* at 700.

93 See generally David J. Bederman, *Customary International Law in the Supreme Court, 1861–1900*, in INTERNATIONAL LAW IN THE U.S. SUPREME COURT, *supra* note 34, at 89; William S. Dodge, *Customary International Law in the Supreme Court, 1946–2000*, in INTERNATIONAL LAW IN THE U.S. SUPREME COURT, *supra* note 34, at 353; Ramsey, *supra* note 34.

1. Constitutional Structure and Original Intent

The structural reason for treating customary international law as federal law is straightforward. Violations of international law by the States are attributable to the nation as a whole.⁹⁴ Such violations thus justify nations harmed by them to take retaliatory action against the United States as a whole. At the time of the Founding, retaliation could take the form of military action.⁹⁵ Today, military action in response to violations of international law is itself a violation of international law, except for defensive action in response to another nation's unlawful use of force or military action taken pursuant to authorization by the U.N. Security Council or, perhaps, in other limited circumstances.⁹⁶ Still, nations may respond to another nation's violation of international law by taking countermeasures not involving the use of force.⁹⁷ Countermeasures can and usually will be directed at the nation as a whole, or States other than the one that committed the violation.⁹⁸ In addition to risking countermeasures against the nation, a State's violation of international law can be expected to produce international friction and an unfriendly attitude toward the United States on the part of injured or otherwise offended nations, which in turn can be expected to complicate the federal government's efforts to achieve the nation's foreign relations goals.

While the costs of a State's violations of customary international law will be borne by the nation as a whole, the benefits will usually be enjoyed by that State alone. Were States free to violate international law, therefore, one would expect excessive violations, as the States would be able to externalize the costs of the violations to their sister States. To put it differently, the rest of the nation would be subsidizing individual States' decisions to violate international law. The structural reason for denying States the power to violate customary international law is well captured in Hamilton's statement that "the

94 See Draft Articles on Responsibility of States for Internationally Wrongful Acts art. 4(1) & cmt. 9, 56 U.N. GAOR Supp. No. 10, at 40, U.N. Doc. A/56/10 (2001) [hereinafter *Responsibility of States*], reprinted in [2001] 2 Y.B. Int'l L. Comm'n 26, U.N. Doc. A/CN.4/SER. A/2001/Add.1 (Part 2).

95 See Bellia & Clark, *supra* note 21, at 6.

96 See U.N. Charter art. 2, para. 4.

97 *Responsibility of States*, *supra* note 94, art. 22 & cmt.1.

98 Cf. Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1261–62 (1999) (arguing that foreign states now sometimes retaliate against the specific State that committed the violation).

peace of the WHOLE ought not to be left at the disposal of a PART.”⁹⁹

A recent episode concerning the execution of Angel Breard illustrates the structural problem.¹⁰⁰ Breard was a Paraguayan national who was convicted of attempted rape and murder in Virginia and sentenced to death.¹⁰¹ Paraguay initiated proceedings against the United States before the International Court of Justice (ICJ), claiming that Breard’s execution would violate the United States’ obligations under the Vienna Convention on Consular Relations.¹⁰² The ICJ, in turn, ordered that Breard’s execution be stayed pending its resolution of Paraguay’s claims.¹⁰³ While Breard and Paraguay pursued relief in the U.S. courts, Secretary of State Madeleine Albright wrote a letter to Virginia Governor James Gilmore urging him to stay the execution.¹⁰⁴ Albright told Gilmore that compliance with the ICJ’s order was important to the nation’s foreign relations and to the safety of American citizens abroad whose rights depended on the Vienna Convention.¹⁰⁵ In response, the Governor issued a statement denying the Secretary of State’s request because, “[a]s Governor of Virginia my first duty is to ensure that those who reside within [Virginia’s] borders . . . may conduct their lives free from the fear of crime.”¹⁰⁶ The U.S. courts eventually denied relief on dubious grounds¹⁰⁷ and Breard was executed in defiance of the ICJ’s order.¹⁰⁸ Governor Gilmore behaved perfectly rationally. He was elected by the citizens of Virginia, not the citizens of New York or California or the forty-seven other States whose residents may have been traveling abroad and whose interests the Secretary of State believed would be harmed by Gilmore’s defiance of the

99 THE FEDERALIST NO. 80, at 476 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

100 This illustration involves obligations under treaties rather than customary international law, but the structural problem is the same in the two contexts.

101 Jonathan I. Charney & W. Michael Reisman, *Agora: Breard*, 92 AM. J. INT’L L. 666, 666 (1998).

102 *Id.* at 669.

103 *Id.* at 671.

104 *Id.* at 671–72.

105 *Id.* at 684.

106 *Id.* at 674 (quoting Gov. Gilmore).

107 *Breard v. Greene*, 523 U.S. 371 (1998) (per curiam); see Carlos Manuel Vázquez, *Night and Day: Coeur d’Alene, Breard, and the Unraveling of the Prospective-Retropective Distinction in Eleventh Amendment Doctrine*, 87 GEO. L.J. 1, 51 (1998).

108 *Id.* at 6.

ICJ. The structural problem with leaving the interests of the rest of the nation in Gilmore's hands requires no elaboration.¹⁰⁹

The Founders recognized this structural problem. The inability of the federal government to prevent or remedy State violations of the law of nations during the period of the Articles of Confederation was cited at the Convention as an important reason for adopting a new constitution.¹¹⁰ Such violations during the period of the Articles of Confederation troubled the Founders because they complicated the national government's ability to achieve its foreign policy goals and, indeed, threatened to plunge the nation into destructive wars.¹¹¹ The Founders were virtually unanimous in the view that the power over international law should be given to the federal government.

Revisionists do not deny this, but they argue that the constitutional text shows that the Founders' solution to the problem, insofar as customary international law was concerned, was to give the power to require compliance with such law to the *lawmakers*, who were empowered to "define and punish offenses against the law of nations,"¹¹² and the *treaty-makers*, who were given the power to codify norms of the law of nations in self-executing treaties.¹¹³ The Founders' failure to include the law of nations in the Supremacy Clause, however, shows that they did not regard such law as self-executing federal law.¹¹⁴ Thus, the revisionists claim, the States remain free to violate such law in the absence of laws or treaties providing otherwise.

I consider the constitutional text's conformity with the modern position in Part II, as Ramsey advances the textual arguments most forcefully, and I conclude that the text neither establishes nor rebuts

109 On why the Supreme Court's decision in the *Breard* case deserves little, if any, weight as precedent, see *id.* at 66–68.

110 See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 19 (Max Farrand ed., rev. ed. 1937) ("[Edmund Randolph] then proceeded to enumerate the defects: . . . that particular [S]tates might by their conduct provoke war without controul . . ."); *id.* at 24–25 ("[Randolph] observed that . . . [i]f a state acts against a foreign power contrary to the laws of nations or violates a treaty, [the Confederation] cannot punish that State, or compel its obedience to the treaty. . . . It therefore cannot prevent a war."); JAMES MADISON, VICES OF THE POLITICAL SYSTEM OF THE UNITED STATES, (1787) reprinted in SELECTED WRITINGS OF JAMES MADISON 35, 35–36 (Ralph Ketcham ed., 2006).

111 See Stephens, *supra* note 16, at 402–03, 403 n.44.

112 Bradley & Goldsmith, *Critique*, *supra* note 9, at 856; see RAMSEY, *supra* note 17, at 348–55.

113 See RAMSEY, *supra* note 17, at 347–48; Bradley & Goldsmith, *Critique*, *supra* note 9, at 819–20.

114 See RAMSEY, *supra* note 17, at 348–55; Bradley & Goldsmith, *Current Illegitimacy*, *supra* note 9, at 321.

the modern position.¹¹⁵ Here, I merely note that treating the law of nations as non-self-executing presents its own structural problem, a problem emanating from another feature of our constitutional system that the revisionists themselves often invoke in objecting to federal common law. In order to protect the States from having their law preempted too casually, the Constitution imposes daunting requirements for the enactment of federal law.¹¹⁶ Lawmaking requires the agreement of majorities of two differently constituted houses of the legislature plus the agreement of a third independently elected official (the President), or, if the President does not agree, a two-thirds vote of the two legislative bodies. Treaty-making requires the agreement of the President and two-thirds of one of the houses of the legislature. These requirements were imposed to place a heavy weight on the scales in favor of the legal status quo. Given the Founders' recognition of the clear structural problem that would result if States were free to violate international law, it would be surprising if they regarded the successful completion of the legislative or treaty-making gauntlet as a predicate for federal enforcement of the law of nations against the States.

And, in fact, the evidence shows that the Founders did not regard such enforcement to be subject to affirmative incorporation of customary international law in a statute or treaty. Some Founders understood that national control over compliance with international law was a necessary implication of the constitutional structure. Indeed, even before the adoption of the Constitution, State courts expressed the view that, in any federal system, the States must lack the power to violate international law. For example, in *Rutgers v. Waddington*, decided during the period of the Articles of Confederation, the Mayor's Court of New York wrote that it would be "contrary to the very nature of the [U.S.] confederacy" for a single state like New York "to abrogate or alter one of the known laws or usages of nations."¹¹⁷

115 See *infra* notes 323–40 and accompanying text.

116 For the propositions in this paragraph, see Clark, *supra* note 24, and discussion *infra* note 474 and accompanying text. Clark argues that the procedural obstacles to federal lawmaking were designed to protect the States from having their law preempted. Once State law has been preempted by federal law, however, the daunting requirements for enacting federal legislation actually make it difficult to devolve power back to the States. Thus, it is more accurate to say that the daunting requirements for enacting federal legislation operate to protect the status quo. See Carlos Manuel Vázquez, *The Separation of Powers as a Safeguard of Nationalism*, 83 NOTRE DAME L. REV. 1601 (2008). In the beginning, however, the status quo was that State law (or general common law) governed most legal matters.

117 SELECT CASES OF THE MAYOR'S COURT OF NEW YORK CITY, 1674–1784, at 316 (Richard B. Morris ed., 1935).

It is true that some statements of the Founders are consistent with a belief that the law of nations was part of the common law.¹¹⁸ But these statements do not support the claim that the Founders viewed customary international law as anything resembling modern-day State law. First, at the time of the Founding, the law of nations was thought to include not just the law addressing the mutual rights and obligations of states, but also the law merchant and general commercial law.¹¹⁹ Only the state-to-state branch of the law of nations included rules whose violation justified resort to war or other countermeasures.¹²⁰ Thus, only this subset of the law of nations implicated the structural rationale for treating customary international law as preemptive of State law. The other branches of the law of nations, by contrast, were understood to be subject to local variation.¹²¹ They correspond to modern-day conflict of laws or simply domestic law. Adherents of the modern position do not claim that the modern-day counterparts of the latter branches of the law of nations have the force of preemptive federal law. In referring to the law of nations generally as part of the common law, the Founders likely did not mean to deny that a subset of it was preemptive of State law for structural constitutional reasons.

Second, as recounted by Bellia and Clark, in the early days of the Republic, it was widely believed that the common law had been incorporated wholesale as national law.¹²² Although this position was ultimately rejected,¹²³ the fact that it was widely held shows that at least some Founders who regarded the law of nations as common law viewed it as federal law.

Third, even if some Founders regarded all of the law of nations as having common law status and did not regard the common law as federal law, it does not follow that they understood the status of the

118 Attorney General Randolph stated, when deciding whether the arrest of a public minister's servant could be punished under common law, that the law of nations was incorporated into the "law of the land." 1 Op. Att'y Gen. 27 (1792). In *Henfield's Case*, 11 F. Cas. 1099 (C.C.D. Pa. 1793) (No. 6360), Justice James Wilson wrote that "though there has been no exercise of the power conferred upon congress by the constitution 'to define and punish offences against the laws of nations,' the federal judiciary has jurisdiction of an offence against the laws of nations, and may proceed to punish the offender according to the forms of the common law." *Id.* at 1120 n.6. For other statements by the Founders to this effect, see Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 825–27 (1989).

119 See Bellia & Clark, *supra* note 21, at 19–20.

120 See *id.* at 11.

121 See *id.* at 20–22.

122 See *id.* at 46–48.

123 See *id.* at 55–56.

law of nations as anything like modern-day State law. The characteristics of the general law of the early Republic were very different from those of today's State law. "[I]n early nineteenth century usage, 'common law' was a general common law shared by the American states rather than a local common law of a particular state."¹²⁴ Before *Erie*, the federal courts "exercised their independent judgment on what that law required."¹²⁵ Thus, by giving the federal courts constitutional and statutory jurisdiction over the types of cases most likely to raise issues under the law of nations,¹²⁶ even Founders who believed that the law of nations merely had the status of the common law were able to give effect to their "clear[] inten[t] that customary international law should have application in our courts,"¹²⁷ as well as their "well-documented desire to ensure that [S]tates complied with international law."¹²⁸ By contrast, federal courts today must follow the State courts' decisions regarding what State law requires.

2. Pre-*Erie* Doctrine

Revisionists contend that, before *Erie*, customary international law was understood to have the status of *Swift*-era general law. As such, States were understood to have the power to depart from such law, and thus to place the United States in breach of it, and the Supreme Court lacked the power to review State court interpretations and applications of it.¹²⁹ But the cases cited by the revisionists do not establish that States were thought to be free to violate international law, and they are at best equivocal regarding the availability of Supreme Court review. Moreover, as Bellia and Clark have shown, there were also cases during this era that articulated an allocation-of-powers rationale for treating a subset of the law of nations as preemptive federal law. As discussed in subpart II.D, this subset of the law of nations appears to have comprised the state-to-state branch of the law of nations, which is what we regard as customary international law today. Even some of the cases cited by revisionists as denying the Supreme Court's jurisdiction to review State court applications of customary international law recognize that such law was nevertheless binding on the States. Revisionists make much of the absence of cases

124 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, 1515 n.9 (1984).

125 *Id.* at 1515.

126 Bellia & Clark, *supra* note 21, at 6.

127 Young, *supra* note 19, at 390.

128 Bradley, Goldsmith & Moore, *supra* note 33, at 883.

129 See Bradley & Goldsmith, *Critique*, *supra* note 9, at 824.

holding State laws invalid on the ground that they violate customary international law,¹³⁰ but it is equally noteworthy that there appear to be no cases upholding the States' ability to depart from such law, and much dicta denying their power to do so.

Furthermore, even if the pre-*Erie* cases did regard customary international law as *Swift*-era general common law, the general common law was very different from today's State law. The pre-*Erie* regime of general common law, in operation, resembled present-day federal law more than present-day State law. To put the matter most favorably to the revisionist position, pre-*Erie* doctrine reflected two contending positions regarding the state-to-state branch of the law of nations—some believed it to be preemptive federal law and others believed it to be part of the general law. If the latter category is no longer available, then pre-*Erie* doctrine supports a post-*Erie* status of customary international law as federal law, not a State law status that had never been in play.

a. State Authority to Depart from Customary International Law

Bradley and Goldsmith cite several early cases involving the immunities of foreign officials as establishing that it was then understood that “one consequence of [customary international law]’s status as general common law was that a [S]tate of the Union had the ability, in the absence of a constitutional provision or federal enactment to the contrary, to violate international law and thereby implicate the international responsibility of the United States.”¹³¹ But the cases do not establish that the States were understood to have the power to depart from customary international law.

The “most notorious . . . example”¹³² that they discuss was New York’s prosecution of a British national, Alexander McLeod, in connection with the destruction of the American steamer, *The Caroline*. The British government claimed that McLeod was entitled to immunity from prosecution under international law.¹³³ Bradley and Goldsmith assert that “Secretary of State Daniel Webster disclaimed the constitutional power to release McLeod but accepted responsibility for any violation of the law of nations.”¹³⁴ But, in fact, Webster only

130 See RAMSEY, *supra* note 17, at 352; Young, *supra* note 19, at 383.

131 Bradley & Goldsmith, *Critique*, *supra* note 9, at 825.

132 *Id.* at 825 n.56.

133 *Id.*

134 *Id.* (citing David J. Bederman, *The Cautionary Tale of Alexander McLeod: Superior Orders and the American Writ of Habeas Corpus*, 41 EMORY L.J. 515, 515–20 (1992)).

denied that *the Executive* had the power to release McLeod. Webster maintained that the State courts would apply the law of nations and that, if they misapplied it, review would be available in the Supreme Court.¹³⁵ When McLeod sought habeas relief in the New York courts, the court did apply the law of nations, but found McLeod not to be entitled to immunity and denied him habeas relief.¹³⁶ McLeod was then advised to appeal to the U.S. Supreme Court, but he declined to do so because of the delay involved.¹³⁷ Instead, he submitted to a jury trial and was acquitted.

The other cases cited by Bradley and Goldsmith for the proposition that States were understood to have the power to depart from customary international law are similarly consistent with the obligation of State courts to apply such law and the power of the Supreme Court to review State court applications of such law.¹³⁸ These exam-

135 See Bederman, *supra* note 134, at 520 (citing Letter from Mr. Webster to Mr. Crittenden (Mar. 15, 1841), reprinted in 29 BRITISH AND FOREIGN STATE PAPERS 1840–1841, at 1139, 1141–42 (London, Ridgway & Sons 1857)); see also *Caperton v. Bowyer*, 81 U.S. (14 Wall.) 216, 225–26 (1871) (argument of counsel for plaintiff in error) (“That the understanding of the administration and of well-informed persons at the time [regarding the *McLeod* case] was, that this, the Supreme Court of the United States, had jurisdiction of the judgment of the Supreme Court of New York, is clear from a notice of the trial of McLeod in the National Intelligencer of May 22d, 1841. The editors alluding to this trial there say: ‘Whatever the decision, whether for releasing or remanding the prisoner, an appeal will probably be taken to the Court of Errors, from which a further appeal lies, in cases of this nature, to the Supreme Court of the United States.’ Mr. Choate, in a speech delivered on the 11th of June, 1841, in the United States Senate, maintains the same position. He says: ‘The clear course of the government, therefore, was to do what it did, to have McLeod’s case fairly tried, and if needful, to have his case brought into the National tribunals.’” (footnote omitted) (citing NAT’L INTELLIGENCER, June 17, 1841)); cf. *infra* note 164 (addressing the response of counsel for defendant in error in *Caperton*). The Supreme Court in *Caperton* did not reach the issue.

136 See Bederman, *supra* note 134, at 521–26.

137 See *id.* at 526; R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT’L L. 82, 95 (1938).

138 Bradley and Goldsmith cite the cases of General Collot and Don Joseph de Cabrera, as recounted by Bederman, *supra* note 134, at 526–27. See Bradley & Goldsmith, *Critique*, *supra* note 9, at 825 n.56. The case of General Collot establishes only that the *Executive* cannot set a State prisoner free. See Bederman, *supra* note 134, at 526. Like McLeod, Collot was able to raise his defense under the law of nations in the State courts and prevailed without the need for Supreme Court review. *Id.* Don Joseph de Cabrera was denied federal habeas relief on the ground that no statute authorized such relief for persons held in the custody of the States, *id.* at 527, a holding with no implications for the modern position, see *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93–94, 97–98 (1807). Nor can one draw any relevant inferences from cases in which States “failed to prosecute the perpetrators of mob violence” even though prosecution was allegedly required by customary international law. Bradley &

ples do show that the federal government was not given *unlimited* power to force States to comply with customary international law. But adherents of the modern position do not contend that the federal Executive may unilaterally release a State prisoner in order to comply with customary international law,¹³⁹ or that a lower federal court may grant habeas relief to State prisoners without statutory authorization.¹⁴⁰ Adherents of the modern position maintain, and revisionists deny, that customary international law is binding on State actors and reviewable in the Supreme Court. The cases cited by Bradley and Goldsmith are, if anything, more supportive of the modern position than of the revisionist position.

b. Supreme Court Review of Customary International Law

Revisionists also maintain that, before *Erie*, the law was clear that the Supreme Court lacked jurisdiction to review State court decisions regarding the law of nations because such law was regarded as nonfederal law. But, as suggested by the McLeod incident just discussed, the law on this point does not support the revisionists as clearly as they contend. In fact, the cases are at best equivocal and, indeed, contain support for the view that customary international law is binding on the States. The cases as a whole show, at most, that there were two contending positions during this era: that the state-to-

Goldsmith, *Critique*, *supra* note 9, at 825. Indeed, the federal courts lack the power to order the States to prosecute individuals even when the failure to prosecute violates *the Constitution*. Cf. *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 & n.6 (1973) (citing *Gomez v. Perez*, 409 U.S. 535 (1973)) (finding a lack of standing for a private citizen to have criminal law enforced). Without such prosecutions there would of course be no case for the Supreme Court to review.

139 For an argument that a *treaty* should be construed to grant the President the power to order the stay of an execution of a State prisoner when the International Court of Justice (ICJ) orders such a stay as a provisional measure, see Carlos Manuel Vázquez, *Breard and the Federal Power to Require Compliance with ICJ Orders of Provisional Measures*, 92 AM. J. INT'L L. 683 (1998). See also Vázquez, *Less than Zero?*, *supra* note 86, at 564–65 (discussing the President's authority to require compliance with a final judgment of the ICJ). But see *Medellín v. Texas*, 552 U.S. 491, 527 (2008) (holding that the President lacked power to order Texas to comply with ICJ final judgment).

140 See *Bollman*, 8 U.S. (4 Cranch) at 93–94. But cf. *Boumediene v. Bush*, 553 U.S. 723, 744–45 (2008) (finding congressional preclusion of habeas jurisdiction for persons held in executive detention unconstitutional). After the McLeod incident, Congress gave the lower federal courts the power to grant habeas relief to persons restrained of their liberty by federal or State officials in violation of the law of nations. Act of Aug. 29, 1842, ch. 257, 5 Stat. 539 (codified as amended at 28 U.S.C. § 2241(c)(4) (2006)). See generally *Bederman*, *supra* note 134, at 527–31 (presenting a history of the grant and the controversies behind it).

state branch of customary international law had the force of preemptive federal law and that it had the status of general common law.

Of the five cases typically cited for the proposition that State court interpretations of customary international law were understood not to be reviewable by the Supreme Court,¹⁴¹ *Huntington v. Attrill*¹⁴² is inapposite because it involved the law merchant.¹⁴³ Although the law merchant was once considered a branch of the law of nations, it differed from the state-to-state branch of the law of nations in that it was recognized to be subject to local variation.¹⁴⁴ Today, the law merchant, or general commercial law, is not regarded as a part of customary international law. Adherents of the modern position do not contend that this law is preemptive of State law.

A second case cited by revisionists as establishing the lack of Supreme Court appellate jurisdiction over customary international law, *Oliver American Trading Co. v. Mexico*,¹⁴⁵ is inapposite because it involved an entirely distinct question. The issue in *Oliver American Trading* was whether the district court had properly certified a question of foreign sovereign immunity for direct review by the Supreme Court. Section 238 of the Judicial Code authorized the direct review by writ of error of questions of jurisdiction,¹⁴⁶ which the Court construed to authorize review of “the question of jurisdiction of the district court *as a federal court.*”¹⁴⁷ Although the Court did describe the immunity question as one of “general law,” its decision was not based on the view that a denial of this immunity by the State courts would not be reviewable in the Supreme Court. Rather, the Court held that the certificate was not proper because the district court’s jurisdiction

141 The five cases discussed here are the ones cited by Bradley and Goldsmith. See Bradley & Goldsmith, *Current Illegitimacy*, *supra* note 9, at 331 & n.64; Bradley & Goldsmith, *Critique*, *supra* note 9, at 824 & n.48; Bradley, Goldsmith & Moore, *supra* note 33, at 913 & n.232; see also Ku, *State Courts*, *supra* note 16, at 277 n.52; Ku & Yoo, *supra* note 16, at 202–03 & nn.182–84.

142 146 U.S. 657 (1892).

143 See *id.* at 673–74; see also *Roth v. Ehman*, 107 U.S. 319, 319 (1883) (granting motion to dismiss because the Court had no jurisdiction to review a State court ruling on the validity of a foreign marriage), *cited in Attrill*, 146 U.S. at 683.

144 See *Bellia & Clark*, *supra* note 21, at 20–22.

145 264 U.S. 440 (1924).

146 Judicial Code of 1911, Pub. L. No. 61-475, § 238, 36 Stat. 1087, 1157, *amended by Act of Jan. 28, 1915*, Pub. L. No. 63-241, § 2, 38 Stat. 803, 804 (“Appeals and writs of error may be taken from the district courts . . . direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision . . .”).

147 *Oliver Am. Trading Co.*, 264 U.S. at 442 (emphasis added).

as a federal court was not based on the presence of the question of immunity. Federal jurisdiction in the case was based on diversity of citizenship.¹⁴⁸ According to the Supreme Court, the sovereign immunity question did not concern the federal court's jurisdiction as a federal court, but was a question "of general law applicable alike to actions brought in other tribunals."¹⁴⁹ *Oliver American Trading* thus held that jurisdiction was lacking because federal jurisdiction was not premised on Mexico's sovereign immunity defense, *not* because the sovereign immunity defense did not arise under federal law.¹⁵⁰ In this light, the most relevant point of Justice Brandeis's opinion for the Court is one that cuts in favor of the modern position—namely, its recognition that the immunity question was "applicable as fully to suits in the [S]tate courts as to those prosecuted in the courts of the United States."¹⁵¹

148 See Transcript of Record at 5–6, *Oliver Am. Trading Co.*, 264 U.S. 440 (No. 662) (Removal Petition) (noting that the amount in dispute exceeds \$3000 and that the defendant is an alien and a nonresident of New York and the plaintiff is a resident of Delaware); *id.* at 78 (Opinion Dismissing for Lack of Jurisdiction) ("On November 11, 1922 the Mexican Government . . . and the National Railways of Mexico (Government Administration) . . . removed the action to this court, it being alleged that the suit was between plaintiff, a Delaware corporation, and aliens, to wit: The Government of the United States of Mexico, a sovereign State, and National Railways of Mexico, a corporation organized under the laws of that country.").

149 *Oliver Am. Trading Co.*, 264 U.S. at 442. The Court may have regarded foreign sovereign immunity as an immunity from jurisdiction over the person of the foreign state, *cf.* Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559 (2002) (arguing that sovereign immunity bears on personal jurisdiction), or it may have regarded it as an immunity from liability, *cf.* Vázquez, *supra* note 53, at 1084 n.132 (arguing that foreign sovereign immunity is in part an immunity from liability). When it enacted the FSIA in 1976, Congress made the absence of sovereign immunity a condition of the subject-matter jurisdiction of the federal courts over suits against foreign states. See 28 U.S.C. § 1330 (2006).

150 Had Mexico sought to remove on the ground that its sovereign immunity defense presented a federal question, its petition would have run afoul of the well-pleaded complaint rule. See *supra* note 63.

151 *Oliver Am. Trading Co.*, 264 U.S. at 443. The subsequent decision in *Transportes Marítimos do Estado v. Almeida*, 265 U.S. 104 (1924), cited by Weisburd for the proposition that the question of immunity was not regarded as a federal question subject to review in the federal courts, see Weisburd, *supra* note 18, at 40, actually confirms that *Oliver American Trading* held merely that "the claim of sovereign immunity does not present a question of federal jurisdiction within the meaning of § 238," *Almeida*, 265 U.S. at 105 (emphasis added). The Court in *Almeida* dismissed the writ of error on the same ground. *Id.*; see also *id.* (distinguishing other cases that did involve the "question . . . of the jurisdiction of the court as a federal court").

The third case relied upon by revisionists, *Wulfsohn v. Russian Socialist Federated Soviet Republic*,¹⁵² is a brief memorandum decision that raises more questions than it answers. The State court of appeals in *Wulfsohn* had dismissed claims against the Soviet Union on the ground of sovereign immunity.¹⁵³ The plaintiff in error appealed to the Supreme Court raising constitutional objections, namely, that the New York court's decision according immunity to an unrecognized government contravened the Executive's exclusive power over recognition of foreign sovereigns and that the dismissal of the suit was a taking of the plaintiff's property without just compensation in violation of the Fourteenth Amendment.¹⁵⁴ The plaintiff in error did *not* argue that the Supreme Court had appellate jurisdiction because the question of sovereign immunity was one of federal law. The statute governing writs of error to the Supreme Court, Section 25 of the First Judiciary Act, extended jurisdiction (in relevant part) only to cases "where any title, right, privilege, or immunity is claimed under the constitution, or any treaty or statute of or commission held or authority exercised under the United States" *and the decision is against the party claiming such right, title, privilege, or immunity*.¹⁵⁵ Because the State court's decision was in favor of the claimed right to immunity, the Supreme Court would have lacked jurisdiction by writ of error whether or not the defendant's right to sovereign immunity had been regarded as a matter of federal law. The Supreme Court summarily dismissed for lack of jurisdiction.¹⁵⁶ The Court did not explain why it believed it lacked jurisdiction over the plaintiff in error's constitutional claims. Presumably the Court agreed with the defendant in error's argument that the State court decision rested on independent and adequate state grounds.¹⁵⁷ It is true that the defendant in error

152 266 U.S. 580 (1924) (per curiam), cited in *Ku*, *State Courts*, *supra* note 16, at 318-19, 335 & n.338, and *Weisburd*, *supra* note 18, at 39-40.

153 *Wulfsohn v. Russian Socialist Federated Soviet Republic*, 138 N.E. 24, 26 (N.Y. 1923).

154 Brief in Behalf of Plaintiffs in Error at 4-5 *Wulfsohn*, 266 U.S. 580 (No. 65).

155 Act of Sept. 6, 1916, ch. 448, § 2, 39 Stat. 726, 727 (1916). The plaintiff in error could have sought a (discretionary) writ of certiorari asking the Court to review the State court's immunity decision, as the Supreme Court had recently been given the power to review by certiorari State court decisions upholding claims of federal right, *see id.*, but he instead pursued his appeal as of right through writ of error.

156 The opinion of the Supreme Court provides in its entirety as follows: "Dismissed for the want of jurisdiction upon the authority of the Act of September 6, 1916, c. 448, § 2, 39 Stat. 726; *Oliver American Trading Co., v. Mexico*, 264 U.S. 440." *Wulfsohn*, 266 U.S. at 580.

157 *See* Motion to Dismiss for Lack of Jurisdiction or to Affirm for Want of Substantial Issues at 6-7, *Wulfsohn*, 266 U.S. 580 (No. 65).

also cited *Oliver American Trading* for the proposition that the Supreme Court lacks jurisdiction over the immunity issue because it is a matter of “general law.”¹⁵⁸ The Supreme Court’s citation of *Oliver American Trading* may suggest that it was endorsing this over-reading of *Oliver American Trading*. But, even if that was the Court’s intention, the cursory memorandum opinion in *Wulfsohn* is a slim reed on which to base the claim that the Supreme Court was thought to lack the power to review State court decisions interpreting customary international law, given that appellate jurisdiction over the sovereign immunity issue was lacking anyway and that such a reading would in any event fail to explain why the Court lacked jurisdiction over the constitutional claims.

The fourth case cited by revisionists, *New York Life Insurance Co. v. Hendren*,¹⁵⁹ is similarly vague. *Hendren* involved a writ of error to review the effect of the outbreak of the Civil War on the obligations of a private insurance contract between a New York insurance company and a citizen of Virginia. The Court concluded that it lacked jurisdiction,¹⁶⁰ and revisionists argue that the Court did so because it regarded the laws of war as a matter of general law rather than one of federal law.¹⁶¹ This reading of *Hendren* derives some surface plausibility from the fact that Justice Bradley, in dissent, put forth a strong structural argument for treating the state-to-state branch of the law of nations as preemptive federal law reviewable in the Supreme Court. Bradley wrote:

[T]he laws which the citizens of the United States are to obey in regard to intercourse with a nation or people with which they are at war are laws of the United States. These laws will be the unwritten international law, if nothing be adopted or announced to the contrary; or the express regulations of the government, when it sees fit to make them. But in both cases it is the law of the United States for the time being, whether written or unwritten.¹⁶²

In Bradley’s view, the case fell within the Supreme Court’s appellate jurisdiction within the meaning of Section 25, for reasons similar to those set forth in the cases discussed by Bellia and Clark: “The power given by the Constitution to Congress to declare war, and the author-

158 *Id.* at 5, 9–10, 12.

159 92 U.S. 286 (1875).

160 *See id.* at 286–87.

161 Bradley & Goldsmith, *Critique*, *supra* note 9, at 824 & n.53; Weisburd, *supra* note 18, at 39.

162 *Hendren*, 92 U.S. at 288 (Bradley, J., dissenting).

ity of the general government in carrying on the same, are the grounds on which the exemption or immunity is claimed.”¹⁶³

Bradley’s opinion in *Hendren* shows that one of the contending pre-*Erie* positions was that the state-to-state portion of customary international law had the status of federal law. The fact that Bradley was a lone dissenter, on the other hand, does not necessarily show that the majority was rejecting the structural constitutional case for treating this portion of the law of nations as preemptive of State law. The majority may have believed instead that the structural argument for treating the laws of war as preemptive was inapplicable to a “sectional civil war.”¹⁶⁴ Moreover, the majority’s holding that jurisdiction was lacking appears to have been based on a reading of Section 25 of the First Judiciary Act that is no longer good law. As noted, Section 25 at the time extended jurisdiction (in relevant part) only to cases “where any title, right, privilege, or immunity is claimed under the constitution, or any treaty or statute of or commission held or authority exercised under the United States.”¹⁶⁵ The majority concluded that it lacked jurisdiction because it “nowhere appear[ed] that the constitution, laws, treaties, or executive proclamations, of the United States were necessarily involved in the decision” of the State court.¹⁶⁶ The majority in *Hendren* thus may have understood the general law of war to be binding on the States and potentially reviewable in the Supreme Court, yet not to be “the constitution” or a “treaty or statute . . . or commission” within the meaning of Section 25. To the extent the Court was resting on the wording of Section 25, its interpretation of the statute is no longer good law, as the Supreme Court has subsequently made clear that State court applications of federal common law are reviewable by the Supreme Court, despite the fact that § 1257 (the successor to Section 25) continues to refer to cases presenting

163 *Id.*

164 *Id.* at 286 (majority opinion); cf. *Caperton v. Bowyer*, 81 U.S. (14 Wall.) 216, 228–29 (1871) (argument of counsel for defendant in error) (“It is true that the courts of the United States, like the courts of the States, and of all other civilized countries, recognize the law of nations as binding upon them; and it is argued that as the government of the United States is charged with the management and control of our foreign relations, the courts of the United States ought to have the power of deciding in the last resort, all questions of international law, otherwise difficulties may arise with foreign nations on account of erroneous decisions by the State courts which the government of the United States could not provide against. But whatever force the argument of convenience might have in a case arising between the United States and a foreign nation, it has very little in a case arising out of a defunct rebellion.”).

165 See Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 83, 85–87, amended by Act of Feb. 5, 1867, ch. 28, 14 Stat. 385.

166 *Hendren*, 92 U.S. at 287.

rights or immunities under the Constitution, treaties, statutes, and commissions of the United States.¹⁶⁷ It is difficult to know the majority's reasoning in *Hendren*, as the opinion contained very little analysis of the jurisdictional question.¹⁶⁸

167 28 U.S.C. § 1257(a) (2006); see, e.g., *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 499–500, 508 (2001). I recognize, of course, that, “the modern conception of federal common law . . . did not exist circa 1788,” or, indeed, before *Erie*. See Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 741 (2010). My point is that the Court's reading of Section 25 in *Hendren* as permitting review only of the specified types of federal law has since been rejected. The Court's literal interpretation of Section 25 in *Hendren* pretermitted any question of whether the law of nations was binding on the States or whether State court applications of such law were reviewable in the Supreme Court as a constitutional matter.

The decision in *City & County of San Francisco v. Scott*, 111 U.S. 768 (1884), cited by Weisburd, *supra* note 18, at 39 & nn.235–37, may have rested on the same statutory ground. See *Scott*, 111 U.S. at 769 (“[The question submitted to the Court] does not depend on any legislation of Congress, or on the terms of the treaty” (citing *Hendren*, 92 U.S. 286)). The precise nature of the issue of “general public law” that the Court was asked to review in *Scott* is unclear from the opinion, so it is difficult to say whether it implicated the state-to-state portion of the law of nations. Cf. *infra* note 168 (noting that the “law of war” issue in *Hendren* may not have been part of the state-to-state portion of the law of nations).

168 It is worth noting, additionally, that the legal principle involved in *Hendren* likely did not belong to the portion of the law of nations that corresponds to today's public international law. It is true that, in 1875, the laws of war were understood to include a rule suspending private contracts between citizens of belligerent states. See 2 WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 1209 (Boston, Little, Brown, & Co. 2d rev. ed. 1896) (1886) (stating that the law of war creates a strict rule of nonintercourse between the populations of the warring parties, and that “existing contracts and pecuniary obligations are suspended”). But, as noted, the law of nations was then thought to encompass areas of the law that we do not regard as part of public international law today. It appears that the effect of war on a private contract is today regarded as within the province of domestic contract law, not the laws of war. Thus, in a 1959 treatise on the modern law of war, the chapter on “Intercourse Between Belligerents” discusses intercourse between the belligerent governments and armies. MORRIS GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 376–99 (1959). With respect to individuals, it says merely that, as a matter of national law, “the contending states usually forbid as a serious crime unauthorized communications, even though innocent in nature, between persons under their control and those in enemy territory.” *Id.* at 378 (citing *Trading with the Enemy Act*, 12 U.S.C. § 95a (2006); *Trading with the Enemy Act*, 1939, c. 39 (Eng.)). By contrast, the 1934 *Restatement of Contracts* did address the effect of war on a private contract, specifying that “[w]ar supervening after the formation of contracts between citizens of the United States and citizens of the enemy country” has the effect of rendering the contract illegal if its performance “involves communication across the line of hostilities, or . . . will aid the enemy or diminish the power of the United States to carry on war effectively.” RESTATEMENT OF CONTRACTS § 596(b) (1934).

The final case often cited as establishing that the Supreme Court was thought to lack jurisdiction to review the State courts' application of customary international law is *Ker v. Illinois*,¹⁶⁹ which presented the question whether the State court's jurisdiction in a criminal case was vitiated by the fact that the defendant had been brought to the jurisdiction against his will from Peru by a private party.¹⁷⁰ The defendant raised arguments based on the Due Process Clause, a federal statute, and a treaty, but not customary international law. After rejecting each of the defendant's claims, the Court commented that the defendant likely had no claim under customary international law either, but that, even if he had had one, the issue would not be within the Supreme Court's jurisdiction to review.¹⁷¹ As in *Hendren*, that proposition (stated without citation in *Ker*) might have been based on the idea that, even if the defendant enjoyed immunity under customary international law, the immunity was not conferred by the Constitution or a statute, treaty, or commission within the meaning of Section 25. In any event, the precedential force of this statement is diminished by the fact that *Ker* did not rely on customary international law at all, and the Court thought that such a claim would have been frivolous in any event.¹⁷² More noteworthy is the Court's statement that the State courts are "bound to take notice" of customary international law.¹⁷³ This dictum in *Ker* shows that, whatever the reason for its view that appellate jurisdiction over the customary international law issue was lacking, the Court did not equate the lack of Supreme Court review with a freedom of the States to disregard customary international law.

In sum, there is substantial support for the proposition that, before *Erie*, the portion of the law of nations that corresponded to present-day customary international law was understood to be binding on the States. The cases cited by revisionists for the claim that States were free to violate such law do not establish that point. As for the

169 119 U.S. 436 (1886).

170 *Id.* at 443 ("[I]t was a clear case of kidnapping within the dominions of Peru, without any pretence of authority . . . from the government of the United States.").

171 *See id.* at 444.

172 The Court may have believed that a private abduction does not violate international law. *But cf.* *Bellia & Clark*, *supra* note 41, at 448–49 (noting that in 1789, injuries to aliens by U.S. citizens were thought to violate the law of nations if not remedied). Or the Court may have believed that the law of nations required the extradition or punishment of the abductor or the payment of damages but not the relinquishment of jurisdiction. *But cf.* Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1158 (1992) (arguing that modern international law requires the repatriation of a persons abducted from foreign territory in violation of international law).

173 *Ker*, 119 U.S. at 444.

Supreme Court's jurisdiction to review State court applications of customary international law, the cases are equivocal at best insofar as they concern public international law norms, and may just have rested on a reading of the statute regulating the Supreme Court's appellate jurisdiction that has since been rejected.¹⁷⁴ In any event, these opinions did not equate lack of reviewability with State freedom to depart from customary international law. Even the cases that most strongly support the claim that customary international law was not reviewable by the Supreme Court insisted that the States were bound by such law, even though States were understood to have the power to depart from other aspects of the general law. Though there appear to be no federal cases invalidating State laws on the ground of conflict with customary international law, this appears to be a result of the absence of any such State laws, as there also appear to be no federal cases upholding State laws that purport to alter or depart from customary international law.

c. The General Law as an Intermediate Status

The pre-*Erie* doctrinal landscape strongly supports the claim that customary international law was understood to be binding on the States, whether or not the State courts' applications of such law were reviewable in the Supreme Court. Even if such law had been viewed as "general law" in all respects, however, the pre-*Erie* approach to such law would not provide much of a historical antecedent for treating customary international law as modern-day State law. Given the mindset of judges of that era, the pre-*Erie* general law regime, as it operated, resembled present-day federal law more than present-day State law.

The Founders sought to ensure that cases possibly implicating the law of nations would be decided in the federal courts, and so they extended the federal judicial power to cases involving ambassadors, foreign states, aliens, and admiralty.¹⁷⁵ The Judiciary Act of 1789, in

174 See *supra* note 167 and accompanying text.

175 See *supra* note 126; see also THE FEDERALIST NO. 3, at 43 (John Jay) (Clinton Rossiter ed., 1999) ("Under the national government, treaties [and] the laws of nations, will always be expounded in one sense and executed in the same manner—whereas adjudications on the same points and questions in thirteen States, or in three or four confederacies, will not always accord or be consistent; and that, as well from the variety of independent courts and judges appointed by different and independent governments as from the different local laws and interests which may affect and influence them."); THE FEDERALIST NO. 99, at 477 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("So great a proportion of the cases in which foreigners are parties involve

turn, granted federal courts jurisdiction in these cases,¹⁷⁶ thus diminishing the need for Supreme Court review of these questions from the State courts. The lower federal courts, for their part, used their own independent judgment regarding the content of this law.¹⁷⁷ Moreover, even when State courts decided issues of customary international law, they could be expected to arrive at interpretations that accorded with those of the federal courts. During this era, federal and State courts alike understood that, in applying the general common law, they were discovering a set of norms that had an existence apart from what the courts said about them. As Professor (now-Judge) Fletcher has documented, because of their sense of common enterprise, federal and State courts frequently relied on one another's decisions in cases involving the general common law, and the result was a remarkable degree of uniformity in the interpretation of this law.¹⁷⁸ The possible threat to this uniformity posed by the State *legislatures'* recognized power to depart from the common law never materialized with respect to the state-to-state portion of the law of nations, perhaps because the States did not understand themselves to be free to depart from the latter.

Post-*Erie* common law, however, exhibits none of these characteristics. States understand that they have the power to depart from the approach of other States and of the federal courts, not just legislatively, but also through judicial decision. The result has been a great diversity of approaches to common law matters among the States. This diversity has not extended to customary international law, presumably because of the "well-entrenched" view that such law is federal.¹⁷⁹ Were the revisionist approach to be adopted, however, the States would know that they are free to adhere to such law or not, or

national questions that it is by far most safe and most expedient to refer all those in which they are concerned to the national tribunals.").

176 Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77 (granting district courts exclusive original jurisdiction over admiralty and maritime cases and concurrent jurisdiction over alien tort suits); *id.* § 11, 1 Stat. at 78 (granting circuit courts concurrent jurisdiction over suits in diversity); *id.* § 13, 1 Stat. at 80–81 (granting the Supreme Court exclusive jurisdiction over cases brought against ambassadors and original, but not exclusive, jurisdiction over suits brought by ambassadors).

177 See, e.g., *Huntington v. Attrill*, 146 U.S. 657, 683 (1892) ("[I]t is one of those questions of general jurisprudence which [the federal] court must decide for itself, uncontrolled by local decisions.").

178 See Fletcher, *supra* note 124, at 1554, 1562–64, 1572–75. Fletcher's analysis focused on the law merchant, but his analysis is *a fortiori* applicable to the state-to-state branch of the law of nations, which was understood to be binding on States as a matter of international law.

179 Bradley & Goldsmith, *Critique*, *supra* note 9, at 816.

to depart or alter it as they wish or as instructed by their legislatures or their citizens through referenda such as Oklahoma's. Such an approach to customary international law would be radically different from the approach that prevailed before *Erie*, whether its status then was federal law or general law.

3. Post-*Erie* Doctrine

The post-*Erie* decision most often cited by proponents of the modern position is *Banco Nacional de Cuba v. Sabbatino*.¹⁸⁰ As revisionists often note, relying on *Sabbatino* as support for the modern position is ironic, since the Court's holding was that customary international law could *not* be applied to question the validity of certain acts of foreign states.¹⁸¹ As discussed below, *Sabbatino* actually shows that not all of customary international law is federal law for all purposes.¹⁸² But the portion of the Court's opinion holding that the act-of-state doctrine itself has the status of federal law does strongly support the modern position, albeit in dictum.¹⁸³

The Court in *Sabbatino* explained that the act-of-state doctrine—which generally prohibits courts from questioning the validity of an act of a foreign state within its own territory—is based on separation-of-powers principles. The Constitution assigns to the President the responsibility for conducting the nation's foreign relations, and the courts' failure to give effect to certain acts of state would hinder the performance of this function. Because the State courts' failure to give effect to such acts would be just as harmful as the federal courts' failure to do so, the Court held, the act-of-state doctrine is equally applicable in State courts.¹⁸⁴ In reaching the conclusion that the act-of-state doctrine thus preempted any contrary State law or policy, the Court relied on an article by Professor (later Judge) Philip Jessup, written shortly after *Erie* was decided. Jessup addressed the applicability of *Erie* to customary international law and concluded that *Erie* did

180 376 U.S. 398 (1964).

181 Bradley & Goldsmith, *Critique*, *supra* note 9, at 860; Young, *supra* note 19, at 440–41.

182 See *infra* text accompanying notes 208–22.

183 Bellia and Clark argue that *Sabbatino* directly supports their claim that a subset of customary international law is preemptive federal law. I consider this claim in subpart II.D, below.

184 The Court left open whether State courts could decide to give effect to foreign acts of state even if the act-of-state doctrine did not require them to do so, *Sabbatino*, 376 U.S. at 425 n.23, but it held that State courts must give effect to such acts when the act-of-state doctrine applies.

not require that customary international law be treated as State law.¹⁸⁵ The Supreme Court agreed with his analysis and found it equally applicable to the act-of-state doctrine:

It seems fair to assume that the Court did not have rules like the act of state doctrine in mind when it decided *Erie R. Co. v. Tompkins*. Soon thereafter, Professor Philip C. Jessup, now a judge of the International Court of Justice, recognized the potential dangers were *Erie* extended to legal problems affecting international relations. He cautioned that rules of international law should not be left to divergent and perhaps parochial [S]tate interpretations. His basic rationale is equally applicable to the act of state doctrine.¹⁸⁶

The Court's endorsement of Jessup's view that customary international law is federal law is admittedly dictum, as the Court noted that the act-of-state doctrine was not itself required by international law.¹⁸⁷ But it was well-considered dictum.¹⁸⁸ Indeed, the Court seemed to regard Jessup's view concerning customary international law and its own view concerning the act-of-state doctrine as instantiations of a broader principle that it appeared to regard as self-evident: that *Erie* was inapplicable "to legal problems affecting international relations."¹⁸⁹ The *Restatement* was thus well justified in regarding *Sabbatino* as strong support for the modern position.¹⁹⁰

Revisionists, for their part, claim Chief Judge Hand's opinion in *Bergman v. De Sieres*¹⁹¹ as support.¹⁹² In this post-*Erie*, pre-*Sabbatino* case, Hand stated that New York law was applicable to the question of

185 See Philip C. Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM. J. INT'L L. 740, 743 (1939).

186 *Sabbatino*, 376 U.S. at 425 (footnote omitted).

187 *Id.* at 421.

188 The Court itself noted that it could have avoided the *Erie* question, since New York law did not conflict with federal law, but it felt "constrained to make it clear that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law." *Id.* at 425.

189 See *id.*; cf. *infra* text accompanying notes 507–508 (arguing that preemptive force of customary international law may be regarded as a doctrinal manifestation of a broader preemption of State action that unduly interferes with the federal government's conduct of foreign relations).

190 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 n.3 (1987).

191 170 F.2d 360 (2d Cir. 1948).

192 Young claims that *Bergman* is an "unequivocal" rejection of the modern position. Young, *supra* note 19, at 458 n.479; see also Bradley & Goldsmith, *Critique*, *supra* note 9, at 828 (noting that Chief Judge Hand "reached a conclusion contrary to Jessup's"); Ku & Yoo, *supra* note 16, at 203 & n.186 (arguing that Chief Judge Hand "treated [customary international law] as part of New York's common law").

a foreign diplomat's immunity, an issue addressed by customary international law. But Hand actually left open whether State law would apply if it conflicted with international law. Indeed, Hand acknowledged that "an avowed refusal to accept a well-established doctrine of international law, or a plain misapprehension of it, [might] present a federal question."¹⁹³ He found it unnecessary to reach this issue, since New York law was consistent with international law.¹⁹⁴ Thus, Hand went no further than to hold that State law applies to the extent that it is consistent with customary international law, which is just another way to put the modern position.

More relevant is the very recent decision in *Samantar v. Yousuf*,¹⁹⁵ which shows that virtually no one today embraces the view that revisionists attribute to Hand. The issue in *Samantar* was whether the immunity of foreign officials was governed by the Foreign Sovereign Immunities Act (FSIA). The executive branch's amicus brief argued that the immunity was not covered by the FSIA, but that foreign officials were entitled to a "common law" immunity.¹⁹⁶ Although the brief does not call it a *federal* common law immunity, it is clear that the executive branch does not regard it as having the force of State law, as its brief maintains that the content of this immunity is determined by "principles adopted by the executive branch, informed by customary international law."¹⁹⁷ The petitioner, for his part, argued that the FSIA governs the immunity of foreign officials for official conduct *because* customary international law entitles them to such an immunity,¹⁹⁸ a position that Bradley and Goldsmith had advanced.¹⁹⁹ As a fall back, however, petitioners would have recognized a common law immunity.²⁰⁰ Finally, respondents also recognized that foreign officials would be covered by a common law immunity, although they

193 See *Bergman*, 170 F.2d at 361.

194 See *id.*

195 130 S. Ct. 2278 (2010).

196 See Brief for the United States as Amicus Curiae Supporting Affirmance at 8, *Samantar*, 130 S. Ct. 2278 (No. 08-1555).

197 See *id.* at 8; see also Statement of Interest of the United States of America at 5–6, *Yousuf v. Samantar*, No. 1:04 CV 1360 (E.D. Va. Feb. 14, 2011) (arguing that "the Executive Branch . . . play[s] the primary role in determining the immunity of foreign officials as an aspect of the President's responsibility for the conduct of foreign relations and recognition of foreign governments").

198 Brief of Petitioner at 43–44, *Samantar*, 130 S. Ct. 2278 (No. 08-1555). They argue that the statute should be read to incorporate this international law immunity. *Id.* at 24–26, 32–34.

199 Curtis A. Bradley & Jack L. Goldsmith, *Foreign Sovereign Immunity, Individual Officials, and Human Rights Litigation*, 13 GREEN BAG 2D 9, 16 (2009).

200 Brief of Petitioner, *supra* note 198, at 24–34.

would have tied it more directly to customary international law and urged a less prominent role for the executive branch.²⁰¹ Again, there is no suggestion that the contemplated “common law” immunity depended in any way on State law.

The Court ultimately rejected the petitioners’ argument that the immunity of foreign officials was governed by the FSIA, holding that the immunity of foreign officials is ordinarily “properly governed by the common law,” as it was for foreign states before the enactment of the FSIA.²⁰² Although the Court did not specify the nature of this common law, the Court’s discussion of the pre-FSIA regime leaves no doubt that it regarded the relevant law as federal, not State, law.²⁰³ Thus, neither the Court nor any of the parties in *Samantar* embraced the revisionist position that the immunity of foreign officials is governed by State law.²⁰⁴ The Court’s characterization of the immunity as one under the “common law” and its description of the Executive’s pre-FSIA role may suggest that it understood customary international law to be applicable in this context only as filtered through the executive branch. As discussed further below,²⁰⁵ however, the opinion is probably best read to leave open this and all other questions about the nonstatutory immunity of foreign officials apart from its federal nature.

B. *The Limits of the Modern Position*

Contrary to the revisionists’ claims, neither the *Restatement* nor most of its defenders have maintained that all norms of customary international law have the status of preemptive federal law applicable in the courts in all circumstances in which they address the matter in dispute. The *Restatement* recognizes that norms of customary international law sometimes lack the status of federal law in the face of certain acts of foreign states and of the President and possibly other executive branch officials. This subpart examines these established

201 Brief for the Respondents at 34–35, 53–55, *Samantar*, 130 S. Ct. 2278 (No. 08-1555); Transcript of Oral Argument at 35–36, 38–39, 42–44, *Samantar*, 130 S. Ct. 2278 (No. 08-1555).

202 *Samantar*, 130 S. Ct. at 2292.

203 See *id.* at 2284 (noting that, pre-FSIA, if the State Department had not expressed a view regarding immunity, “a district court inquired ‘whether the ground of immunity is one which it is the established policy of the [State Department] to recognize’” (alteration in original) (quoting *Republic of Mexico v. Hoffman*, 324 U.S. 30, 36 (1995))).

204 See Bradley & Goldsmith, *Critique*, *supra* note 9, at 828 (citing *Bergman v. De Sieyes*, 170 F.2d 360 (2d Cir. 1948), with approval for this proposition).

205 See *infra* text accompanying notes 550–557.

limits of the modern position's claim that customary international law has the force of federal law, and explains their compatibility with the structural argument for regarding customary international law as preemptive federal law.

1. *Sabbatino* and the Inapplicability of Some Customary International Law Norms to Some Acts of Foreign States

In attacking the modern position, the revisionists describe it as maintaining that all of customary international law has the force of preemptive federal law always and in all contexts.²⁰⁶ It is true that the *Third Restatement* states broadly, in its black letter, that “[i]nternational law . . . [is] law of the United States and supreme over the law of the several States” and that “[c]ourts in the United States are bound to give effect to international law.”²⁰⁷ But this seemingly unlimited view is qualified in the comments and reporter’s notes, especially in their discussion of *Sabbatino*. As noted above, revisionists often note the irony of the *Restatement’s* reliance on *Sabbatino*, given *Sabbatino’s* holding that some rules of customary international law are *not* enforceable in federal or State courts in certain circumstances.²⁰⁸ But such reliance is not so odd if the modern position does not in fact insist that all customary international law is always enforceable as preemptive federal law. The *Restatement* does not deny that *Sabbatino* precludes the application of some rules of customary international law in some contexts,²⁰⁹ which in turn shows that the *Restatement’s* version of the modern position is not as uncompromising as the revisionists claim.²¹⁰

Sabbatino held that federal and State courts alike had to give effect to the act of a foreign state performed within its own territory even though it conflicted with the claimed rule of customary international law prohibiting discriminatory or uncompensated takings of the property of foreign nationals. The Court concluded that judicial enforcement of that rule in that context would interfere with the Executive’s pursuit of the nation’s foreign policy interests. In reaching this conclusion, the Court emphasized the disputed and controversial character of the rule. Capital-importing states at the time vociferously objected to the rule, and as a result the rule “touch[ed]

206 Bradley & Goldsmith, *Critique*, *supra* note 9, at 846 & n.202; Young, *supra* note 19, at 377–78.

207 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111(1), (3) (1987).

208 See *supra* text accompanying note 181.

209 See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 n.1.

210 Some scholarly defenders of the modern position are quite explicit in noting that it does not insist that all customary international law is always preemptive federal law. See Goodman & Jinks, *supra* note 16, at 480; Neuman, *supra* note 9, at 376.

... sharply on national nerves.”²¹¹ The holding of *Sabbatino* might be generalized as precluding the application of rules of customary international law to question the validity of an act of a foreign state within its own territory if such rules are disputed and touch sharply on national nerves. In other words, rules of customary international law possessing such characteristics lack the status of federal law in that particular context.

One possible way to reconcile *Sabbatino* with the *Restatement's* black-letter rule that customary international law has the status of federal law is to understand the Court to have held that there was in fact no norm of international law prohibiting the discriminatory or uncompensated taking of foreign nationals' property. The Court's reliance on the disputed nature of the asserted international law norm might support such a reading.²¹² If a large enough number of states disputed the norm, the norm might lack the necessary state practice and *opinio juris* to be a rule of customary international law. But the Court's opinion is not susceptible to such a reading. Had the Court denied the existence of the claimed norm, the Court would have been taking a position contrary to the longstanding position of the executive branch on the matter.²¹³ Yet, in explaining why this norm could not be applied in this context, the Court gave as one reason the interference with the Executive's conduct of foreign relations that would result if the courts were to disagree with the Executive's view.²¹⁴ The Court's reasoning here indicates that the Court was not in fact rejecting the Executive's view that there was a rule of customary international law prohibiting discriminatory or uncompensated takings of foreign nationals' property. Instead, the Court held that some claimed rules of customary international law (namely, those that are disputed and touch sharply on national nerves) may not be used by

211 *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964).

212 Dean Koh appears to read *Sabbatino* this way. Koh, *supra* note 16, at 1834–35.

213 See *Sabbatino*, 376 U.S. at 429 & n.29.

214 *Id.* at 431–33. Note that the Court here did not even consider the possibility that the role of the courts was just to apply whatever interpretation of customary international law the Executive was embracing at the moment. The Court appears to have believed that the courts' role, if they did reach the international law issue, was to apply their own best judgment of what international law required. It was willing to find the international norm inapplicable on allocation-of-powers grounds, but it was unwilling to compromise the courts' role as an independent judge of international law if the question were in fact before it. Cf. *infra* notes 538–557 and accompanying text (discussing the Court's pre-FSIA approach to the immunity of foreign states and heads of state).

courts to invalidate the act of a foreign state within its own territory even if they are in fact rules of international law.²¹⁵

The *Restatement* takes a different approach to reconciling *Sabbatino* with its black-letter rule that “international law is law of the United States.” Its reporter’s notes explain that the black-letter rule is not applicable in the *Sabbatino* context.²¹⁶ The *Restatement* here cites an article by its Chief Reporter, Louis Henkin, which clarifies his understanding of the relationship between the act-of-state doctrine and the idea that international law is part of our law. In a case like *Sabbatino*, he wrote,

the proposition that “international law is part of the law of the United States” . . . [is] irrelevant. Effectively, it means that the courts will apply international law in an appropriate case *against the United States*, the one government which is subject to the law of the United States. In a case like *Sabbatino*, however, the Government of Cuba, acting in Cuba, obviously was not subject to the laws of the United States. . . . International law might have been relevant if it required the United States to respond to Cuba’s violation in a particular way; for example, if international law forbade the United States to give effect to Cuba’s confiscations, American courts would carry out that obligation and refuse to give them effect. But international law does not tell the United States how to react to Cuban acts that violate international law. The United States is free to condone, acquiesce in, implement, or even applaud them.²¹⁷

This analysis contains an important insight (discussed further below), but the attempt to dissolve the apparent conflict between the act-of-state doctrine and the idea that international law is U.S. law by reference to choice-of-law rules cannot succeed. Choice-of-law rules themselves have the status of either State or federal law. Since the Court in *Sabbatino* held that the act-of-state doctrine is a matter of federal law, presumably the doctrine’s applicability cannot turn on State choice-of-law rules. It follows that the applicability of the doctrine must turn on federal choice-of-law rules. What are the relevant choice-of-law rules? Henkin appears to have had in mind territorial rules of the traditional variety. Thus, he stressed that, because Cuba was acting within its own territory, Cuban law would apply, and Cuban law did not incorporate

215 See *Sabbatino*, 376 U.S. at 428.

216 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 reporter’s note 1 (1987).

217 Louis Henkin, *Act of State Today: Recollections in Tranquility*, 6 COLUM. J. TRANSNAT’L L. 175, 181 (1967) (footnote omitted); see also *id.* at 183 (making it clear that Henkin viewed the applicability of act-of-state doctrine as determined by choice-of-law principles).

the claimed rule of international law.²¹⁸ But choice-of-law rules are not set in stone, and the traditional territorial rules are not always followed. In most cases there is nothing to prevent the United States from applying its own law or policy,²¹⁹ which generally frowns upon discriminatory or uncompensated takings of property,²²⁰ or from declining to give effect to uncompensated takings by foreign states that violate international law. It is *Sabbatino* itself that adopts a federal rule barring the application of rules of international law having certain characteristics to invalidate an act of a foreign state performed within its own territory. We might call this a federal choice-of-law rule, but, in the end, it is a rule making certain rules of customary international law inapplicable in our courts (State and federal) in this particular context, a rule that is at least in tension with the broad black-letter rule that international law is U.S. law.

In the end, the *Restatement* recognizes that, in light of the act-of-state doctrine, customary international law is not enforceable in the courts as federal law in certain circumstances. It gives an unpersuasive explanation based on the conflict of laws, but the source of the exception is less important than the fact that the exception is recognized. The question, then, is which norms lack this status and in what circumstances. As discussed above, *Sabbatino* is best read to hold that disputed norms that touch sharply on national nerves are inapplicable in the context of a suit challenging the act of a foreign state within its own territory.

The conclusion that such norms are inapplicable in that context is consistent with the allocation-of-powers rationale for according preemptive force to customary international law. As discussed above, the structural concern is that violations of international law attributable to the United States would interfere with the federal government's ability to conduct the nation's foreign relations effectively. To avoid interference with the federal government's ability to achieve foreign

218 *See id.* at 181.

219 The Constitution may limit the application of federal law if the case has no connection with the United States. *Cf.* *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 320 (1981) (holding that the Due Process Clause of the Fourteenth Amendment limits States' power to apply their laws to disputes having few contacts with the State). *But cf.* *Lea Brilmayer & Charles Norchi, Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217 (1992) (arguing that the Due Process Clause of the Fifth Amendment incorporates different limits than the Due Process Clause of the Fourteenth Amendment).

220 U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”); *Chi., Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 230 (1897) (holding that the Takings Clause of the Fifth Amendment applies to the States through the Fourteenth Amendment).

relations goals, the courts will enforce international law to prevent violations of international law by the States. But smooth and effective foreign relations do not require the courts to invalidate *foreign* acts that violate international law. To the contrary, striking down such acts might itself produce foreign relations problems. Thus, the allocation-of-powers rationale for according preemptive force to customary international law supports Henkin's view that this principle is relevant only when international law is sought to be applied "*against the United States*" (including the States). The rule that Henkin characterized as a choice-of-law principle is better understood as stemming from the constitutional structure, which compels the application of customary international law against the United States and the States, but not against foreign states acting within their own territory. Territorial notions of sovereignty, which underlie traditional choice-of-law rules, play a role in delineating the limits of the federal rule barring application of customary international law in this context. Presumably, the reason the constitutional structure does not forbid the invalidation of foreign state acts performed outside their territory is that, in light of traditional notions of territorial sovereignty, the failure to give effect to such acts will not produce undue international friction. But the real work in the analysis is done by the constitutional structure.

A second problem with Henkin's choice-of-law explanation of *Sabbatino's* holding is that it proves too much. The Court in *Sabbatino* did not hold that customary international law can never be applied to invalidate the acts of a foreign state within its own territory. Rather, it was careful to limit its holding to norms of international law having certain characteristics. The implication of the Court's analysis is that norms of customary international law that are not as disputed or do not touch as sharply on national nerves might be applied to invalidate the act of a foreign state within its own territory. Under the territorial choice-of-law rules applied by Henkin, however, Cuban law would be equally applicable, and U.S. law equally inapplicable, whether or not the Cuban act of state violated clear and uncontroversial norms of international law.²²¹ On the other hand, the Court's distinction can

221 Henkin did recognize that, under choice-of-law rules, the ordinarily applicable law could be displaced if it conflicted with the forum's public policy. According to Henkin, the act-of-state doctrine is a special choice-of-law rule that operates to preclude courts (State and federal) from declining to give effect to the ordinarily applicable law because of a conflict with public policy. *See id.* at 178. Thus, perhaps Henkin would have said that the act-of-state doctrine precluded resort to the public policy exception only if the rule of international law that was violated was disputed and touched sharply on national nerves. But this characterization merely brings to the fore my earlier point that the real work in these cases is not being done by choice-of-

be explained in separation-of-powers terms. Even though the constitutional structure does not require the application of customary international law to invalidate foreign acts of state in such contexts, the Court could reasonably have concluded that the invalidation of foreign acts that conflict with clear and uncontroversial norms of international law would not unduly interfere with the conduct of foreign relations by the federal political branches, and that countervailing notions of justice warrant the invalidation of such acts.²²²

2. *The Paquete Habana* and the Applicability of Customary International Law to Federal Officials

That the modern position does not insist that customary international law has the force of federal law always and for all purposes is also shown by the recognition in *The Paquete Habana* that the applicability of such law is subject to “controlling executive . . . act[s].”²²³ If customary international law did have all of the attributes of federal law for all purposes, then it would follow that the President would have the duty faithfully to execute it.²²⁴ That duty, however, would be in conflict with an acknowledgement that the President has the power to act in contravention of such law in at least certain circumstances.

Exactly in which circumstances the President may violate customary international law has been the subject of heated debate.²²⁵ Some adherents of the modern position maintain that the President is free to violate such law only when speaking for the United States at the

law rules, but rather by the separation-of-powers principles that justify a distinction between accepted, undisputed norms and controversial, disputed ones.

222 The Court does not tell us whether federal law *requires* the invalidation of foreign state acts that conflict with clear and uncontroversial norms of international law or merely *permits* the invalidation of such acts if State law incorporates the relevant international law norms. *Cf. Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 n.23 (1964) (leaving open whether States may be more deferential to foreign states than the act-of-state doctrine requires). Leaving it to the States to decide the applicability of undisputed norms of customary international law to the acts of foreign states would not be inconsistent with the structural case for the modern position, although *Sosa* appears to reflect a preference for treating the issue as a federal one. *See infra* Part I.C. If the issue were treated as a matter of State law, Supreme Court review of State court decisions regarding the content of customary international law would have to be available, for the reasons discussed *infra* Part IV.

223 *The Paquete Habana*, 175 U.S. 677, 700 (1900).

224 U.S. CONST. art. II, § 3.

225 *See, e.g., Agora: May the President Violate Customary International Law?*, 80 AM. J. INT’L L. 913 (1986); *Agora: May the President Violate Customary International Law? (Cont’d)*, 81 AM. J. INT’L L. 371 (1987).

international plane as “sole organ” of the nation’s foreign relations.²²⁶ Others defend a broader presidential power to exempt executive officials from complying with customary international law.²²⁷ Some courts have held that cabinet-level officials have the authority to violate customary international law,²²⁸ a position that the Office of Legal Counsel has endorsed.²²⁹ On the other hand, it is widely understood that lower-level executive officials lack the power to violate customary international law unless authorized by the President or perhaps a cabinet-level official.²³⁰ In *The Paquete Habana* itself, the Court enforced a rule of customary international law against a lower-level executive official.

Exempting the President from certain norms of customary international law would be consistent with the allocation-of-powers rationale for according such norms the status of federal law. The allocation-of-powers concern is that violations of such norms would interfere with the federal government’s ability to conduct foreign relations, and, of course, the Constitution allocates to the President important foreign relations powers. As discussed below, Bellia and Clark argue that the violation of certain norms of customary international law by the States would be in conflict with the federal power to recognize foreign governments, a power that is, in turn, inferred from the power to send and receive ambassadors. The power to receive ambassadors is allocated exclusively to the President; the power to send ambassadors is shared by the President and the Senate.²³¹ To the extent that the preemptive effect of such norms is traced to the recognition power, therefore, it would seem to follow that the President himself is not bound and may even have the power to authorize

226 See Louis Henkin, *The President and International Law*, 80 AM. J. INT’L L. 930, 936 (1986).

227 See, e.g., Jonathan I. Charney, *The Power of the Executive Branch of the United States Government to Violate Customary International Law*, 80 AM. J. INT’L L. 913, 921 (1986) (arguing that the President’s special role in the U.S. government gives him the authority, acting alone, to place the United States in violation of customary international law).

228 See, e.g., *Garcia-Mir v. Meese*, 788 F.2d 1446, 1453–55 (11th Cir. 1986) (finding that the Attorney General had the authority to violate customary international law).

229 Auth. of the Fed. Bureau of Investigation to Override Int’l Law in Extraterritorial Law Enforcement Activities, 13 Op. O.L.C. 163, 163–64 (1989).

230 *Id.* at 180; LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 243–44 (2d ed. 1996).

231 U.S. CONST. art. II, §§ 2–3.

violations.²³² On the other hand, to the extent that a norm's preemptive effect is traceable to the war power, one would think that the President is bound, as the Constitution allocates the war power to Congress.²³³

Which norms exactly are binding on the President is beyond the scope of this Article. The present point is that even adherents of the modern position hold varying views on this question. What unites them is the claim that the customary international law binds the States.

C. *Sosa and the Modern Position*

Revisionist scholars and at least one revisionist federal judge²³⁴ have read the decision in *Sosa v. Alvarez-Machain* as rejecting the modern position. Some defenders of the modern position, on the other hand, have read *Sosa* as definitively rejecting the revisionist view.²³⁵ (There is a great deal of truth in Young's assertion that "Justice Souter's majority opinion in *Sosa v. Alvarez-Machain* has become something of a Rorschach blot, in which each of the contending sides in the debate over the domestic status of customary international law . . . sees what it was predisposed to see anyway."²³⁶) In my view, *Sosa* does not definitively adopt either position, but its analysis strongly supports the modern one.

The issue in *Sosa* was whether a federal cause of action for damages was available for the defendant's alleged violations of customary international law.²³⁷ The plaintiff had relied on § 1350 as creating a cause of action,²³⁸ but the Court concluded that the provision was purely jurisdictional.²³⁹ The Court proceeded to consider whether it was appropriate for the federal courts to create a cause of action as a

232 This may explain the extraordinary degree of deference the courts accorded to executive branch suggestions of immunity for foreign states before the enactment of the FSIA. See *infra* notes 538–540 and accompanying text.

233 U.S. CONST. art. I, § 8, cl. 11.

234 See *Al-Bihani v. Obama*, 619 F.3d 1, 19 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the denial of rehearing en banc) ("*Sosa* thus confirmed that international-law principles are not automatically part of domestic U.S. law and that those principles can enter into domestic U.S. law only through an affirmative act of the political branches.>").

235 See Ralph G. Steinhardt, *Laying One Bankrupt Critique to Rest: Sosa v. Alvarez-Machain and the Future of International Human Rights Litigation in U.S. Courts*, 57 VAND. L. REV. 2241, 2254 (2004).

236 See Young, *supra* note 34, at 28 (footnote omitted).

237 *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712, 724 (2004).

238 *Id.* at 713 & n.10.

239 *Id.* at 714.

matter of federal common law.²⁴⁰ It concluded that it was appropriate to do so if certain conditions were met. In particular, the Court held that such a cause of action could properly extend only to norms of customary international law that satisfy a heightened standard of clarity and breadth of acceptance.²⁴¹ Bradley and Goldsmith, in their post-*Sosa* article written with Professor David Moore, stress that these limits, and the Court's generally cautious approach to this issue, are inconsistent with the modern claim that all customary international law has the status of federal common law.²⁴²

But, as discussed above, the question whether customary international law has the status of federal law is distinct from the question whether someone injured by a violation of such law has a cause of action for damages against the individual who caused the injury. Even if international law makes the defendant's conduct unlawful, it does not itself typically establish a right of the victim to collect damages from the individual who acted unlawfully.²⁴³ That the Court limited the cause of action for damages to norms having certain characteristics does not establish that only norms having these characteristics have the force of federal law. In the absence of a cause of action, norms of customary international law could have the force of federal law and be enforceable if invoked defensively or pursuant to a right of action created by another law, such as § 1983.²⁴⁴ It is not uncommon for the Court to deny the existence of a federal right of action for damages under federal statutes,²⁴⁵ yet no one claims that such statutes lack the force of federal law.

Bradley, Goldsmith, and Moore briefly consider and reject the argument that *Sosa* is inapposite to their critique of the modern position because the question before the Court was the existence of a private right of action for damages.²⁴⁶ They say that the opinion cannot fairly be read as turning on the fact that the issue was the existence of

240 *Id.* at 725–28.

241 *Id.* at 724–25 (recognizing a federal right of action for violation of customary international law norms that are “accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms” that Blackstone had described, viz., “violation of safe conducts, infringement of the rights of ambassadors, and piracy”).

242 Bradley, Goldsmith & Moore, *supra* note 33, at 902–07.

243 *See supra* notes 39–40 and accompanying text.

244 42 U.S.C. § 1983 (2006).

245 *See, e.g.,* Karahalios v. Nat'l Fed'n of Fed. Emps., Local 1263, 489 U.S. 527, 536–37 (1989); Touche Ross & Co. v. Redington, 442 U.S. 560, 568, 578 (1979).

246 Their first response is that this objection is unavailable to those who believe the Court embraced the modern position. Bradley, Goldsmith & Moore, *supra* note 33, at 909. Presumably, it is still open to the rest of us.

a private cause of action because the Court extensively discussed post-*Erie* federal common law and cited the “limits on implied rights of action as only one of many reasons for judicial caution in allowing claims under” § 1350.²⁴⁷ It is true that the Court cited five reasons to be cautious in creating a federal right of action for violations of customary international law, but the fact that the issue before it was whether “to create a private right of action” was prominent among them.²⁴⁸ The Court wrote:

The creation of a private right of action raises issues beyond the mere consideration whether underlying primary conduct should be allowed or not, entailing, for example, a decision to permit enforcement without the check imposed by prosecutorial discretion. Accordingly, even when Congress has made it clear by statute that a rule applies to purely domestic conduct, we are reluctant to infer intent to provide a private cause of action where the statute does not supply one expressly.²⁴⁹

And, although it is true that two of the other reasons for caution given by the Court related to “post-*Erie* federal common law,”²⁵⁰ the propriety of implying a private right of action is commonly treated as an aspect of “post-*Erie* federal common law.”²⁵¹

Furthermore, the Court’s final two reasons for caution, the only two that relate specifically to the “foreign affairs” nature of the issue, apply only to a sort of case that falls outside the allocation-of-powers rationale for according customary international law the force of preemptive federal law²⁵²—a type of case as to which the Court in *Sabbatino* had already articulated limits similar to those adopted in *Sosa*.²⁵³ The Court’s fourth reason for caution was based on the idea that

[i]t is one thing for American courts to enforce constitutional limits on our own State and Federal Governments’ power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of *foreign governments* over their own citizens, and to hold that a foreign government or its agent has transgressed those limits.²⁵⁴

247 *Id.*

248 *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004).

249 *Id.*

250 *See id.* at 725–26.

251 For example, the issue is covered in the “Federal Common Law” section of Hart and Wechsler’s casebook on federal courts and the federal system. *See* HART & WECHSLER, *supra* note 55, at 690–742.

252 *See Sosa*, 542 U.S. at 727–28.

253 *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964).

254 *Sosa*, 542 U.S. at 727 (citing *Sabbatino*, 376 U.S. at 431–32) (emphasis added).

The Court obviously had in mind the *Filartiga*-type case involving an alien challenging the act of a foreign official, a sort of case falling outside the core rationale for treating customary international law as preemptive federal law. It was for the same reason that the Court in *Sabbatino* excluded disputed or controversial norms of customary international law from the scope of those having the force of preemptive federal law in the context of suits challenging the conduct of foreign states within their own territory.²⁵⁵ This limitation dovetails with the Court's fifth and final reason for caution: "We have no congressional mandate to seek out and define *new and debatable* violations of the law of nations"²⁵⁶ The Court in *Sosa* accordingly placed a limit on the judicially created federal right of action for damages for violation of customary international law very similar to the limit that the Court had imposed in the parallel context in *Sabbatino*—a limit turning on the clarity and breadth of acceptance of the claimed norm.²⁵⁷ In sum, the Court's reasons for caution are compatible with the modern position not just because the question before it was the creation of a private remedy not conferred by customary international law *ex proprio vigore*, but also because some of the Court's concerns are implicated only in contexts that are not the central concern of the modern position.²⁵⁸

Although the Court in *Sosa* was not squarely presented with the question of customary international law's status as federal or State law, its opinion tends to support the modern position. First, in explaining that the Court's "post-*Erie* understanding has identified limited enclaves in which federal courts may derive some substantive law in a common law way," the Court recognized that, "[f]or two centuries we have affirmed that the domestic law of the United States recognizes

255 See *Sabbatino*, 376 U.S. at 428.

256 *Sosa*, 542 U.S. at 728 (emphasis added).

257 See *id.* at 724–25; *Sabbatino*, 376 U.S. at 428; see also William S. Dodge, *Customary International Law and the Question of Legitimacy*, 120 HARV. L. REV. F. 19, 26 (2007), <http://www.harvardlawreview.org/media/pdf/dodge.pdf>.

258 The Court's concern with imposing debatable rules on foreign state actors should not have led it to restrict the right of action against *Sosa*, since *Sosa* was acting as an agent of the United States when he performed the acts on which Alvarez's suit was based. This latter fact may suggest that the *Sosa* limitations are not limited to damage actions alleging violations of international law attributable to foreign officials, as in the *Filartiga*-type case. On the other hand, the Court nowhere asserted that *Sosa*'s actions were attributable to the United States, *but cf. Sosa*, 542 U.S. at 737 ("And all of this assumes that Alvarez could establish that *Sosa* was acting on behalf of a government when he made the arrest, for otherwise he would need a rule broader still."), and some of the Court's reasons for restricting the right of action are implicated only in the *Filartiga*-type case.

the law of nations.”²⁵⁹ In addition, it noted that the Court in *Sabbatino* had “endorsed the reasoning” of Philip Jessup, “who had argued that *Erie* should not preclude the continued application of international law in federal courts.”²⁶⁰

Moreover, *Sosa*’s willingness to create a federal common law right of action for damages for violation of some norms of customary international law itself has implications for the debate about the status of customary international law, and those implications favor the modern position. Given how strict the Court has been of late in recognizing new federal rights of action, what is most striking about *Sosa* is its relative receptivity to recognizing one in this context. In cases that address the existence of a federal right of action for damages for violation of a federal statute that does not explicitly provide a right of action, the Court’s position is flatly that it will not create one.²⁶¹ Rather, it will recognize only rights of action created by Congress. The Court’s holding in *Sosa* that § 1350 was “strictly jurisdictional”²⁶²—as well as its acknowledgement that the question before it was whether to “create” a private right of action—means that the Court did not understand the right of action for violations of customary international law to have been created by Congress.²⁶³ Yet the Court found it proper to create a right of action for violation of certain norms of customary international law, noting that the international context made “the absence of congressional action addressing private rights of action . . . more equivocal than its failure to provide such a right when it creates a statute.”²⁶⁴

In the absence of a federal right of action, persons injured by violations of federal statutes are relegated to remedies that State law may provide. Thus, in *Merrell Dow Pharmaceuticals Inc. v. Thompson*,²⁶⁵ the Court found that an individual injured by a company’s violation of

259 *Id.* at 729 (citing *Sabbatino*, 376 U.S. at 423, *The Paquete Habana*, 175 U.S. 677, 700 (1900), *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815), and *Tex. Indus., Inc. v. Radcliffe Materials, Inc.*, 451 U.S. 630, 641 (1981)). Since the Court was citing these cases as supporting the propriety of recognizing a new federal common law cause of action, this statement suggests that it understood the cited cases to be treating customary international law as federal law, or at least as more like modern-day federal law than modern-day State law.

260 *Id.* at 730 n.18.

261 See *Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001) (“Without [Congressional authorization], a cause of action does not exist and courts may not create one, no matter . . . how compatible with the statute.”).

262 *Sosa*, 542 U.S. at 713.

263 See Dodge, *supra* note 257, at 20–21.

264 *Sosa*, 542 U.S. at 727.

265 478 U.S. 804 (1986).

standards set forth in the federal Food, Drug, and Cosmetics Act (FDCA), could sue only on a State law negligence per se theory.²⁶⁶ In *Sosa*, the Court could have held that the right of action for damages for violation of customary international law came from State law. If it had understood customary international law to be a State law matter after *Erie*, it presumably would have taken this course. The fact that it did not even consider the possibility of relegating persons complaining of international law violations to their State law remedies suggests that the Court was not inclined to regard customary international law as a State law matter. The fact that the case involved international law made the Court *more* willing—not less—to recognize a federal right of action under customary international law than under federal statutes, presumably because it considered it less appropriate to leave the matter to State law for the reasons noted by Professor Jessup and endorsed by the Court in *Sabbatino*.²⁶⁷

Finally, it is not the case that *Sosa* “confirmed that international-law principles are not automatically part of domestic U.S. law and that those principles can enter into domestic U.S. law only through an affirmative act of the political branches,”²⁶⁸ or that *Sosa*’s recognition of a right of action turned on “its reading of the specific intent of Congress”²⁶⁹ or on “Congress’s intent in enacting” § 1350.²⁷⁰ The Court’s holding that § 1350 is purely jurisdictional contradicts any claim that Congress, in enacting that provision, intended to transform any norm of customary international law into “domestic U.S. law” or to create a right of action for damages for violation of such norms. Rather, Congress merely intended to allow independently existing causes of action to be maintained in federal court. The First Congress’s belief that such causes of action existed was based on its understanding of the nature and status of customary international law within our legal system. Since the members of the Congress that enacted § 1350 were also Founders, it is fair to say that the *Sosa* Court based its willingness to recognize a federal right of action for damages for certain violations of customary international law on the Founding

266 *Id.* at 807, 817; *see also* *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 759–60 (1975) (Powell, J., concurring).

267 *Cf. Sosa*, 542 U.S. at 730 n.18 (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421–23, 425 (1964) (citing Jessup, *supra* note 185) (arguing that “*Erie* should not preclude the continued application of international law in federal courts”)).

268 *See Al-Bihani v. Obama*, 619 F.3d 1, 19 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the denial of rehearing en banc).

269 Young, *supra* note 34, at 29.

270 Bradley, Goldsmith & Moore, *supra* note 33, at 896.

generation's understanding of the nature and status of customary international law, not on any "affirmative act" of Congress. In other words, the Court in *Sosa* was not giving effect to the intent of Congress, but rather translating into post-*Erie* terms the Founders' understanding of the nature of the law of nations as it interacted with the "ambient law of the era."²⁷¹ That is also a fair description of what defenders of the modern position seek to do.²⁷²

* * * *

In sum, the constitutional structure strongly supports denying the States the power to place the nation in breach of its obligations under customary international law. This structural case was well understood by the Founders, who placed the responsibility for compliance with international law squarely in the hands of the federal government. The Founders gave Congress the authority to legislate regarding the law of nations, but they also contemplated that the courts would apply such law in appropriate cases even in the absence of legislative incorporation. They regarded the state-to-state portion of the law of nations—the portion that corresponds to modern-day customary international law—as either preemptive of State law or as having the status of general common law. Some Founders, in turn, understood the general common law to be federal law, while others regarded it as a category of law distinct from both federal and State law.

The pre-*Erie* cases reflect the same range of views regarding the status of the state-to-state branch of the law of nations. Some judges clearly understood this law to be preemptive of State law for structural constitutional reasons. While the cases are equivocal as to whether the State courts' decisions regarding such law were reviewable by the Supreme Court, even the cases calling such review into question affirm that such law was nevertheless binding on the States. The pre-

271 *Sosa*, 542 U.S. at 714.

272 If § 1350 is purely jurisdictional, then it is also difficult to explain how the First Congress believed the statute fell within the bounds of Article III unless it either understood the law of nations to be federal or embraced some theory of protective jurisdiction. Since I accept protective jurisdiction, I do not read *Sosa* as necessarily indicating that the First Congress regarded the law of nations as federal. Revisionists who reject protective jurisdiction, *see supra* note 54 and accompanying text, can argue that the First Congress overlooked Article III, but such arguments are disfavored. *But cf. Mossman v. Higginson*, 4 U.S. (4 Dall.) 12, 14 (1800) (construing provision of First Judiciary Act conferring jurisdiction over suits "where an alien is a party" as requiring one of the parties to be a citizen of a State); *Bellia & Clark*, *supra* note 41, at 451 (arguing that the Framers of § 1350 understood it to apply only to suits by aliens against U.S. citizens).

Erie doctrinal landscape thus falls far short of supporting the revisionist claim that all of customary international law during this period was regarded as nothing more than general common law. In any event, the courts' pre-*Erie* approach to the general common law differed dramatically from their post-*Erie* approach to the common law. Given that the contending pre-*Erie* positions were that the state-to-state portion of the law of nations either had the force of preemptive federal law or had an intermediate status closer to modern-day federal law than to modern-day State law, the pre-*Erie* cases fail to support the revisionists' conclusion that customary international law should now be regarded as having a State law status that was never in play.

After *Erie*, the Supreme Court in *Sabbatino* endorsed Philip Jessup's view that *Erie* did not require that customary international law be treated as State law, noting that "rules of international law should not be left to divergent and perhaps parochial [S]tate interpretations."²⁷³ Even Judge Hand's opinion in *Bergman v. De Sieyes*,²⁷⁴ often cited by revisionists in support of a State law status for such law, acknowledged that a State's violation of well-established rules of international law might present a federal question. The recent *Samantar* decision shows that no one today embraces the view that revisionists mistakenly attribute to Judge Hand.

To be sure, not all of customary international law has the force of preemptive federal law in all contexts. *Sabbatino* holds that some norms of customary international law may not be applied to challenge certain acts of foreign states within their own territory, and *The Paquete Habana* recognizes that some customary international law is subject to "controlling executive acts." Adherents of the modern position do not dispute these propositions, which are consistent with the structural constitutional case for regarding customary international law as binding on State actors.

Finally, revisionists are wrong to claim that *Sosa* rejects the modern position. To the contrary, the Court's creation of a federal common law cause of action for damages for violation of certain norms of customary international law is more supportive of the modern position than of the revisionist position. The Court recognized that *Sabbatino* had endorsed Jessup's view regarding *Erie*'s effect on the status of customary international law, and, in concluding that it was appropriate to create a federal common law right of action for damages for violation of certain norms of customary international law, it relied on the fact that, "[f]or two centuries we have affirmed that the domestic

²⁷³ *Sabbatino*, 376 U.S. at 425 (footnote omitted).

²⁷⁴ 170 F.2d 360 (2d Cir. 1948).

law of the United States recognizes the law of nations.”²⁷⁵ Thus, although the Court did not definitively adopt the modern position in *Sosa*, it came close to doing so.

II. THE INTERMEDIATE THEORIES

Revisionists and defenders of the modern position agree that, before *Erie*, customary international law was regarded as (at least) general common law.²⁷⁶ Federal courts reached their own conclusions about the content of the general common law, but State courts were not bound by federal interpretations.²⁷⁷ Revisionists and defenders of the modern position likewise agree that, after *Erie*, the general common law no longer exists.²⁷⁸ If customary international law now has the status of domestic law in this country at all, it has to be either federal law or State law. If customary international law is now federal law, then this law preempts any inconsistent State law, State courts are bound by the federal courts’ views regarding the content of this law, and the Supreme Court may review State court decisions regarding such law. If customary international law is now purely a matter of State law, then it does not preempt State law, and the State courts’ views about its content would (apparently) bind the federal courts, including the Supreme Court. The *Third Restatement* takes the position that customary international law is generally federal law, with the effects just noted;²⁷⁹ the revisionists maintain that, unless transformed into federal law through political branch lawmaking, customary international law is, at best, State law.²⁸⁰ But both agree that, after *Erie*, these are the only two possibilities.

More recently, scholars have argued that customary international law can have an intermediate status between State and federal law. Professor Ramsey has proposed that customary international law be

275 *Sosa*, 542 U.S. at 729.

276 See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW pt. 1, ch. 2 introductory note (1987) (“During the reign of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 10 L.Ed. 865 (1842), State and federal courts respectively determined international law for themselves as they did common law, and questions of international law could be determined differently by the courts of various States and by the federal courts.”); Bradley & Goldsmith, *Critique*, *supra* note 9, at 822–23 (noting that customary international law was generally applied as part of the “general common law” before *Erie*); Koh, *supra* note 16, at 1830–31 (same); Young, *supra* note 19, at 374 & n.43, 393–94 & n.143 (collecting articles).

277 See Bradley & Goldsmith, *Critique*, *supra* note 9, at 823.

278 Goodman & Jinks, *supra* note 16, at 472; Koh, *supra* note 16, at 1831; Stephens, *supra* note 16, at 397; Young, *supra* note 19, at 375.

279 See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111(1) & cmt. d.

280 See *supra* note 15 and accompanying text.

regarded as “nonpreemptive” federal law, meaning that it can be applied as federal law whenever it does not conflict with State law.²⁸¹ Professor Young has argued that customary international law can remain general law, to be applied in American courts in accordance with choice-of-law rules, just as foreign law sometimes is.²⁸² Dean Aleinikoff has proposed that customary international law be regarded as federal law applicable in federal courts but not applicable in State courts.²⁸³

Bradley, Goldsmith, and Moore and Bellia and Clark do not defend an intermediate status for customary international law, but they argue that some subset of customary international law may be treated as federal law even though not incorporated into law by one of the forms of federal law listed in the Supremacy Clause (statutes and treaties). Bellia and Clark set forth a structural constitutional basis for according a subset of customary international law preemptive force.²⁸⁴ Bradley, Goldsmith, and Moore argue that customary international law may (sometimes) be incorporated as federal law by the President acting alone and by the courts pursuant to jurisdictional statutes.²⁸⁵

On closer inspection, some of these intermediate positions turn out to be not so intermediate, and all but that of Bellia and Clark encounter significant problems.

A. *Ramsey’s Position*

Professor Ramsey argues that customary international law should be regarded as nonpreemptive federal law, a law that federal courts may apply, but only if there is no conflicting State law.²⁸⁶ (Even then, apparently the State courts need not apply this law.²⁸⁷) Ramsey argues that this position is supported by the text of the Constitution as understood by the Founders.²⁸⁸ He also argues that his proposal would replicate the effect that customary international law possessed as pre-*Erie* general law.²⁸⁹ On closer analysis, however, nonpreemptive federal law appears to be another name for State law. Moreover, Ramsey’s theory would produce acute anomalies, would be potentially very diffi-

281 See RAMSEY, *supra* note 17, at 350–51; Ramsey, *supra* note 17, at 584; *infra* Part II.A.

282 See Young, *supra* note 19, at 370; *infra* Part II.B.

283 See *infra* Part II.C.

284 See *infra* Part II.D.

285 See Bradley, Goldsmith & Moore, *supra* note 33, at 922.

286 See Ramsey, *supra* note 17, at 577, 584.

287 See RAMSEY, *supra* note 17, at 350.

288 See *id.* at 348–55.

289 See Ramsey, *supra* note 17, at 558.

cult to apply, and would render customary international law inapplicable where it is needed most. Ramsey's textual and historical support for this highly problematic approach is more equivocal than he claims.

1. Nonpreemptive Federal Law as State Law

To modern ears, the concept of nonpreemptive federal law sounds like a contradiction in terms. We are accustomed to thinking of federal law as by its nature preemptive of conflicting State law. With respect to customary international law, Ramsey reverses the relationship between State and federal law, stipulating that this federal law applies only where there is no conflict with State law.²⁹⁰ In the event of a conflict between customary international law and State law, the courts must apply State law.²⁹¹

Under this theory, the space for application of customary international law depends on how one determines whether a conflict exists. For example, if State law recognizes a cause of action but does not affirmatively recognize an immunity for a sitting head of state, is there a conflict with a norm of customary international law entitling the head of state to immunity? The answer would appear to depend on whether the State's law purports to be comprehensive, in the sense that it permits all that it does not prohibit. If State law is comprehensive in this sense, then there would be a conflict between a State's provision of a cause of action and a norm of customary international law providing immunity from such a cause of action, even if State law did not specifically deny such an immunity. Presumably, a federal court would answer the comprehensiveness question by reference to State law. If State law tells us that State law is comprehensive, then customary international law would not be applied at all unless the State affirmatively incorporated it. If State law tells us that State law is not comprehensive with respect to customary international law, then State law effectively incorporates customary international law wholesale, subject to being overridden at retail by statute or perhaps by State judicial decision. In either case, customary international law would be applicable solely as State law.

Most likely, State law will be silent as to whether it is comprehensive. In such circumstances, the federal court could perhaps determine that it is appropriate to apply customary international law to the extent that it does not directly conflict with State law. But this approach could easily be understood as the application of interna-

290 *See id.* at 584.

291 *See id.*

tional law as State law. Indeed, this would appear to be a perfectly reasonable interpretation of State law that is silent regarding international law. Since customary international law was regarded as part of the law of England, it is proper to assume that the States received such law into their common law upon independence, or upon becoming a State, subject to legislative override.²⁹² In short, if the federal courts answer the comprehensiveness question by reference to State law, it would seem to follow that customary international law would be applicable as a matter of State law, not federal law.

On the other hand, for the federal courts to answer the comprehensiveness question by reference to federal law would be to give customary international law the force of preemptive federal law, running afoul of Ramsey's insistence that such law is nonpreemptive. Ramsey says that, when State law does not "explicitly reject" the immunity defense, "the federal courts [could] apply a version of the *Charming Betsy* rule, interpreting State law not to violate international law if another construction of the law is possible."²⁹³ But, if Ramsey would apply such a rule even when State law purports to be comprehensive and does not provide for such a rule, then he would be allowing customary international law to preempt State law. Because he insists that customary international law is nonpreemptive, presumably he would not allow the presumption to be applied in such circumstances. If, on the other hand, he would allow federal courts to apply the *Charming Betsy* rule only when State law does not purport to be comprehensive, then, again, the applicability of customary law would be fully explicable on the theory that the common law, as received by the State from England, presumptively incorporates customary international law. On this theory, the federal courts would be applying customary international law as State law, not federal.

In any event, the States would be free to declare that their courts will not construe State statutes or the common law to conform to customary international law, as the voters of Oklahoma recently have done.²⁹⁴ Indeed, the States would presumably be free to declare that they will construe State law to *violate* customary international law whenever possible. Ramsey says that "the [*Charming Betsy*] presumption is not the same as preemption, so its use is not governed by Article VI."²⁹⁵ But he elsewhere makes clear that State law prevails in the

292 See Young, *supra* note 19, at 480.

293 See Ramsey, *supra* note 17, at 578 (referring to *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)).

294 See *supra* note 1 and accompanying text.

295 Ramsey, *supra* note 17, at 578.

event of a conflict.²⁹⁶ If State law specifies that State law is not to be interpreted to conform to international law, then there would appear to be a conflict between State law and customary international law whenever the *Charming Betsy* presumption would otherwise be doing any work. Thus, Ramsey's claim that "federal courts might have the power to interpret [S]tate law to avoid . . . conflicts [between State law and customary international law], even while recognizing that in the event of a conflict the [S]tate would prevail,"²⁹⁷ would appear to hold true only if the State does not itself provide for a different way to resolve such conflicts. And if State law does not provide for a different presumption, then the *Charming Betsy* presumption could be understood as a State law presumption. As such, it would be fully consistent with the revisionist view.

Customary international law appears to be doing more work in one of Ramsey's examples. Ramsey posits a claim under customary international law "against a multinational corporation for complicity in human rights violations in connection with a project in Burma."²⁹⁸ Ramsey might permit a federal court to resolve this dispute on the basis of customary international law, but only if the relevant State conflict-of-laws rules would not apply State law to this claim, but would instead apply Burmese law, and Burmese law would not support recovery.²⁹⁹ The federal court could recognize the claim even if the State courts would not recognize a claim based on international law.³⁰⁰ It is not clear why Ramsey would accept the applicability of customary international law to this case. He tells us that he would not permit the federal court to adjudicate the claim under international law if, under State choice-of-law rules, the State courts would apply State law.³⁰¹ Presumably that is because he would regard the State choice-of-law rule as effectively extending State law extraterritorially to this dispute. But doesn't a State choice-of-law rule making Burmese law applicable to this dispute reflect the State's determination that this dispute is properly governed by Burmese law? If a State's courts have determined that the dispute is properly resolved under Burmese law, the State is not neutral with respect to the applicability of international law; presumably, the State would regard it as proper to resolve the dispute according to international law only if Burmese law incorporated international law. But Ramsey would permit the federal courts

296 *See id.* at 585.

297 *Id.* at 579.

298 *Id.*

299 *See id.*

300 *Id.*

301 *See id.* at 579–80.

to apply customary international law even if Burmese law does not incorporate it.³⁰²

Ramsey claims that the federal court would not be displacing State choice-of-law rules because “state conflicts rules do not address the status of international law; these rules only decide which municipal legal rules to apply.”³⁰³ But this is true only with respect to horizontal choice-of-law rules. Whether to apply a rule of municipal law that conflicts with international law is a vertical choice-of-law question. If a State’s courts would not apply international law to a case, that is presumably because the State has determined that the dispute is properly resolved according to municipal law even if it conflicts with international law. Ramsey’s reverse-supremacy approach to customary international law would appear to require a federal court to do the same. To do otherwise would be to replace the State’s vertical choice-of-law rule with a federal one.

Ramsey also argues that a federal court that applied international law would not be displacing the State’s refusal to recognize the international law claim because such a refusal is “just a decision by the [S]tate that *its courts* are not a forum for international law claims.”³⁰⁴ But a decision not to provide a forum for the adjudication of the dispute would usually be framed as a dismissal for lack of jurisdiction or on the ground of forum non conveniens, neither of which would have res judicata effect.³⁰⁵ A court’s resolution of the dispute according to Burmese law would have res judicata effect, and would thus bar a subsequent claim under international law. If so, a State choice-of-law rule would appear to bear on substance and presumably have to be followed by federal courts.³⁰⁶

At any rate, the States would be free to characterize their choice-of-law rules as substantive. Thus, at best, federal courts would be free to apply international law only if the States characterized their choice-of-law rules as nonsubstantive denials of a forum. But, again, the States would retain ultimate control over the applicability of international law in federal courts, as Ramsey implicitly recognizes when he concedes that the federal courts would not be free to apply international law if the States made it clear that their refusal to recognize an

302 *Id.* at 579.

303 *Id.*

304 *Id.*

305 *See Mizokami Bros. of Ariz. v. Mobay Chem. Corp.*, 660 F.2d 712, 716–17 (8th Cir. 1981); *cf. Parsons v. Chesapeake & Ohio Ry. Co.*, 375 U.S. 71, 72–73 (1963) (*per curiam*) (holding that a State court dismissal on forum non conveniens grounds does not preclude federal court’s consideration of § 1404(a) transfer).

306 *See Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496–97 (1941).

international law claim was based on their determination that some or all corporations were, as a substantive matter, not subject to international law.³⁰⁷

Ramsey's approach would also produce significant problems of application. First, customary international law would presumably be inapplicable if it conflicted with the law of *any* of the fifty States. (If customary international law is nonpreemptive, then presumably it cannot preempt the law of any of the fifty States.) Under Ramsey's approach, therefore, the federal courts would be required to canvass the laws of all States whose laws could constitutionally be applied to the dispute to determine whether they would regard their law as applicable and whether their law conflicts with customary international law. Since, as Ramsey recognizes, the constitutional limits on the application of State law to foreign disputes are quite modest,³⁰⁸ the number of States that may constitutionally apply their law to any given dispute could be large. The analysis would appear to require the resolution of complex choice-of-law issues under various States' laws, as well as issues of substantive law.

Second, if Ramsey would indeed permit a federal court to entertain an international law claim when the State courts would not (as he claims he would), his approach would replicate the forum shopping problem that *Erie* sought to eliminate. If nonpreemptive federal law would not support "arising under" jurisdiction (a question that Ramsey leaves open³⁰⁹), then his approach would result in federal courts possibly reaching a different result than State courts depending on the "accident of diversity."³¹⁰ Ramsey acknowledges the problem, but maintains that it is a necessary consequence of the rule adopted by the Constitution (a claim I consider below).³¹¹

Ramsey perceives, and accepts, a second problem with his proposal: that it would produce a lack of uniformity between State and federal courts in the interpretation of customary international law.³¹² Ramsey argues that nonuniformity should not be regarded as a problem because "[n]on-uniformity was the rule for at least the 150-odd years prior to *Erie*" and it did not create significant foreign relations

307 See Ramsey, *supra* note 17, at 579 n.91.

308 See *id.* at 573.

309 See *id.* at 583 n.105.

310 *Klaxon*, 313 U.S. at 496.

311 See Ramsey, *supra* note 17, at 583.

312 *Id.* at 582 (noting that the nonuniformity problem arises "if the federal courts and State courts reach independent conclusions as to the substantive content of international law").

problems then.³¹³ For reasons explained in Part IV, divergent State and federal interpretations of customary international law would indeed pose a significant foreign relations problem for the nation. On the other hand, it seems to me that Ramsey's approach does not present the problem of nonuniformity between a federal court and the courts of the State in which it sits. Ramsey's acceptance of this objection suggests that he envisions that federal courts will not be bound by State court interpretations of customary international law. But, if customary international law were nonpreemptive, then it would seem to follow that federal courts will in fact have to follow State court interpretations of such law. Ramsey admits that federal courts cannot apply customary international law if the States have rejected it. It follows that, if a State incorporates customary international law in part but rejects it in part, then federal courts may enforce only the part that the State has incorporated. It follows further that, if the State has incorporated a mistaken interpretation of customary international law, the federal courts are bound to enforce that mistaken interpretation. The States could in theory decide to incorporate customary international law as interpreted by the federal courts; this would amount to a delegation of the interpretation of customary international law by the State to the federal courts. In this situation, there would be no lack of uniformity. Apart from such a delegation, the only time the federal courts would be using their independent judgment about the content of customary international law would be when State law is silent about its content. Since, by hypothesis, there would be no State interpretation of international law in such contexts, there would be no lack of uniformity. In sum, lack of uniformity as between State and federal courts is not a problem, but only because Ramsey's approach is, in application, indistinguishable from the revisionist view that customary international law is State law.

On the other hand, Ramsey's approach would produce a different sort of disuniformity: the fifty different States would each reach their own conclusions regarding customary international law, thus potentially producing fifty different interpretations of customary international law. Indeed, the federal courts would themselves be applying nonuniform interpretations of customary international law, since they would have to follow the nonuniform interpretations of such law by the fifty State courts. And federal and State courts alike would confront potentially complex choice-of-law problems if different States adopted different interpretations of international law. The Supreme Court in *Sabbatino* expressed concern about such

313 *Id.*

nonuniformity when it wrote that “rules of international law should not be left to divergent and perhaps parochial [S]tate interpretations.”³¹⁴

It is not true that we managed to live with such disuniformity for 150 years. As discussed in Part I, during those years, customary international law was regarded as either binding and preemptive federal law or as general common law. To the extent it was regarded as the latter, federal and State courts alike understood their task to be to discover and apply a general law whose content did not depend on their decisions, a regime that resulted in a remarkable degree of uniformity.³¹⁵ By contrast, if Ramsey’s approach were adopted, the State courts would be accorded the power to incorporate customary international law—and to require or preclude the federal courts from applying it—in whole, in part, or not at all. The State courts would also be recognized to have the power to modify or supplement such law, and again the federal courts would be required to follow. Conflicting interpretations—and conflicting degrees of incorporation—are much more likely to occur if Ramsey’s approach were adopted than under the pre-*Erie* general law approach.

Finally, and most importantly, Ramsey’s approach would disallow federal court enforcement of customary international law in precisely the type of case that concerned the Founders the most. As many have recounted, the Founders were most concerned about violations of international law *by the States*.³¹⁶ The problems caused by State violations of international law demonstrated to the Founders that responsibility for compliance with international law had to be assigned to the federal government.³¹⁷ Ramsey recognizes the structural problem with leaving questions of international law to the States, but he argues that the Founders addressed it, with respect to customary international law, by giving *Congress* the power to require States to comply with such law.³¹⁸ Unless Congress gives preemptive effect to customary international law, he argues, the States retain the power to violate it.³¹⁹ I discuss Ramsey’s basis for these conclusions below. The pre-

314 *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964). The Court attributed this concern to Professor Philip Jessup, *see id.*, but Jessup’s article does not express a concern about nonuniformity, *see* Jessup, *supra* note 185, at 743. It is thus likely that it was the Court itself that perceived that divergent State court international law would be a problem.

315 *See supra* note 178 and accompanying text.

316 *See, e.g.*, Bradley, *supra* note 86, at 144.

317 *Id.* at 146.

318 *See* Ramsey, *supra* note 17, at 582.

319 RAMSEY, *supra* note 17, at 350.

sent point is that Ramsey's argument that customary international law is nonpreemptive federal law is unresponsive to the Founders' main concerns. Under Ramsey's approach, the federal courts would remain powerless in the face of State action contravening such law. They would be able to enforce such law only if the States have been silent, and they would be able to resolve an international law claim differently from the State courts only in the unusual situation of a dispute arising from conduct that took place entirely abroad—a type of case that was hardly a central concern of the Founders. It seems highly unlikely that these very unusual situations were what the Founders had in mind when they wrote, for example:

Under the national government . . . the laws of nations . . . will always be expounded in one sense and executed in the same manner—whereas adjudications on the same points and questions in thirteen States . . . will not always accord or be consistent The wisdom of the convention in committing such questions to the jurisdiction and judgment of courts appointed by and responsible only to one national government cannot be too much commended.³²⁰

2. Ramsey's Textual and Historical Support

Ramsey acknowledges that, under his approach, the applicability of international law remains within the States' control.³²¹ He insists that this necessarily follows from the constitutional text and the Framers' intent.³²² But neither the text nor the Framers' intent provides significant support for his argument.

Ramsey's principal textual argument is that the Constitution enumerates the categories of preemptive federal law and customary international law is not among them.³²³ This omission is particularly telling, he argues, because the other principal form of international law—treaties—is listed.³²⁴ In addition, he notes that the Constitution is not silent about customary international law: it expressly gives Congress the power to “define and punish . . . Offences against the Law of Nations.”³²⁵ He argues that the Offenses Clause tells us that customary international law can be preemptive federal law only if enacted

320 THE FEDERALIST NO. 3, at 37–38 (John Jay) (Clinton Rossiter ed., 1961).

321 See Ramsey, *supra* note 17, at 582.

322 See *id.* at 585.

323 See *id.* at 559–60.

324 *Id.* at 560; see also U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States . . . and *all Treaties* made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land” (emphasis added)).

325 U.S. CONST. art. I, § 8; see Ramsey, *supra* note 17, at 560.

into federal law by statute (or treaty).³²⁶ In other words, customary international law is non-self-executing federal law.

But there is another possible explanation for the inclusion of treaties but not customary international law in the Supremacy Clause. The British rule with respect to treaties, which we would have inherited had the Constitution not established a different rule, was that treaties do not have the force of domestic law until implemented by statute.³²⁷ One purpose of the Supremacy Clause with respect to treaties was to reverse the British rule and give treaties the effect of domestic law once in force.³²⁸ With respect to customary international law, the British rule was the opposite: such law was regarded as part of the law of the land without the need for legislative implementation.³²⁹ If the Founders assumed that the British approach would apply unless changed, then there was no need to declare that customary international law was to have the force of domestic law. Even without such a declaration, customary international law would be the law of the land, just as it was in England.

Of course, a second effect of the Supremacy Clause with respect to treaties was to establish that they were preemptive of State law. Because customary international law is not listed, the text of the Supremacy Clause does not establish that such law is likewise preemptive of State law. Ramsey argues that such law cannot be understood to have been included in Article VI's reference to the "laws of the United States . . . made in Pursuance [of the Constitution]," since customary international law is not made through the lawmaking procedures set forth in the Constitution.³³⁰ But, as noted above, some Founders appear to have regarded the preemptive effect of (some of) the law of nations as an inference from the constitutional structure, and the Constitution is, of course, part of the supreme law of the land.³³¹ Moreover, the text cannot help Ramsey if, as revisionists argue, customary international law was understood by the Founders to be general law.³³² Pre-*Erie* general law had some characteristics of contemporary federal law (federal courts were not bound by State court interpretations of the law) but lacked others (State courts could

326 See RAMSEY, *supra* note 17, at 348–50; Ramsey, *supra* note 17, at 560–61.

327 See Vázquez, *Treaties as Law of the Land*, *supra* note 86, at 614–15.

328 See generally *id.* at 616–19 (describing the purpose and original meaning of the Supremacy Clause).

329 See 4 WILLIAM BLACKSTONE, COMMENTARIES *67.

330 See Ramsey, *supra* note 17, at 559–60 (quoting U.S. CONST. art. VI, cl. 2).

331 See *supra* text accompanying note 117; see also *infra* text accompanying note 350.

332 See Young, *supra* note 19, at 374 & n.43.

enforce their own interpretations of the law).³³³ If that intermediate option is no longer available, then the status of customary international law, post-*Erie*, must change in one direction or the other. If the text of the Supremacy Clause was understood to leave customary international law with that intermediate status, then that text cannot help us choose between the two other options.

Ramsey defends his proposal as the closest available approximation of the intermediate status that customary international law possessed before *Erie*, but his proposal would make customary international almost indistinguishable from State law. His attempt to recapture customary international law's pre-*Erie* status overlooks his own insight that *Erie* "did not just overrule one line of cases, but overthrew an entire way of thinking about law."³³⁴ As noted above, before *Erie*, State and federal interpretations of the general common law converged because those courts believed themselves to be involved in the common enterprise of discovering and applying a law whose content did not depend on their decisions. With that way of thinking about the law overthrown, relegating customary international law to the status of the present-day common law would produce far greater disuniformity than the Founders contemplated. In light of the State courts' new conception of their role vis-à-vis the common law, customary international law's pre-*Erie* status would be more closely recaptured if it were regarded as federal law.³³⁵

The Offenses Clause similarly fails to support Ramsey's position. Revisionists read that clause to establish that the federal law status of customary international law depends on legislative transformation.³³⁶ But, here again, an alternative reading is available. The Offenses Clause can be understood instead to reflect the view that congressional action is necessary to make violations of customary international law a criminal offense. Although today it is accepted that the Offenses Clause empowers Congress to pass civil as well as criminal laws,³³⁷ it is clear from the clause's use of the terms "punish" and "Offenses" that criminal laws were the central concern of the clause.³³⁸ Today, it is well accepted that the violation of treaties can-

333 See Bradley & Goldsmith, *Critique*, *supra* note 9, at 823.

334 Ramsey, *supra* note 17, at 585.

335 For elaboration of this point, see *supra* text accompanying note 178.

336 See Bradley & Goldsmith, *Current Illegitimacy*, *supra* note 2, at 325; Young, *supra* note 19, at 393.

337 See J. Andrew Kent, *Congress's Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 TEX. L. REV. 843, 861-62 (2007).

338 Cf. *id.* at 868 (noting that the executive branch until recently interpreted the Offenses Clause to permit proscription of criminal conduct only).

not be made a criminal offense except pursuant to statute.³³⁹ A fortiori, the same must be true of customary international law. Since treaties are concededly federal law even though a federal statute is required to make violations criminal, the Constitution's enumeration of an express federal power to criminalize violations of customary international law does not establish that customary international law is non-self-executing in other respects.³⁴⁰

In addition to his textual analysis, Ramsey finds evidence of the Framers' intent in Justice Chase's opinion in *Ware v. Hylton*.³⁴¹ He argues that the following language from Chase's opinion clearly establishes that the Founders understood that customary international law would not preempt State law:

It is admitted, that Virginia could not confiscate private debts without a violation of the modern law of nations, yet in fact, she has so done, the [state] law is obligatory on all citizens of Virginia, and on her Courts of Justice; and, in my opinion, on all the Courts of the United States. If Virginia by such conduct violated the law of nations, she was answerable to Great Britain, and such injury could only be redressed in the treaty of peace.³⁴²

In context, however, that language does not support the claim that the Founders believed that State law could preempt customary international law. Justice Chase was discussing the petitioner's argument that a Virginia statute confiscating the property of British citizens was invalid because it violated the law of nations.³⁴³ The relevant Virginia law was enacted in 1777, before the Constitution was written, and even before the Articles of Confederation were in force.³⁴⁴ Justice Chase made it clear in his opinion that, in his view, Virginia at the time was a *sovereign nation*.³⁴⁵ Thus, his statement that a statute of the Virginia legislature would prevail over customary international law stands only for the proposition that a nation's legislature may preclude the application of customary international law by that nation's courts. The

339 See Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 718 & n.108 (1995).

340 It is true that, in the early Republic, it was believed by some that the common law, unaided by a statute, could be the basis of a federal criminal prosecution. Still, it is likely that many Founders held the opposite view, a view that was later adopted by the Supreme Court in *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812).

341 3 U.S. (3 Dall.) 199 (1796).

342 RAMSEY, *supra* note 17, at 352 (alteration in original) (citing *Ware*, 3 U.S. (3 Dall.) at 229 (opinion of Chase, J.)).

343 See *Ware*, 3 U.S. (3 Dall.) at 222 (opinion of Chase, J.).

344 See *id.* at 199–200 (statement of the case).

345 See *id.* at 223–24 (opinion of Chase, J.).

equivalent proposition today would be that *Congress* has the power under our Constitution to preclude the application of customary international law in our courts, a proposition that even the *Restatement* endorses.³⁴⁶ The structural argument for the preemptive force of customary international law relies on the place of the States in our federal Union. Chase's analysis in *Ware* does not contradict that argument.³⁴⁷

Indeed, Chase's opinion in *Ware* suggests that the Founders would not have agreed that the States had the power to preempt customary international law under the Constitution as eventually adopted, or even under the Articles of Confederation. The petitioner in *Ware* argued alternatively that Virginia's violation of the law of nations was invalid as an interference with the national government's exclusive power over war and peace.³⁴⁸ Chase rejected that argument, but only because he believed that, before the Articles of Confedera-

346 See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 115(1)(a) (1987). Ramsey also relies on similar statements by Justice Iredell in his circuit court opinion in *Ware*, which was reversed by the Court on other grounds. See RAMSEY, *supra* note 10, at 352–53 (citing *Ware*, 3 U.S. (3 Dall.) at 265–66 (opinion of Iredell, J.)). But Iredell, too, relied on the fact that Virginia's law was passed before the Articles of Confederation were in force: “[N]o one has suggested, that the act of October, 1777, was in any manner inconsistent with the Constitution of the [S]tate; and at that time the articles of Confederation were not in force” *Ware*, 3 U.S. at 266 (opinion of Iredell, J.); *cf. infra* note 351. In addition, Ramsey relies on this statement from Justice Cushing's brief opinion: “A State may make what rules it pleases; and those rules must necessarily have place within itself. But here is a treaty, the supreme law, which overrules all State laws upon the subject, to all intents and purposes; and that makes the difference.” RAMSEY, *supra* note 17, at 353 (quoting *Ware*, 3 U.S. (3 Dall.) at 282 (opinion of Cushing, J.)). It is unclear how this statement supports Ramsey's position. Clearly Cushing could not have meant that State laws are valid unless they violate a treaty; as Ramsey recognizes, State laws that violate the Constitution and federal statutes are also invalid. In any event, in light of the reasoning of Chase and Iredell, the very general statement in Cushing's opinion cannot be read to suggest that a State statute enacted after the adoption of the Constitution would be valid and binding even if it violated customary international law.

347 When Chase further indicated that the U.S. courts would similarly be precluded from invalidating Virginia's act in reliance on customary international law, *see Ware*, 3 U.S. (3 Dall.) at 229 (opinion of Chase, J.), he presumably meant that the U.S. courts were required to resolve the validity of the Virginia confiscation pursuant to the law applicable in Virginia at the time of the law's enactment, and since neither the Articles of Confederation nor the Constitution was in force at the time, there was then no higher domestic law to require the application of customary international law. Chase considered separately whether the laws or treaties that came into existence afterwards retroactively required the invalidation of Virginia's statute, and he concluded (along with all of the other Justices save Iredell) that they did. *See id.* at 242–43.

348 *See Ware*, 3 U.S. (3 Dall.) at 219–20 (argument of counsel for the petitioner).

tion came into force, Congress did not possess exclusive power over war and peace.³⁴⁹ He recognized, however, that if the Constitution did allocate exclusive power over war and peace to the national government, the States would have been implicitly prohibited from exercising “external sovereignty.”³⁵⁰ *Ware* thus reflects the view of at least some Founders that State discretion to violate international law is inconsistent with a federal structure.³⁵¹ As noted above, the court in *Rutgers v. Waddington* reached the same conclusion even with respect to the weaker federal system established by the Articles of Confederation.³⁵²

Ramsey claims that his concept of nonpreemptive federal law replicates the pre-*Erie* concept of general law.³⁵³ It is true that most general law—the part of it that corresponds to what we now consider the common law—was thought to be alterable by State legislatures. But, as discussed above, it is far from clear that the part of general law that corresponds to today’s customary international law was also thought to be alterable by the States. Ramsey notes that there were no nineteenth-century decisions striking down State statutes that conflicted with customary international law,³⁵⁴ but he cites no cases upholding such statutes either. The lack of cases either way suggests that the States did not regard themselves as free to depart from that portion of

349 See *id.* at 231–33 (opinion of Chase, J.).

350 See *id.* at 232. This is, of course, a precursor to the structural argument that Professors Bellia and Clark develop in their article. See Bellia & Clark, *supra* note 21, at 5–7.

351 In his opinion in *Ware*, Justice Iredell opined that if the Articles of Confederation had been in force in 1777:

I think there is no colour for alledging [sic] any inconsistency [of the Virginia law] with them, since Congress could have passed no act on this subject, but if they had wished for an act, must have recommended to the State Legislatures to pass it. And the very nature of a recommendation implies, that the party recommending *cannot*, but the party to whom the recommendation is made, *can* do the thing recommended.

Ware, 3 U.S. (3 Dall.) at 266 (opinion of Iredell, J.). If Iredell meant that the Virginia law would have been valid under the regime of the Articles of Confederation even if it had violated the law of nations, his dictum would be in tension with *Rutgers*, but it would not imply that he would have considered such a law to be valid under the Constitution, since the Constitution does give the federal government the power to pass a law on the subject and, indeed, all of the Justices in *Ware* found that the Constitution itself gave legal force to a treaty on the subject. See *id.* at 236 (opinion of Chase, J.); *id.* at 249 (opinion of Paterson, J.); *id.* at 259 (opinion of Iredell, J.); *id.* at 281 (opinion of Wilson, J.); *id.* at 282 (opinion of Cushing, J.).

352 See *supra* text accompanying note 117 (discussing *Rutgers v. Waddington*).

353 See RAMSEY, *supra* note 17, at 585.

354 See *id.* at 352.

the law of nations. This view may in turn have been based on the States' understanding that international law generally was binding on all, combined with a recognition that, if violations of international law were permitted at all by our Constitution, they would have to be authorized by the federal government. As we have seen, the idea that, in a federal system, departures from international law must be a matter for the federal government, not the States, even predated the Constitution.³⁵⁵

B. *Young's Position*

Like Ramsey, Young proposes a solution that seeks to avoid the problems of both the modern and revisionist positions by replicating the pre-*Erie* status of customary international law as general law.³⁵⁶ Unlike Ramsey's proposal, Young's is truly intermediate in that it would not effectively relegate customary international law to State law status. That is because Young would recognize that, in certain circumstances, federal law may require the application of customary international law even if State law would not.³⁵⁷ Still, Young's proposal tilts heavily toward the revisionist view, as he makes it clear that the applicability of customary international law would ordinarily be determined by State law.³⁵⁸ Moreover, the particular mechanism that Young proposes to determine when customary international law will be applied in federal or State courts—the application of choice-of-law rules³⁵⁹—is problematic in a number of respects.

355 See *supra* text accompanying note 117.

356 See Young, *supra* note 19, at 370.

357 See *id.* Indeed, Ramsey's main criticism of Young's proposal is that it would effectively accord customary international law preemptive force in some circumstances. See Ramsey, *supra* note 17, at 567–71. Young, for his part, criticizes Ramsey for sometimes permitting Supreme Court displacement of State court applications of customary international law. See Young, *supra* note 19, at 484. This criticism seems misplaced. First, it depends on Young's belief that Ramsey would regard customary international law as federal law for purposes of arising under jurisdiction, see *id.* at 483–84, whereas Ramsey expressly reserves judgment on that point, see Ramsey, *supra* note 17, at 583 n.105. Second, since Ramsey insists that customary international law is nonpreemptive, it would seem to follow that, even if the Supreme Court could exercise appellate jurisdiction over a case "arising under" that law, it may not review or reverse the State court's interpretation of it. Indeed, although Young denies it, the logic of his proposal would appear to require the conclusion that the Supreme Court may review State court applications of international law in certain circumstances. See *infra* text accompanying note 448–49. In my view, Ramsey's position is highly problematic, and Young's slightly less so, precisely insofar as they would deny the Supreme Court authority to review State court interpretations of customary international law.

358 See Young, *supra* note 19, at 508–09.

359 See *id.* at 468.

Section 1 considers Young's criticisms of the modern position. Section 2 considers Young's prescriptions.

1. Young's Criticisms of the Modern Position

Young offers a lengthy critique of the modern position, which he describes as the view that "customary international law is *always* federal law and *always* displaces [State] law, without consideration of the nature of the particular rule at issue or of the constellation of federal, [S]tate, international, and private interests that might be implicated by it."³⁶⁰ He finds "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."³⁶¹ He concludes that "the modern position offends constitutional norms of federalism, separation of powers, and democracy."³⁶²

The critiques based on democracy, federalism, and separation of powers are overdrawn. Revisionists often criticize international law for its "democratic deficit." One version of this critique stresses that its norms often do not reflect the preferences of the majority of the world's people.³⁶³ Many countries that participate in its creation are not democracies; the "dead hand" of older customary international legal norms binds states even after those norms have changed; and undemocratically selected elites, such as judges on international tribunals and law professors, have undue influence in the creation and interpretation of customary international law.³⁶⁴ Young credits a different version of the democracy critique: the makers of customary international law do not fairly represent the people *of the United States*. Thus, quoting Professor Trimble, he notes that "at least some of the potential lawmakers, such as foreign governments, are neither representative of the American political community nor responsive to it."³⁶⁵

360 *Id.* at 437; *see also id.* at 444, 463, 509 (describing similarly the modern position). As discussed in subpart I.B, few proponents of the modern position take such an uncompromising position.

361 *Id.* at 462.

362 *Id.*

363 *See* J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 518–23 (2000); John O. McGinnis & Ilya Somin, *Democracy and International Human Rights Law*, 84 NOTRE DAME L. REV. 1739, 1771–73 (2009).

364 *See* McGinnis & Somin, *supra* note 363, at 1764–68.

365 Young, *supra* note 19, at 398–99 (quoting Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 721 (1986)); *see also* Bradley & Goldsmith, *Critique*, *supra* note 2, at 857, 868 (arguing the modern position conflicts with basic principles of American democracy).

Young is not comforted by the “internationalist” response that the federal political branches at least *participate* in the international lawmaking process.³⁶⁶

In my view, both versions of the democracy critique are misguided. As Young recognizes, compliance with international law was an “important desideratum” for the Framers,³⁶⁷ who “clearly intended that customary international law should have application in our courts.”³⁶⁸ Yet, at the time of the Founding, far fewer of the world’s nations were democracies than today—and, to the extent that the law of nations was thought to be “made” at all, it was made at a much earlier time, when even fewer countries were democracies. Moreover, in the Founders’ view, much of the law of nations was not “made” at all, but instead had its basis in natural law or right reason.³⁶⁹ They wished to see international law complied with, not because it satisfied their conceptions of democracy, but because they feared the consequences for the nation if such law were violated.³⁷⁰ As discussed above, this remains the most powerful structural argument for treating customary international law as preemptive federal law. The reality that violations of international law risk bad consequences for the nation in the form of adverse reactions by other nations is a fact about the world that must be taken into account in some fashion. (Moreover, it bears recalling, in this connection, that adherents of the modern position do not claim that customary international law’s status as federal law is immune from alteration by democratic means. The debate concerns the default rule: does it take an act of federal political branches to prohibit States from violating such law, or to permit them to do so?)

Young ultimately concludes that the democracy critique adds nothing to the federalism and separation-of-powers critiques.³⁷¹ In

366 See Young, *supra* note 19, at 399.

367 *Id.* at 469 n.531.

368 *Id.* at 390.

369 See RAMSEY, *supra* note 17, 344–46; Saikrishna Prakash, *The Constitutional Status of Customary International Law*, 30 HARV. J.L. & PUB. POL’Y 65, 70 (2006). For this reason, Young is on weak ground when he distinguishes the “old” law of nations from the “new” international law on the ground that the former was “empirically-based,” where as the latter is not. See Young, *supra* note 19, at 390–91. The “new” international law may or may not have an empirical basis, but it is clear that much of the “old” international law did not. In any event, this distinction is orthogonal to the Founders’ concerns. As discussed in the text, the Founders wished to see norms of international law complied with, regardless of their provenance, because they were concerned about the consequences of violations of such law.

370 See Stephens, *supra* note 16, at 400–02.

371 See Young, *supra* note 19, at 400.

my view, the democracy critique is actually *in tension with* the federalism and separation-of-powers critiques. The latter critiques reduce themselves to the objection that customary international law is not made in the manner contemplated by the Constitution for making preemptive federal law. Young relies heavily on the scholarship of Bradford Clark, who has argued forcefully that the list of categories of supreme federal law set forth in the Supremacy Clause is exclusive.³⁷² As discussed above, Clark has argued that the process for making these three forms of federal law—such as the bicameralism and presentment requirements for making federal statutes—was designed to privilege the status quo.³⁷³ By establishing an onerous procedure for making federal law, the Constitution makes it difficult to enact preemptive federal law.³⁷⁴ If so, then the separation-of-powers and federalism critiques are subject to a democracy objection. By making change so difficult, the Constitution gives a veto power to legislators representing a minuscule percentage of the nation's population, thus preventing the enactment of preemptive federal law even when a substantial majority of the population favors such legislation. From a democracy perspective, this would appear to be problematic.

Young would no doubt respond that he is not criticizing the modern position as inconsistent with some ideal of democracy, but rather as inconsistent with “our” democracy—that is, the version of democracy embodied in our Constitution.³⁷⁵ Presumably, then, Young is also not objecting that the modern position is inconsistent with some idealized version of separation of powers or federalism, but rather with “our” separation of powers and federalism. It follows that one cannot assess the modern position except by interpreting our Constitution and determining if the modern position is consistent with that interpretation. In other words, separation of powers and federalism are not a basis for critiquing the modern position distinct from the claim that the modern position is inconsistent with the Constitution as properly construed. And, if that is so, then any separation-of-powers or federalism critique presupposes a theory of constitutional interpretation.

Ramsey's theory of constitutional interpretation is very much a textualist and originalist one. I concluded above that neither the con-

372 See Clark, *supra* note 24, at 1323–24. Young relies on Clark's scholarship throughout his piece. See Young, *supra* note 19, at 371 nn.25–26, 378 n.60, 393 n.142, 402 n.192.

373 See Clark, *supra* note 24, at 1338–46; Young, *supra* note 19, at 402.

374 For a critique of this view, see Vázquez, *supra* note 116, at 1602–03.

375 Young criticizes the “internationalist” response to the democracy critique of the modern position on this ground. See Young, *supra* note 19, at 399.

stitutional text nor the Founders' intent required the revisionist position favored by Ramsey. Being less of a textualist or originalist, Young places more of an emphasis on constitutional "structure" and "principle," as well as evolved judicial doctrine. A critique based on structure and principle, however, seems vulnerable to the same objection as one based on separation of powers and federalism: unless Young means to criticize the modern position as inconsistent with some idealized version of constitutional structure or principle, he must link this critique to some other accepted indicium of constitutional meaning. If he bases his appeal to structure and principle on the Constitution's text or the Founders' intent, his arguments are vulnerable to the same response as Ramsey's. Young's critique would appear to be distinct from Ramsey's, then, only insofar as he relies additionally on tradition and evolved judicial doctrine.

I considered the modern position's conformity with pre-*Erie* doctrine above and concluded that there were two contending positions.³⁷⁶ Young stresses that, before *Erie*, customary international law was treated as "general law," but he recognizes that this regime operated very differently from that of present-day State law.³⁷⁷ As Young notes, the "general law" regime produced a remarkable degree of uniformity because State and federal courts viewed themselves as engaged in a common enterprise and thus tended to rely on each other's decisions and arrive at very similar results.³⁷⁸ Young is entirely correct in concluding that "[t]he revisionist view that a [S]tate choosing to apply customary international norms necessarily incorporates those norms as [S]tate law would eliminate that sort of imperative."³⁷⁹ This was precisely the reason that we concluded in Part I that, as between the modern and the revisionist positions, the operative law in the pre-*Erie* period resembled the modern position more than the revisionist position.

Of course, Young does not believe that those are our only two choices. He proposes an intermediate status for customary interna-

376 Post-*Erie* doctrine would of course be an odd ground on which to defend a revisionist position, since revisionism by definition seeks to overturn entrenched doctrine.

377 See Young, *supra* note 19, at 466–67.

378 See *id.* ("Although each [S]tate had the *power* to interpret general law by its own lights . . . both [S]tate and federal participants in that system viewed themselves as participants in a common enterprise and, accordingly, put a strong emphasis on mutual deference and uniformity."); see also Fletcher, *supra* note 124, at 1554, 1562–64, 1572–75 (describing the uniformity experienced by the marine insurance industry under the general law regime during the early nineteenth century).

379 Young, *supra* note 19, at 467.

tional law intended to replicate its pre-*Erie* status as general law. As discussed in greater detail in the next section, Young proposes that customary international law continue to be treated as general law, applicable in the courts whenever a valid choice-of-law rule calls for its application. Except to the very limited extent that he would recognize a role for federal choice-of-law rules, Young would recognize a State power to depart from customary international law,³⁸⁰ and he would deny the Supreme Court the power to review State court interpretations of such law, even when a federal choice-of-law rule applies. Although formally this regime may be closer to the pre-*Erie* general law regime, in operation it would suffer from the very problems that he rightly attributes to the revisionist position. With the loss of a sense of common enterprise, and the explicit recognition of a State power to depart from customary international law, State courts would be far less likely to follow federal precedents, and State courts and even legislatures may discourage or even prohibit the application of customary international law, as the citizens of Oklahoma recently voted to do. Thus, we are far more likely to get divergent interpretations of customary international law and even outright violations of it. Innocence lost cannot be so easily regained.

In the end, Young's approach is less problematic than Ramsey's only insofar as he is willing to accept that federal law sometimes requires the application of customary international law. Because he is willing to accept such a federal role in very limited circumstances, however, his proposal is only marginally preferable to Ramsey's. Moreover, the particular approach that Young proposes for determining the applicability of customary international law in our courts—which relies on choice-of-law rules—would be unhelpful, inapposite, and difficult to apply.

2. Young's Intermediate Status for Customary International Law

Young proposes that customary international law continue to be regarded as general law.³⁸¹ He argues at length that this status is compatible with *Erie*'s rejection of such status for the common law.³⁸² The key to his proposal's consistency with *Erie* lies in his recognition that customary international law would be applicable in the courts only

380 See, e.g., *id.* at 480–81 (“[T]he *Charming Betsy* principle would bolster a requirement that [S]tate departures from longstanding customary international norms be indicated by clear legislation or judicial precedents . . .”); *id.* at 496–97 (addressing objection that States may depart from customary international law).

381 See *id.* at 468.

382 See *id.* at 467–74.

insofar as an “otherwise valid” choice-of-law rule calls for its application to a particular case.³⁸³ As Young recognizes, choice-of-law rules are themselves the creatures of either State or federal law.³⁸⁴ Since the applicability of customary international law would thus be determined by State or federal law, Young’s proposal is consistent with *Erie*’s statement 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.”³⁸⁵

Young stresses that the applicability of customary international law, in both State and federal courts, will ordinarily be determined by *State* choice-of-law rules³⁸⁶—presumably the choice-of-law rules of the State in which the court is sitting.³⁸⁷ He acknowledges, however, that federal law could play a role in some cases.³⁸⁸ I will first discuss the status of customary international law insofar as Young would determine its applicability by reference to State choice-of-law rules. I shall then discuss its status insofar as Young would permit federal law to determine its applicability.

a. State Choice-of-Law Rules

Young proposes that customary international law be treated as general law, to be applied by the courts when an otherwise valid choice-of-law rule calls for its application.³⁸⁹ The choice-of-law rules that Young has in mind are the rules the courts apply to resolve conflicts between the laws of different States or nations.³⁹⁰ An initial problem with this proposal is the uncertainty that it would bring to

383 *See id.* at 468.

384 *See id.* at 483.

385 *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938); *see* Young, *supra* note 19, at 483. *Erie*’s list of possible federal sources of law is underinclusive, if only because it excludes treaties. *Cf.* U.S. CONST. art. VI, § 2 (stating treaties are the “supreme Law of the Land”). The point for now, however, is that *Erie* appears to hold that all law applied in the courts of this country is either State or federal. This requirement would clearly be satisfied by Young’s proposal if foreign law were regarded as incorporated into the law of the forum State whenever choice-of-law rules call for its application. *See infra* note 429 and accompanying text. If one resists that conceptualization, then *Erie* must be understood to establish instead that all law applied in the courts must be applied as a result of *authorization* by either State or federal law (since the State and federal courts commonly apply foreign law).

386 *See* Young, *supra* note 19, at 370.

387 *See Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496 (1941).

388 *See* Young, *supra* note 19, at 470.

389 *See id.* at 370.

390 *See id.* at 470.

the question of the applicability of customary international law.³⁹¹ The proposal would increase uncertainty in at least two respects: (a) different States approach choice of law differently and (b) many of the approaches used are themselves highly indeterminate. A more fundamental problem is that these choice-of-law rules are inapposite, as they address a sort of conflict that is very different from that between customary international law and State law. Since States are free to adopt special choice-of-law rules for a particular issue, presumably most States will end up articulating special rules to determine the applicability of customary international law. If so, then it is unclear what is gained by regarding these rules as choice-of-law rules, as opposed to State rules regarding the incorporation of customary international law as State law.

In any event, to the extent that the matter turns on State rules (whether regarded as choice-of-law rules or rules about incorporation of customary international law as State law), the ultimate determination of whether to apply customary international law will be made by the States, which would be free to deviate from, or decline altogether to apply, customary international law. The State would be able to preclude such review by making it clear that it is declining to incorporate customary international law or (what may amount to the same thing) that its choice-of-law rule precludes its application. Thus, except to the extent that Young would permit the application of a federal choice-of-law rule, Young's proposal suffers from the same basic problem as Ramsey's.

i. The Diversity and Indeterminacy of Existing Choice-of-Law Approaches

An initial concern with Young's proposal is the great uncertainty that would be produced through a resort to State choice-of-law rules. Dean William Prosser once described choice of law as a "dismal swamp,"³⁹² and matters have only gotten worse since he wrote. At one time, most States applied more or less the same choice-of-law rules, those set forth in the *First Restatement*.³⁹³ The *First Restatement* approach often determined the applicable law by reference to the location in which a key event occurred. For example, in tort cases, the applicable law was that of the state in which the injury occurred (the

391 See Daniel J. Meltzer, *Customary International Law, Foreign Affairs, and Federal Common Law*, 42 VA. J. INT'L L. 513, 520, 532-36 (2002).

392 William L. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953).

393 RESTATEMENT (FIRST) OF CONFLICT OF LAWS (1934).

lex loci delicti).³⁹⁴ This approach sometimes produced harsh and seemingly arbitrary results, but it had the virtue of being relatively determinate. Over time, some States came to reject the *First Restatement* approach in favor of some version of the interest analysis first proposed by Professor Brainerd Currie.³⁹⁵ Later, the *Second Restatement* articulated a multifactor balancing approach whose most noteworthy feature is the high degree of its indeterminacy.³⁹⁶ Today, with the States employing seven different choice-of-law approaches,³⁹⁷ most of which are themselves highly indeterminate, the choice-of-law situation in the United States is widely regarded as being in a state of crisis.³⁹⁸ Because of the diversity of approaches in use in the United States, the particular approach that will govern the applicability of customary international law in this country under Young's proposal will depend on where the suit is brought. Since most of the approaches are themselves highly indeterminate anyway, the use of such rules will be unappealing to anyone who values certainty and predictability in the law.

ii. The Inappositeness of Choice-of-Law Rules

More importantly, the choice-of-law rules to which Young would relegate the question of the applicability of customary international law are inapposite, as they address a completely different type of

394 See *id.* §§ 378–390.

395 See BRAINERD CURRIE, *Notes on Methods and Objectives in the Conflict of Laws*, in *SELECTED ESSAYS ON CONFLICTS OF LAWS* 177, 183–87 (1963).

396 See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) (1971); Larry Kramer, *Choice of Law in the American Courts in 1990: Trends and Developments*, 39 AM. J. COMP. L. 465, 466 (1991) (“To be sure, judges make decisions based on unarticulated intuition in fields other than choice of law, but in no other field do they seem quite so comfortable about it. Much of the blame can perhaps be attributed to the dominance of the Second Restatement, since its undirected, multifactor analysis invites post-hoc rationalizing of intuitions about the applicable law.”); Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2466 (1999) (“[T]he *Second Restatement* . . . lists a dizzying number of factors with no hint as to their relative weight.”).

397 See Symeon C. Symeonides, *Choice of Law in the American Courts in 2009: Twenty-Third Annual Survey*, 58 AM. J. COMP. L. 227, 231 (2010).

398 See, e.g., Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1, 1–2 (1991) (advocating congressional action to restore determinacy and uniformity to choice-of-law conflict); Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. 1839, 1839–40 (2006) (discussing the inadequacy of current choice-of-law doctrine, particularly with regard to class action suits); Jed J. Borghesi, Note, *Class Action Fairness: A Mature Solution to the 23(b)(3) Choice of Law Problem*, 95 GEO. L.J. 1645, 1645–46 (2007) (arguing for a solution to choice-of-law problems that respects federalist and nonfederalist concerns).

choice-of-law problem. These rules were designed for horizontal choice-of-law questions: a choice between the law of two states, both typically addressing the legal relations of private parties. The choice-of-law issue arises because the parties' transaction or relationship spanned more than one state or the parties are from different states. The choice-of-law issue is horizontal because the states whose laws are contending for application are coequal, whether they are States of the Union or states in the international sense.³⁹⁹ Neither state purports to impose obligations on the other. If the courts of one state decline to apply the law of the other state to the particular dispute, it is generally on the theory that the law is inapplicable because that state's connection to the dispute is less direct or less relevant than that of the forum state or of a third state. The forum state's decision not to apply another state's law leaves that state's law untouched in its core applications—disputes in which all of the parties are from the same state and all of the relevant acts took place in that state's territory. Such a decision merely declines to apply the law to peripheral cases.

A conflict between the law of a State and international law is of a completely different character. Such a conflict is "vertical" in the sense that one of the two laws purports to impose limits on the other. It is the very point of international law (when it applies) to limit the State's freedom to, for example, entertain a suit against a diplomat or to execute a minor.⁴⁰⁰ For a State not to apply that law is to deny the applicability of the law not at its periphery, but at its core. Unlike a State's decision not to apply the law of a sister State or of a foreign nation to a particular dispute, a State's decision not to apply customary international law results in a violation of such law.

Being a vertical conflict, the conflict between State law and international law is analogous to that between State law and federal law. Normally, in the case of a vertical conflict, if the "higher" law is law at all, it will categorically prevail in the event of a conflict. This is the result for which the Supremacy Clause provides.⁴⁰¹ In the event of a

399 A conflict between the law of a State of the Union (say, New York) and a state in the international sense (say, France) might appear not to be a contest between the laws of coequal sovereigns. But, from the perspective of international law (both public and private) the law of New York is considered national (or municipal) law, as international law does not distinguish between national law and the law of domestic subunits. Cf. *Responsibility of States*, *supra* note 94, at 41.

400 These are two of the examples Young considers. See Young, *supra* note 12, at 474–81. As to whether there really is a customary international law prohibition of the execution of minors applicable against the United States, see *infra* text accompanying note 426.

401 If anything, the conflict between State law and international law is more acute than the sort of conflict usually addressed by the Supremacy Clause. The latter type

conflict between a law that purports to limit what a State may do and a State law that requires or permits what is prohibited, to resolve the conflict by recourse to a choice-of-law rule that permits the application of the second law is to deny the first law the status of a binding law at all.⁴⁰²

The inappositeness of horizontal choice-of-law rules is well illustrated by consideration of the rules that were once widely applied to resolve such conflicts and continue to be applied in some States (and in the rest of the world).⁴⁰³ As noted, the choice-of-law rule that once prevailed for tort cases was the *lex loci delicti* rule, under which the law to be applied was the law of the place where the injury occurred.⁴⁰⁴ In Young's example of a tort claim under State law against a foreign diplomat entitled to immunity as a matter of international law where State law does not recognize an immunity,⁴⁰⁵ the *lex loci delicti* approach would require the application of the law of the place where the tort occurred. Since international law has no defined territory, perhaps it would never be applicable under a *lex loci delicti* approach. Alternatively, one could say that the "territory" of international law is the whole world (or at least those nations of the world bound by the rule in question), in which case the *lex loci delicti* approach would not

of conflict is typically between a federal statute regulating private parties and a State law regulating private parties. The State and federal laws are deemed to be in conflict if they regulate the private parties differently. *The Supremacy Clause* would be violated if the State court declined to apply the federal law, but the State would not be violating the federal *statute* by failing to apply it. In contrast, because international law applies to state action and purports to bind the State, the State would be directly violating international law if its courts applied a State law that conflicted with it.

402 Young recognizes that the conflict between State and federal law is a vertical one, but he maintains that the conflict between State law and international law is horizontal because there is no "lexical rule" such as the Supremacy Clause to specify a hierarchy. See Young, *supra* note 12, at 484. But the Supremacy Clause merely sets forth a rule to resolve the vertical conflict; it is not what makes the conflict a vertical one. The conflict between international law and State law is vertical because international law purports to limit states, just as federal law purports to limit State law. It is for the same reason that a conflict between the Constitution and a federal statute is a vertical one, even though the Supremacy Clause does not specify a hierarchy as between the two. Here, too, it is thought to be self-evident that the law that purports to restrict the other, if it is law at all, must control. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803).

403 The following States adhere to the *First Restatement* approach for torts, contracts, or both: Alabama, Florida (contracts only), Georgia, Kansas, Maryland, New Mexico, North Carolina (torts only), Oklahoma (contracts only), Rhode Island (contracts only), South Carolina, Tennessee (contracts only), Virginia, West Virginia (torts only), Wyoming. See Symeonides, *supra* note 397, at 231–32.

404 See *supra* note 394 and accompanying text.

405 See Young, *supra* note 19, at 479–81.

help us decide between the two conflicting laws, since the territory of the international law rule (the world) would overlap with that of the State in which the tort occurred. The latter is of course true of conflicts between State and federal law (that is, the tort occurred in both the State and the United States), which is why territorial choice-of-law rules are unhelpful in resolving such conflicts.

Young's proposal is less implausible if one uses one of the modern approaches to choice of law that some States have adopted, but these newer approaches too are addressed to horizontal conflicts and are inapposite to vertical conflicts such as the one under discussion. The choice-of-law revolution's first significant incursion came in the form of interest analysis. The one feature of Currie's interest analysis that is widely regarded as an advance is its identification of "false conflicts," that is, situations in which only one of the States whose conflicting laws are contending for application has an interest in applying its law to the particular case.⁴⁰⁶ For example, if two citizens of New York are riding in an automobile and have an accident in Ontario, and Ontario law denies the passenger a right to recover against the driver for negligence while New York law permits recovery, only New York (the State of the common domicile) has an interest in applying its law to govern the liability of the driver to his guest.⁴⁰⁷ The purpose of Ontario's law is to protect hosts from the ungratefulness of their guests, and Ontario has no interest in applying its law because the host in this case was not from Ontario. Despite the complexities that may arise in determining the interests underlying the contending laws, interest analysis has been widely regarded as a success insofar as it has facilitated the resolution of such false conflicts.⁴⁰⁸ However, conflicts between State law and international law will never be false conflicts. As noted above, the whole point of international law is to constrain states. Thus, if a State law conflicts with international law, the conflict will always be a true one.⁴⁰⁹

406 See LEA BRILMAYER & JACK GOLDSMITH, *CONFLICTS OF LAWS* 218–19 (5th ed. 2002); William F. Baxter, *Choice of Law and the Federal System*, 16 *STAN. L. REV.* 1, 8 (1963).

407 These were the facts of *Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963), in which the New York courts first adopted interest analysis. See *id.* at 280.

408 But see Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 *YALE L.J.* 1277, 1300–01 (1989).

409 This is true even if the suit involves a dispute between foreign parties in which all the events took place in a foreign country. In such a case, the relevant conflict would be between the law of the country where the conduct took place and international law. If there is a conflict at all, it is because the law of that foreign country does not accord with international law. Since it is the point of international law to constrain that country, the conflict will always be a true one.

Young argues that the conflict between a State law that recognizes a tort cause of action but is silent regarding immunity and a rule of international law that entitles the defendant to immunity would be a false conflict.⁴¹⁰ But this misconceives the concept of a false conflict. Before asking whether a conflict is true or false, one must determine whether the laws contending for application conflict. To determine whether they conflict, one must determine the content of the laws in question. In the case of a State whose law recognizes a generally applicable tort cause of action but is silent as to immunity, the court first has to decide whether the State's law implicitly recognizes an immunity. This is a matter of interpreting the State's domestic law. If the State recognizes an immunity, then there is no conflict with international law and thus no choice-of-law issue to resolve. If the State denies an immunity, then there is a conflict. Only then does one engage in interest analysis to determine if the conflict is true or false. Whether the conflict is true depends on whether the State's interests would be advanced by having its law applied to the case, which in turn depends on such factors as whether the plaintiff is a citizen of that State. If the plaintiff is a citizen, and if we assume that the State's cause of action was designed to benefit citizens,⁴¹¹ then the conflict would be a true one.⁴¹²

Young posits a tort committed by a diplomat in Massachusetts injuring a Massachusetts resident.⁴¹³ If Massachusetts law denied immunity and international law conferred one, there would be a conflict. If Massachusetts denied immunity in order to protect its citizens who are injured by diplomats, the conflict would be a true one (because the injured party was from Massachusetts). On the other hand, if Massachusetts law were construed to grant immunity, there would be no conflict at all because State law and international law are the same. What Young considers a false conflict is in fact a nonexistent conflict. The State law's silence on the question of immunity raises an issue of interpretation, not a choice-of-law issue. A State

410 Young says that such a conflict would not be an "actual" conflict, but presumably he is invoking Currie's concept of a true conflict (the opposite of a false conflict), as he cites Larry Kramer's discussion of Currie's false conflict analysis. See Young, *supra* note 19, at 469 (citing Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 311 (1990)).

411 This is an assumption often made in interest analysis, although scholars have criticized it. See Brilmayer, *supra* note 408, at 1300.

412 If the plaintiff is not from the forum State, then the relevant conflict will be between the law of the State of the plaintiff's domicile and international law. See *supra* note 409 and accompanying text. If the law of that State grants immunity, there is no conflict. If the law of that State denies immunity, the conflict will be a true one.

413 See Young, *supra* note 19, at 479.

might resolve that question through a background rule that all that is not explicitly prohibited is permitted. Young himself proposes that State and federal courts resolve the issue by assuming that the States had retained the background understanding, expressed by Blackstone (among others), that the law of nations was part of English common law.⁴¹⁴ Under this approach, State law would be understood to incorporate customary international law unless the legislature has expressly rejected it. That is certainly a reasonable solution, but it is not a choice-of-law solution.⁴¹⁵

Resolving true conflicts has been the *bête noire* of interest analysis. Currie originally proposed always applying forum law.⁴¹⁶ This approach would, of course, always reject the application of international law. Most States have rejected the forum law solution.⁴¹⁷ California has adopted Professor William Baxter's comparative impairment approach, under which true conflicts would be resolved by applying the law that would be impaired most if not applied,⁴¹⁸ a notoriously difficult test to apply. In the case of a vertical true conflict, it would seem that the higher law would always be completely impaired if not applied, whereas, depending on how one characterized its purpose, State law may or may not be fully impaired if not applied insofar as it violates international law. This test would thus seem to favor the application of international law.

Other States have adopted Dean Robert Lefflar's "better law" approach.⁴¹⁹ This test differs from the others in that it openly

414 See *id.* at 480.

415 At least, it is not a horizontal choice of law solution. It might be understood as a vertical choice-of-law solution, but, as such, it would not depend on horizontal choice-of-law concepts such as that of a false conflict.

416 See CURRIE, *supra* note 395, at 184; Brainerd Currie, *Comments on Babcock v. Jackson, a Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212, 1237–38, 1242 (1963). The discussion in the remainder of this subsection assumes that the law of the State conflicts with customary international law – in other words, in Young's hypothetical diplomatic immunity case, that customary international law entitles the diplomat to immunity and that Massachusetts law does not recognize an immunity for diplomats, either by incorporating customary international law or independently. As noted, if the plaintiff is a citizen of Massachusetts, the conflict will be a true one.

417 Two States—Kentucky and Michigan—follow the forum law approach, but for torts only. See Symeonides, *supra* note 397, at 231, 248 n.80.

418 See *Bernhard v. Harrah's Club*, 546 P.2d 719, 723–26 (Cal. 1976).

419 See Robert A. Lefflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 295–304 (1966); Robert A. Lefflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1588, 1590–93 (1966). The following States apply the "better law" approach: Arkansas (torts only), Minnesota, New Hampshire (torts only), Rhode Island (torts only), and Wisconsin. See Symeonides, *supra* note 397, at 231–32.

requires an evaluation of the substance of the contending laws. An approach that leaves it to State courts to evaluate the merits of a rule of international law that binds the United States (and which the federal government thus very likely agrees with, at least tacitly) is highly problematic. The structural problem with leaving compliance with international law to the States has already been noted. Leaving it to State judges to assess the desirability of a given norm of customary international law seems particularly inadvisable, as State judges would appear to be even less qualified than State executives or legislatures to evaluate norms of international law.

The largest number of States (though barely a majority) follows the approach of the *Restatement (Second) of the Conflict of Laws*.⁴²⁰ The *Second Restatement* takes a hybrid approach, designating the State where a particular act took place as the State whose law presumptively applies, but permitting that law to be displaced if another State's interest is greater.⁴²¹ To guide the determination of the latter question, the *Second Restatement* sets forth multiple factors to be considered.⁴²² As applied to a vertical conflict of the sort we are considering, the initial presumption will be useless if, as discussed above, the "territory" of international law is the world (or all states bound by the relevant international law norm).

The analysis provided in the *Second Restatement* to displace the presumptively applicable law is notoriously indeterminate. The *Restatement* sets forth an unexhaustive list of seven factors to be considered.⁴²³ The upshot is that the State courts will be deciding whether international law is to be applied based on their case-specific conclusions about whether applying such law would be reasonable. It is thus not surprising that Young believes that "[his] approach's heavy reli-

420 The following States follow the *Second Restatement*: Alaska, Arizona, Colorado, Connecticut, Delaware, Florida (torts only), Idaho, Illinois, Iowa, Kentucky (contracts only), Maine, Michigan (contracts only), Mississippi, Missouri, Montana, Nebraska, Nevada (torts only), New Hampshire (contracts only), New Jersey (torts only), Ohio, Oklahoma (torts only), South Dakota, Tennessee (torts only), Texas, Utah, Vermont, Washington, and West Virginia (contracts only). See Symeonides, *supra* note 397, at 231–32.

421 See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 cmt. d (1971).

422 See *id.* § 145(2).

423 See *id.* § 6(2) (stating that the factors to be considered "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").

ance on choice of law rules [means] 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.”⁴²⁴ This would certainly be true if the court applied the *Second Restatement* approach, or most versions of interest analysis, as those approaches would essentially license courts to decide the applicable law in accordance with their intuitions about the desirability of the particular rules of international law involved, or their more general views about whether the matter is one that international law “ought to govern.” For example, Young’s application of the *Second Restatement* test to a conflict between a State’s law that would subject a minor to the death penalty and a rule of customary international law that prohibits the application of the death penalty to minors seems to reflect Young’s own intuition that this is a matter best left to local decisionmaking. “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.”⁴²⁵ In this particular case, Young’s intuition appears to accord with that of the rest of the world, which recognizes that states that have persistently objected to an evolving rule of customary international law are exempt from the rule if it does eventually develop into customary law.⁴²⁶ But, if applied to a rule of customary law that actually binds the United States, and with which the federal govern-

424 Young, *supra* note 19, at 474.

425 *Id.* at 477.

426 See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 cmt. d (1987) (“[I]n 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.”); Curtis A. Bradley, *The Juvenile Death Penalty and International Law*, 52 DUKE L.J. 485, 492, 539 (2002) (concluding that international law arguments made against the juvenile death penalty have “significant weaknesses”, that “the United States has persistently objected to—and thereby legally opted out of—any customary international law restriction on the juvenile death penalty,” and that “the *jus cogens* challenge to the juvenile death penalty seems unpersuasive”). *But cf.* Connie de la Vega & Jennifer Brown, *Can a United States Treaty Reservation Provide a Sanctuary for the Juvenile Death Penalty?*, 32 U.S.F. L. REV. 735, 770 (1998) (“[T]he prohibition of the juvenile death penalty is not only customary international law, but also *jus cogens*, and a norm to which the renegade United States should be bound.”); Joan F. Hartman, “Unusual” Punishment: *The Domestic Effects of International Norms Restricting the Application of the Death Penalty*, 52 U. CIN. L. REV. 655, 686 (1983) (“Mere failure to conform to the norm is not tantamount to a substantive protest.”); Lynn Loschin, *The Persistent Objector and Customary Human Rights Law: A Proposed Analytical Framework*, 2 U.C. DAVIS J. INT’L L. & POL’Y 147, 171 (1996) (“Passive failure to bring domestic law into conformity is not sufficient, particularly when the objecting state has had multiple opportunities to discuss the issue and make

ment thus at least tacitly agrees, an approach that calls on State judges to decide whether to apply the law on the basis of their judgment about whether the rule is a good one or whether international law “ought to govern” is highly problematic. If the applicability of international law in our courts is to be decided on this basis, the States—and in particular State judges—would seem to be the wrong organs to make that determination.

iii. The Likelihood of Special Choice-of-Law Rules

To the extent that Young would determine the applicability of customary international law by reference to State choice-of-law rules, he would leave it to rules that States are free to alter as they wish. There is of course nothing to prevent States from changing their general approach to choice of law or from adopting a different approach for conflicts involving international law than for the sorts of horizontal conflicts that they are most accustomed to confronting. (Dépeçage is a familiar technique in choice of law.⁴²⁷) The most likely to adopt a special choice-of-law rule for conflicts involving international law are the States that adhere to the *First Restatement’s* territorial approach, since, as we have seen, those approaches are very likely to be useless in the case of vertical conflicts. The more modern approaches to choice of law will be of any use only to the extent that they are indeterminate. But these approaches too are fraught with problems and thus likely to be displaced with special choice of law rules.

If a special choice-of-law rule were adopted, it would likely be a flat rule declaring one or the other to be supreme unless the legislature specifically provided otherwise. That is of course the sort of rule that the Constitution adopts to resolve the analogous conflict between State and federal law. It is also the sort of rule that Oklahoma chose in its recent constitutional amendment.⁴²⁸ In the case of vertical conflicts, this sort of rule would appear to be the only one available. A

principled objections. Therefore, . . . the analysis would . . . deny the United States persistent objector status.” (footnote omitted)).

427 Dépeçage is defined as “[a] court’s application of different state laws to different issues in a legal dispute; choice of law on an issue-by-issue basis.” BLACK’S LAW DICTIONARY 502 (9th ed. 2009). The *Restatement* embraces dépeçage. See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 7(3) (“The classification and interpretation of local law concepts and terms are determined in accordance with the law that governs the issue involved.”).

428 The Oklahoma constitutional amendment goes further than a rule of State law superiority, as it would bar application of international law even if it does not conflict with State law. But this rule could be conceived as a rule of State law superiority, coupled with a stipulation that State law is comprehensive.

rule of State law superiority would amount to a rule denying customary international law the status of law, although such a rule could be supplemented (as a matter of State law) by a *Charming Betsy* presumption, under which State law will be interpreted to be consistent with international law if ambiguous. Alternatively, the State could determine that particular rules of customary international law but not others shall be applicable in the State, depending on the State's views about their desirability. The "choice of law" label seems entirely inapt to describe an approach of this sort. A State that picks and chooses norms of international law in this way would appear to be engaged in a process of selective incorporation of international law.⁴²⁹

iv. The Role of the Federal Courts

Since customary international law would have the status of "general law" under Young's proposal, Young concludes that cases turning on such law would not "arise under" federal law for purposes of Article III.⁴³⁰ The federal courts would nevertheless have jurisdiction over cases involving customary international law if the parties were diverse.⁴³¹ In such cases, Young says that he would permit the federal courts to use their own judgment as to the content of customary international law, as they did before *Erie*.⁴³² It would seem to follow from

429 Even in the horizontal choice-of-law context, a State's decision that another State's law is applicable is often conceptualized as the first State's incorporation of the other State's law as its own. See *Guinness v. Miller*, 291 F. 769, 770 (S.D.N.Y. 1923) (Hand, J.), *aff'd sub nom. Guinness v. Miller*, 299 F. 538 (2d Cir. 1924), *aff'd in part, rev'd in part sub nom. Hicks v. Guinness*, 269 U.S. 71 (1925); WALTER WHEELER COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 20–21 (1942). This conceptualization seems even more apt in the vertical choice-of-law context, at least where, as Young suggests, the "choice" to apply international law is left to the States.

430 See Young, *supra* note 19, at 468. This assumes rejection of theories of protective jurisdiction such as Professor Wechsler's, under which Congress would be empowered to grant the federal courts "arising under" jurisdiction if it would have had the power to displace State law with a federal rule, but without actually displacing State law. See Wechsler, *supra* note 50, at 224–25. See generally Vázquez, *supra* note 50 (discussing various theories of protective jurisdiction). Under this theory, Congress could confer jurisdiction over cases arising under customary international law because Congress has the power to displace State law with customary international law under the Offenses Clause. Young rejects protective jurisdiction. See Young, *supra* note 49. In any event, as discussed above, the Supreme Court's jurisdiction over a case and its power to displace a State court's interpretation of customary international law are separate questions. See *supra* text accompanying note 66.

431 Presumably such jurisdiction would also exist if a customary international law issue arose in a claim that is ancillary to a claim that arises under a federal statute or treaty or the Constitution.

432 See Young, *supra* note 19, at 471–72.

Young's theory, however, that the federal courts would be free to use their own judgment about the content of customary international law only in limited circumstances. In the absence of a federal choice-of-law rule, the federal courts would have to apply the choice-of-law rules of the State in which it sits. If the applicability of customary international law were a matter of State choice of law, then a federal court would not be free to apply customary international law if the State in which it sits has rejected the application of such law, as the citizens of Oklahoma have done. Additionally, if the State's "choice" to apply customary international law were expressly made contingent on a particular interpretation of such law, the federal court would appear to be bound by that interpretation. At the other end of the spectrum, the federal courts would be able to apply their own interpretation of customary international law if the State has made clear that it is incorporating or has chosen to apply the correct interpretation of such law (and if the State courts have not yet interpreted the particular norm involved). In my view, the federal courts could also defensibly apply their independent judgment regarding the content of the international law norm if the State has not specified a special choice-of-law rule for conflicts between State law and customary international law. The rationale would be that (a) horizontal choice-of-law rules are inapposite and (b) presumptive incorporation of customary international law as State law can be assumed, in the absence of explicit State rejection of such law, on the theory that such law was incorporated as English common law at the time of the Founding. Even in such circumstances, however, Young's theory appears to require the conclusion that the States would be free to reject an interpretation of customary international law by the federal courts, even the Supreme Court, either by legislation or judicial decision, and once the State has done so, the federal courts would thereafter be bound to follow the state courts' interpretation.⁴³³

433 Young suggests that, if a basis of jurisdiction other than "arising under" jurisdiction existed (for example, diversity), the Supreme Court could take cases to review issues of customary international law. *See id.* at 500. Presumably, Young means that the Supreme Court can review such cases when they arise in the lower federal courts, as the Supreme Court lacks jurisdiction to review cases from the State courts on the basis of diversity. *See* 28 U.S.C. § 1257 (2006). If Young does have Supreme Court review of State court decisions in mind, Congress would have to pass a statute authorizing such review on the basis of diversity. But if Congress were concerned enough about customary international law to warrant such a statute, it would presumably be concerned enough about State interpretations of customary international law to declare such law (or perhaps certain norms of customary international law, or norms meeting certain requirements of clarity or acceptance) to be preemptive federal law. Congress would clearly have the power to do so under the Offenses Clause, and this

v. Summary

Young's proposal to employ State choice-of-law rules to determine the applicability of customary international law is problematic because States employ a variety of different approaches to choice of law and most of the States' approaches are highly indeterminate. More fundamentally, such rules are inapposite, as they address horizontal choice-of-law problems. The determinate approaches are thus likely to be useless; the indeterminate ones less so, but only because they essentially leave the question to the unguided discretion of the lower courts. In any event, States would be free to adopt special choice-of-law rules for conflicts involving international law and would be well advised to do so, given the problems with applying horizontal choice-of-law rules. If a State does adopt a special rule to address the applicability of customary international law, it may as well frame the rule as one about the incorporation of customary international law as State law. There would appear to be nothing to gain from employing the choice-of-law terminology, and much confusion to be avoided by abandoning it.

The federal courts could defensibly presume that a State's rule regarding the applicability of customary international law is that of the *Charming Betsy*: such law applies unless the legislature has specifically rejected it. But, if customary international law truly were applicable only through otherwise valid choice-of-law rules, then, to the extent the choice-of-law question were governed by State law, the States would retain the power to reject its application. States would be free to adopt a rule like that approved by the citizens of Oklahoma under which customary international law never applies, and they could even adopt a rule under which ambiguous State laws will be construed whenever possible so as to violate international law. Thus, except to the limited extent that he would recognize federal choice-of-law rules, Young's approach suffers from the same problems as Ramsey's. It merely uses a different vocabulary to avert violations of international law in the absence of clear State decisions to depart from such law.

approach would give the Court power to review cases without regard to diversity while obviating "protective jurisdiction" issues under Article III. That Young is not maintaining that the Supreme Court would be able to review a State court's interpretation of customary international law even in cases falling within Article III's diversity clauses is shown by his statement, discussed in the next subsection, that State courts would retain ultimate authority over the interpretation of customary international law even when federal law requires its application. See Young, *supra* note 19, at 509.

b. Federal Choice-of-Law Rules

Young's approach differs from Ramsey's in that he would recognize certain circumstances in which the applicability of customary international law would be determined by federal law. Young prefers to characterize the role of federal law here as a "federal common law constraint on State choice of law."⁴³⁴ But it would appear to make no difference whether it is characterized that way or instead as a federal choice-of-law rule that displaces the State choice-of-law rule or, indeed, as the federal incorporation of a particular rule of customary international law displacing a contrary State law. However the federal role is characterized, the result is the same: federal law requires the application of customary international law to the dispute.

The irrelevance of the characterization is shown by Young's example of a case in which a court viewed federal law as (possibly) imposing a limit on State choice of law: Chief Judge Hand's opinion in *Bergman v. De Sieyes*.⁴³⁵ As discussed above, Hand in *Bergman* stated that New York law was applicable to the question of a foreign diplomat's immunity, but acknowledged that "an avowed refusal to accept a well-established doctrine of international law, or a plain misapprehension of it, [might] present a federal question."⁴³⁶ While Young regards the role of federal law in the situation described (and left open) by Hand as imposing a limit on State choice of law, it could equally (or more accurately) be characterized as "choosing" international law as the applicable law, or even as incorporating a subset of customary international law as preemptive federal law.⁴³⁷ Indeed, Hand seems to have had the last of these conceptualizations in mind, as he wrote that a "federal question" might be presented in the circumstances he was discussing.

Young does not tell us much about the circumstances in which he would regard it as appropriate for federal law to require application of customary international law, but he does tell us that he regards this outcome as appropriate only in rare circumstances.⁴³⁸ His concession that federal law might sometimes limit the States' freedom not to choose international law comes in his discussion of a diplomat's claim

434 Young, *supra* note 19, at 480.

435 See *id.* at 458, n.479.

436 See *Bergman v. De Sieyes*, 170 F.2d 360, 361 (2d Cir. 1948)

437 See Meltzer, *supra* note 391, at 531 ("[I]nstead of arguing as [Young] does that federal interests shape choice of law rules that sometimes call for application of [customary international law] (for example, of head of state immunity), why not cut out the middleman, and say that federal interests call for application of a substantive rule of immunity as a matter of federal common law?").

438 See Young, *supra* note 19, at 508–09.

of immunity from a State law claim, and his analysis suggests that the possible federal displacement of State choice-of-law rules would have to occur on a retail basis—that is, with respect to particular rules of international law.⁴³⁹ In this respect, his approach differs from the one suggested (but not ruled upon) by Hand, which would apparently have required compliance, as a matter of federal law, with (at least) all “well-established” rules of international law. Young says that any judicially recognized federal rule requiring compliance with customary international law must be “tied closely . . . to specific concerns about preserving political branch control over foreign policy,”⁴⁴⁰ as the *Sabbatino*⁴⁴¹ rule was, and he insists that State rules must apply “unless those rules pose a significant conflict with specific federal interests,”⁴⁴² which is the approach to federal common law contemplated by *United States v. Kimbell Foods, Inc.*,⁴⁴³ a case not involving customary international law.⁴⁴⁴ Young’s treatment of *Sabbatino* as an outer limit, rather than as an example of a more general principle, is questionable given the Court’s indication that the federal common law rule that it articulated and Jessup’s view concerning the status of customary international law were both instantiations of the more general proposition that “legal problems affecting international relations” were a federal matter.⁴⁴⁵ Young’s insistence on application of the *Kimbell Foods* framework for articulating federal common law overlooks his own insight that the modern position, or some variant of it, might be justifiable outside that framework.⁴⁴⁶ As discussed in Part I and by Bellia and Clark, the view that customary international law, or some subset thereof, generally has the force of preemptive federal law can be justified as necessary to preserve federal political branch control over for-

439 See Young, *supra* note 34, at 29 (outlining this point more clearly and arguing that the Supreme Court embraced this view in its decision in *Sosa*).

440 Young, *supra* note 19, at 509.

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

442 Young, *supra* note 19, at 509.

443 440 U.S. 715 (1979). Bradley, Goldsmith, and Moore take a similar position. See Bradley, Goldsmith & Moore, *supra* note 33, at 935–36.

444 See Young, *supra* note 19, at 509; see also Ernest A. Young, *Historical Practice and the Contemporary Debate over Customary International Law*, 109 COLUM. L. REV. SIDEBAR 31, 39–40 (2009), www.columbialawreview.org/Sidebar/volume/109/31_Young.pdf.

445 See *Sabbatino*, 376 U.S. at 425.

446 Cf. Young, *supra* note 19, at 447 (“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.”).

eign policy. The constitutional structure does not require the retail incorporation of customary international law.⁴⁴⁷

Because Young would regard customary international law as “general law” even when federal law requires its application, he maintains that, even then, the Supreme Court would lack jurisdiction to review State court applications of such law, and hence “a [S]tate court would retain independent interpretive authority over that law.”⁴⁴⁸ If so, then there would be a significant difference between a federal choice-of-law rule requiring application of customary international law and a federal incorporation of customary international law as federal law, as clearly the Supreme Court would have jurisdiction to review a State court’s interpretation of customary international law in the latter situation. But it seems to me that, precisely because there is no real difference between the two, the Supreme Court would in fact have jurisdiction to review a State court’s interpretation of customary international law in the former situation. Perhaps the Court would lack the power to review a State court’s interpretation of such law if the only point of the federal choice-of-law rule was to require the States to go through the motions of applying customary international law. But, if the federal government had an interest in having international law applied, its interest would presumably not be satisfied by a State court’s application of some zany interpretation of it. The reasons that Young cites as justifying the adoption of a federal common law choice-of-law rule—such as the “threat to the ability of the federal political branches to conduct foreign affairs”⁴⁴⁹ that would be posed by the court’s failure to apply international law in a given case—would be equally impaired if the State court misapplied such law. Judge Hand appeared to believe that federal jurisdiction would exist if federal law required the States to give effect to “well-established” principles of international law. I agree that the Supreme Court would possess juris-

447 Nor does *Sosa* embrace a “retail incorporation” approach. As discussed above, the issue in *Sosa* was whether to recognize a private right of action, not whether customary international law had the status of federal law. (Indeed, Young himself argues that *Sosa* may well have created a federal right of action for damages for violations of a general law rule. See Young, *supra* note 34, at 31.) Moreover, the Court’s limitation of the right of action to certain rules of customary international law does not reflect an adoption of a retail approach (that is, an approach that applies to individual rules of customary international law). The Court, rather, created a private right of action for all rules meeting certain generally applicable requirements. See *supra* text accompanying note 241. The Court did suggest that it might be appropriate to consider certain case-specific factors, but only to determine whether the action should be allowed to proceed. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004).

448 Young, *supra* note 19, at 509.

449 *Id.* at 480.

diction to review a State court's application of customary international law in such circumstances. In other words, if federal law (however denominated) requires application of a norm of customary international law, the norm is no longer merely "general law."

If Young were correct about the lack of Supreme Court power to review State court interpretations of customary international law, this would count as a substantial point against his approach, both because of the resulting lack of uniformity in the interpretations of international law within the United States and because of the actual violations of international law that would occur. Because the Supreme Court would in fact have the power to review State court applications of customary international law when federal law required its application, Young's approach would actually be less problematic than Ramsey's. This is so because, despite his denial, Young would in fact recognize some preemptive force to customary international law. In my view, he is right to do so, but he does not go far enough. His own structural and doctrinal arguments would support a broader preemptive force for such law than he would recognize.

C. *Aleinikoff's Position*

Dean Aleinikoff is drawn to an intermediate status for customary international law, but he concludes that the particular approaches championed by Young and Ramsey fail on their own terms. He believes that Ramsey's thesis is internally inconsistent and that Young "uses the apparatus of choice of law to rename well-established norms of preemption and supremacy."⁴⁵⁰ Aleinikoff proposes instead that we treat customary international law as "*nonpreemptive, nonfederal law*."⁴⁵¹ Since this characterization would seemingly regard customary international law as even less federal than Ramsey's approach (which purports to treat such law as nonpreemptive *federal law*), one might think that Aleinikoff's proposal poses the same problems as Ramsey's and then some. But, on closer inspection, Aleinikoff's proposal poses problems of an entirely different sort.

For Ramsey, the "nonpreemptive" nature of customary international law meant that it could not be applied if it conflicted with State law. In the face of such a conflict, neither State nor federal courts would be permitted to apply it. Aleinikoff, on the other hand, views his concept of nonpreemptive nonfederal law as being applicable in the federal courts regardless of what State law has to say. For Aleinikoff, customary international law is nonpreemptive only in the

450 Aleinikoff, *supra* note 20, at 96.

451 *Id.* at 97.

sense that it is not applicable in the State courts in the event of a conflict with State law. In other words, customary international law, according to Aleinikoff, “binds federal courts but not state courts.”⁴⁵²

An initial problem with this proposal is that it would reproduce the one aspect of the pre-*Erie* regime that everyone had thought *Erie* had completely ruled out. Under Aleinikoff’s proposal, the law applied in the State courts would differ from that applied in the federal courts. The applicable law would thus turn on “the accident of diversity.”⁴⁵³ (Aleinikoff makes clear that, under his proposal, customary international law would not be federal law for purposes of arising under jurisdiction.⁴⁵⁴)

Aleinikoff appears to regard his regime as being one in which customary international law, as interpreted by federal courts, would effectively “announce the rule for the federal branches,”⁴⁵⁵ whereas the applicability of customary international law to State actors “would be a matter of [S]tate law as to whether and how international law . . . ought to be incorporated.”⁴⁵⁶ But if his proposal is that customary international law would be applicable in federal court but not in State court (unless incorporated by State law), then it would not always apply to federal officials, and it might sometimes apply to the actions of State officials even when State law has not incorporated it. Imagine a suit against a federal official seeking to enjoin conduct that allegedly contravenes customary international law. If customary international law were nonfederal law, such a suit would have to be brought in State court in the absence of diversity.⁴⁵⁷ The federal official would have a right to remove the case to federal court if he raised a federal defense.⁴⁵⁸ Presumably his defense in the typical case would be that a federal statute authorized his conduct. Customary international law would then be invoked by the plaintiff to defeat the defense of justification.⁴⁵⁹ But the official would not be *required* to remove the case. If

452 *Id.* at 99.

453 *See Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496 (1941).

454 *See Aleinikoff, supra* note 20, at 98.

455 *See id.* at 97.

456 *See id.* at 98.

457 *Cf. Westfall Act*, Pub. L. No. 100-694, § 5, 102 Stat. 4563, 4564 (1988) (codified at 28 U.S.C. § 2679(b)(1) (2006)) (“Any other civil action or proceeding *for money damages* arising out of or relating to the same subject matter against the employee or the employee’s estate is precluded without regard to when the act or omission occurred.” (emphasis added)).

458 *See Mesa v. California*, 489 U.S. 121, 129 (1989) (citing 28 U.S.C. § 1442(a) (1988)).

459 One possible problem with this argument is that customary international law, even under the modern position, does not necessarily trump federal statutes. *See*

a federal court but not a State court would apply customary international law, the officer might well prefer to stay in State court. If the State court declined to apply customary international law and ruled in favor of the officer, Aleinikoff would apparently not permit Supreme Court review, as the petitioner's claim would be that the officer violated customary international law, and such law (in Aleinikoff's view) is nonfederal.⁴⁶⁰

Conversely, consider an action against a State official alleging that State conduct violates customary international law. Such an action could be commenced in federal court if the plaintiff were from a different State, or if the claim under customary international law were pendent to a federal claim. Under *Pennhurst State School & Hospital v. Hoffman (Pennhurst II)*,⁴⁶¹ an action seeking to enjoin such conduct would have to be dismissed on Eleventh Amendment grounds,⁴⁶² but courts have held that the Eleventh Amendment does not bar damage suits in federal court against State officials for violations of State law.⁴⁶³ Moreover, the compatibility of State law with customary international law could arise in an action between private parties, and if the parties were diverse, the issue could be adjudicated in federal

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 115 reporters' note 4 ("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. But customary law is made by practice, consent, or acquiescence of the United States, often acting through the President, and it has been argued that the sole act of the President ought not to prevail over a law of the United States." (citations omitted)). But Aleinikoff would permit later-in-time custom to prevail over federal statutes. See Aleinikoff, *supra* note 20, at 100. In the more common case of earlier-in-time custom, Aleinikoff is presumably contemplating its application via the *Charming Betsy* presumption. Cf. *id.* at 99.

460 If the State court were likely to apply customary international law to the case, then the officer would presumably remove the case to federal court. If the likelihood that the State court would apply international law were uncertain, the officer might decide to take his chances in State court. If the State court did ultimately apply customary international law but ruled against the officer, Aleinikoff would apparently not permit an appeal to the Supreme Court.

461 465 U.S. 89 (1984).

462 See *id.* at 101-02.

463 See *Pena v. Gardner*, 976 F.2d 469, 473-74 (9th Cir. 1992); see also *Pennhurst II*, 465 U.S. at 111 n.21 (clarifying that *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), held that cases seeking damages against individual officers do not necessarily implicate relief against the sovereign); PAUL M. BATOR ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1203 (3d ed. 1988) (noting that *Pennhurst II* left open the issue of whether State officials could be sued in federal court for damages resulting from State law violations).

court. In addition, in a case challenging State law as a violation of a federal statute or constitutional provision, a claim under customary international law could be added as a pendent claim, or customary international law could be brought in by way of the *Charming Betsy* presumption to aid in the application of the relevant federal law, as Aleinikoff proposes.⁴⁶⁴ Thus, if customary international law were applicable in federal court even when it conflicts with State law, it would control the validity of State action in some circumstances.

For this reason, Aleinikoff's statement that customary international law would be "nonpreemptive" is inaccurate. Customary international law would serve to preempt State law in cases in which federal jurisdiction could be established on the basis of diversity of citizenship or when the customary law claim is pendent to a federal claim. Thus, he is wrong to claim that his proposal does not "rais[e] serious federalism issues."⁴⁶⁵ Admittedly, such issues would arise only in some cases, probably few—but that itself is a significant problem with the proposal, as the applicability of customary international law would depend on the fortuity of federal jurisdiction.

At the same time, in cases outside the federal courts' diversity or supplemental jurisdiction (which would probably be most cases against State actors), Aleinikoff's proposal would relegate the enforcement of customary international law against the States to the States themselves, which would be free to declare such law completely inapplicable, as the citizens of Oklahoma have done, and could even adopt a reverse-*Charming Betsy* rule. In this respect, Aleinikoff's proposal is open to the same objection as Ramsey's. Aleinikoff acknowledges that some might think that his proposal "renders [customary international law] useless where it is most needed."⁴⁶⁶ As noted above, the Founding generation was most concerned about violations of international law *by the States*, yet Aleinikoff's proposal is designed to leave it to the States to determine the applicability of customary international law to the States (although it would not quite accomplish this).⁴⁶⁷

464 See Aleinikoff, *supra* note 20, at 99.

465 See *id.* at 100.

466 *Id.* at 99.

467 To be sure, Congress could cure this problem, as well as the "accident of diversity" problem, by conferring exclusive jurisdiction on the federal courts in all cases raising claims under customary international law. As discussed above, such a statute could be upheld, under current doctrine, even if customary international law were not regarded as self-executing federal law. See *supra* text accompanying notes 45–56. In Aleinikoff's view (unlike Young's and Ramsey's) the federal courts would not be bound by the States' contrary interpretations of such law. Thus, a bare grant of juris-

In response to this objection, Aleinikoff explains that “nothing in [his] understanding of [customary international law] argues against the existence of federal common law relating to foreign affairs.”⁴⁶⁸ And this federal common law of foreign affairs, which would be “binding on [S]tate courts,”⁴⁶⁹ could include some norms of customary international law. In his view, “[customary international law] and federal common law cases involving foreign affairs are overlapping . . . categories.”⁴⁷⁰ Aleinikoff does not develop a theory of federal common law to guide the courts in determining which norms of customary international law properly have that status. He tells us that “not all” such norms do,⁴⁷¹ but, as noted above, defenders of the modern position do not contend otherwise. Thus, Aleinikoff’s position may amount to a theory for making customary international law applicable in the courts even when it lacks the force of preemptive federal law under the modern view. If so, then, far from being an intermediate position, it would be an expansion of the role of customary international law in the U.S. legal system beyond that entailed by the modern position.⁴⁷²

If relatively few norms of customary international law would emerge with federal common law status under Aleinikoff’s approach to federal common law, then his proposal would be quite similar to Young’s.⁴⁷³ Both Aleinikoff and Young tell us, in the end, that the applicability of customary international law turns on State law except when federal law requires its application. While Young envisions a very restricted role for federal law, Aleinikoff seems open to a broader federal role. To the extent that Aleinikoff would base the preemptive force of some customary international law on the existence of a “federal common law of foreign relations” having its source in the consti-

dition over such cases would establish a regime much like the modern position. But this result could be achieved only through congressional action. The problem under discussion arises only when Congress has not acted, as no one doubts that Congress could enact the modern position by legislation.

468 See Aleinikoff, *supra* note 20, at 99–100.

469 *Id.* at 100.

470 *Id.*

471 See *id.* at 97.

472 Aleinikoff recognizes that his proposal would go beyond the modern position in at least one respect: he would permit later-in-time customary international norms to trump federal statutes and treaties. See *id.* at 100; *supra* note 459.

473 Aleinikoff’s proposal would not suffer from the problems discussed above that result from Young’s proposal to use choice-of-law rules to determine the applicability of customary international law. On the other hand, Young’s proposal does not suffer from the *Erie* problem that afflicts Aleinikoff’s proposal.

tutional structure, his position resembles that of Professors Bellia and Clark, which I examine next.

D. *The Bellia-Clark Position*

In light of the revisionists' heavy reliance on the work of Professor Bradford Clark, the recent contribution to this debate of Professors Clark and Bellia holds special interest. Clark pioneered the "Supremacy Clause exclusivity" critique of federal common law that some revisionists have found compelling.⁴⁷⁴ On this view, the three categories of federal law listed in the Supremacy Clause are the sole categories of preemptive federal law envisioned by the Constitution. The argument relies on constitutional structure as well as text. Clark's claim is that the process for making the three forms of federal law was intentionally made difficult in order to protect the States from having their laws displaced. Thus, Article I's bicameralism and presentment requirements for the making of federal statutes serve as a procedural safeguard of federalism, as do Article II's requirement of two-thirds Senate consent for making treaties and Article V's onerous requirements for amending the Constitution. The central role given to the Senate in each situation reflects the federalism purpose underlying these requirements, as the Founders regarded the Senate as the body most responsive to State concerns. On this view, the trouble with federal common law—understood as "federal rules of decision whose content cannot be traced directly by traditional methods of interpretation to federal statutory or constitutional commands"⁴⁷⁵—is that the process for making it evades the Constitution's onerous and carefully wrought procedures for preempting State law.⁴⁷⁶ The revisionists apply this general critique of federal common law to the more specific

474 See Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1273–74 (1996) ("For the political safeguards of federalism to function effectively, the federal government must adhere closely to the detailed procedures required for the adoption of positive federal law—most notably, the requirements of bicameralism and presentment."). For a more recent elaboration of these arguments by Clark, see Clark, *supra* note 24, at 1328–46. Of the revisionists, Young relies on this argument most heavily, see *supra* text accompanying note 372, but Bradley and Goldsmith invoke it as well, albeit without attributing the argument to Clark, see Bradley & Goldsmith, *Critique*, *supra* note 9, at 868; see also RAMSEY, *supra* note 17, at 289–90 (articulating a similar view). For a critique of this view, see Monaghan, *supra* note 167.

475 HART & WECHSLER, *supra* note 55, at 607.

476 Once State law has already been preempted, the carefully wrought procedures for making federal law will actually make it difficult to devolve power to the States. See Vázquez, *supra* note 116. However, in the beginning, the procedures did operate to protect State law from being preempted.

argument that customary international law has the status of federal common law.

In their recent contribution to the customary international law debate, Bellia and Clark begin by agreeing with the revisionists that customary international law is not, as such, made preemptive of State law by the Supremacy Clause.⁴⁷⁷ They stress that the frequent statements in pre-Independence British sources that the law of nations was part of the law of the land did not necessarily mean that it was superior to other parts of the law of the land.⁴⁷⁸ In fact, they point out, parts of the law of nations, such as the law merchant, were understood to be subject to local variation.⁴⁷⁹ Thus, the new nation's inheritance of that principle from England does not have implications for its place in the hierarchy of domestic law. They also agree with the revisionists that Article III does not give the federal courts the power to articulate and enforce norms of customary international law as preemptive federal law.⁴⁸⁰

Bellia and Clark go on to argue, however, that a subset of the law of nations was deemed applicable in the courts on a completely different rationale. Specifically, "history and structure demonstrate that courts have applied certain principles derived from the law of nations as a means of upholding the Constitution's allocation of foreign affairs powers to Congress and the President—in particular, the powers to recognize foreign nations and decide questions of war and peace."⁴⁸¹ The portion of the law of nations that was considered judicially enforceable on this theory was the portion that gave rise to "perfect rights"—that is, rights of sovereigns whose violation was regarded as a just cause for war.⁴⁸² The sources cited by Bellia and Clark estab-

477 See Bellia & Clark, *supra* note 21, at 34–37.

478 See *id.* at 39.

479 See *id.* at 20.

480 See *id.* at 39.

481 *Id.* at 7.

482 See *id.* at 17. They trace the concept of "perfect rights" to Vattel and other writers on the law of nations. See JEAN JACQUES BURLAMAQUI, *THE PRINCIPLES OF NATURAL AND POLITIC LAW* 173 (Thomas Nugent trans., Cambridge, Univ. Press 4th ed. 1792) (1747 & 1751); ALBERICO GENTILI, *DE IURE BELLI LIBRI TRES* 106 (John C. Rolfe trans., Clarendon Press 1933) (1612); G.F. DE MARTENS, *SUMMARY OF THE LAW OF NATIONS, FOUNDED ON THE TREATIES AND CUSTOMS OF THE MODERN NATIONS OF EUROPE* 273 (William Cobbett trans., Phila., Thomas Bradford 1795); SAMUEL PUFENDORF, *DE JURE NATURAE ET GENTIUM LIBRI OCTO* 127 (C.H. Oldfather & W.A. Oldfather trans., Clarendon Press 1934) (1688); EMMERICH DE VATTTEL, *THE LAW OF NATIONS* 145 (Joseph Chitty ed., Philadelphia, T. & J.W. Johnson & Co. 1883) (1758); CHRISTIAN WOLFF, *JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM* 43–108 (Joseph H. Drake trans., Clarendon Press 1934) (1764).

lish that the Constitution presumptively requires adherence to these norms in order to avoid triggering foreign conflict. “The law of nations supplied a well-known set of default rules relating to perfect rights that would have informed the Founders’ understanding of the federal political branches’ recognition and war powers.”⁴⁸³

Bellia and Clark acknowledge that “[n]one of [the early] cases expressly involved preemption of [S]tate law; in each, the federal court exercised exclusive jurisdiction, and [S]tate law did not purport to provide a conflicting rule of decision.”⁴⁸⁴ But their theory clearly requires the conclusion that State laws in conflict with the relevant rules of customary international law infringe the federal political branches’ exclusive powers over recognition and war and peace and thus may not be enforced. “Were . . . states free to disregard perfect rights, they could trigger a war and usurp the political branches’ exclusive powers over war and peace.”⁴⁸⁵ The allocation of such powers to the federal government is, on the Bellia-Clark view, a feature of the Constitution, and, of course, “[t]he Constitution preempts conflicting [S]tate law.”⁴⁸⁶ Thus, Bellia and Clark conclude that, in these early cases, “[b]y reasoning that the constitutional allocation of powers required adherence to certain principles of the law of nations, the Court laid the groundwork for its future holding [in *Sabbatino*] that such principles apply in both [S]tate and federal court, and even in the face of contrary [S]tate law.”⁴⁸⁷

Because the preemptive force of (some) customary international law is based on an inference from the Constitution itself, the Bellia-Clark argument is consistent with Clark’s “Supremacy Clause exclusivity” argument. The “Supremacy Clause exclusivity” objection to federal common law has traction only to the extent that the preemptive force of such law cannot be traced to one of the categories of federal law listed in the Supremacy Clause. But much of what is often regarded as (illegitimate) federal common lawmaking can be justified as (legitimate) statutory or constitutional interpretation. Clark recognized this point in developing his original critique of federal common law,⁴⁸⁸ and his work with Bellia on customary international law fits comfortably within this tradition.

Bellia and Clark do not fully work through the implications of their historical research for the modern debate about the status of

483 Bellia & Clark, *supra* note 21, at 46.

484 *Id.* at 75.

485 *Id.* at 59.

486 *Id.* at 75.

487 *Id.* at 58. Their treatment of *Sabbatino* is discussed below.

488 See Clark, *supra* note 474, at 1289.

customary international law. They “do[] not attempt to resolve all questions regarding the status of customary international law in U.S. courts,” and they “take no position on how courts should treat numerous modern rules of customary international law unknown to the Founders.”⁴⁸⁹ But they do not deny that their thesis would support many features of that position. In my view, their structural argument broadly supports the modern position.

Bellia and Clark argue only that a subset of the law of nations, as known to the Founders and the early Court, was thought to provide a default rule against which to measure intrusions on the federal government’s exclusive powers of recognition and war. This subset consisted of norms that created “perfect rights,” meaning norms whose violation justified resort to war by offended nations.⁴⁹⁰ The fact that only a subset of the law of nations was covered might be thought inconsistent with the claim—often attributed to defenders of the modern position—that all of modern customary international law has the status of preemptive federal law. But, on closer inspection, the Bellia-Clark position may be consistent with even that broad claim. As Bellia and Clark explain, the law of nations was thought, in the Founders’ time, to include the law merchant and general commercial law, as well as what Bellia and Clark call the law of state-to-state relations. Although they do not say so clearly, it appears that Bellia and Clark equate the portion of the law of nations that gave rise to “perfect rights” with the portion of the law of nations that regulated state-to-state relations.⁴⁹¹ When Bellia and Clark note that not all of the law of nations was thought to have the preemptive force they claim for “perfect rights,” they appear to be excluding only the law merchant and general commercial law—which, as they show, was always thought to be subject to local variation.⁴⁹² As already noted, these latter branches of the old law of nations are today not regarded as public international law at all; rather, they are considered part of the conflict of laws

489 Bellia & Clark, *supra* note 21, at 90.

490 *See id.* at 17

491 *See id.* at 20, 24–26, 38, 41, 42, 56–58. They suggest that the role of the courts was understood to be only to protect the perfect rights of *foreign* nations. This possible limitation on the context in which the law of state-to-state relations was regarded as enforceable and preemptive federal law is discussed below.

492 *See id.* at 15, 20–22; *see also* H.W. HALLECK, ELEMENTS OF INTERNATIONAL LAW AND LAWS OF WAR 130, 134 (Philadelphia, J.B. Lippincott & Co. 1866) (citing as examples of “imperfect” duties “the ordinary duties of comity [and] of diplomatic and commercial intercourse”). By “diplomatic . . . intercourse,” Halleck means “those of sending and receiving diplomatic legation,” which are “at most *imperfect* obligations.” *See id.* at 134. Today, there is no international law duty to send or receive a diplomatic legation.

or merely domestic law. Defenders of the modern position do not claim that these norms have the status of preemptive federal law.⁴⁹³

The precedents discussed by Bellia and Clark might be thought irrelevant to the modern debate for a different reason. Their argument regarding the preemptive force of norms conferring perfect rights appears to depend on the notion that, under the law of nations as it then prevailed, violation of public rights was a just cause for initiating war. This is, indeed, the rationale for regarding violations of such norms to be an intrusion into the political branches' exclusive war powers. Today, however, international law forbids the use of force to resolve international disputes. The use of force is permitted only in self-defense or if authorized by the Security Council (in which the United States holds a veto).⁴⁹⁴ It is thus no longer the case that the United States' breaches of other nations' rights under international law will justify the use of force against the United States by those nations. Moreover, it might be argued that, given the United States' superior military power, the use of force by other nations against the United States is, in any event, highly unlikely today. Thus, to the extent that the historical argument rests on the allocation of the war power to Congress and the idea that breaches of perfect rights justified war, it may be thought to be irrelevant to modern conditions.

But Bellia and Clark do not rely solely on the federal government's exclusive power over war and peace. They also invoke the exclusive recognition power, which is itself an inference from the allocation to the President of the power to send and receive ambassadors.⁴⁹⁵ Since territorial sovereignty is an incident of state sovereignty, any state action that interfered with such sovereignty would be in conflict with the federal government's decision to recognize a foreign state as a state in the international sense. More broadly, Bellia and Clark write:

[T]he Constitution assigns the power to send and receive ambassadors to the President and the Senate. This power cannot be under-

493 See also *infra* text accompanying notes 495–96 (noting that, to the extent that Bellia and Clark rely on the federal government's exclusive recognition power, their argument would seem to extend to the state-to-state branch of the law of nations in its entirety).

494 See U.N. Charter art. 2, para. 4; *id.* art. 51; *cf. id.* art. 27 (regarding the Security Council veto).

495 See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 204 cmt. a (1987) (stating that the President's recognition power "is implied in the President's express constitutional power to appoint Ambassadors (Article II, Section 2) and to receive Ambassadors (Article II, Section 3), and his implied power to conduct the foreign relations of the United States").

stood without reference to what it meant to recognize another nation at the founding. Recognition implied that the United States would respect the rights of the state in question under the law of nations.⁴⁹⁶

On this theory, the act of recognizing a foreign state implicitly incorporates the state's rights vis-à-vis the United States under international law, not just those whose violation justifies the use of force. If so, then all violations of international legal rights of recognized foreign states would be preempted, not just those that justified war.

Additionally, it might be argued that violations of other states' rights under international law are preempted because they threaten forms of retaliation not involving the use of military force, to the ultimate detriment of the nation as a whole. There is an obvious structural reason to deny a single State the power to impose these costs on the nation as whole, as the Founders recognized. Even if such violations do not threaten military invasion, they produce international friction, which, in turn, makes it more difficult for the federal government to accomplish its foreign relations objectives through the negotiation of treaties or simply through diplomacy. This argument for regarding State laws violating customary international law as preempted by the constitutional structure is less directly linked to an exclusive federal power expressly in the Constitution's text than the "perfect rights" argument is to the war power. But the Constitution's allocation to the federal government of the power to send and receive ambassadors and the power to make treaties might be thought to imply an exclusive federal power to determine whether our relations with other nations shall be friendly or hostile. This may be what *Bellia* and *Clark* have in mind when they refer to the federal government's exclusive foreign affairs power.⁴⁹⁷

The argument that State violations of the state-to-state branch of the law of nations are preempted because they interfere with the federal government's exclusive power over foreign relations is essentially the structural argument for the modern position discussed in Part I. So understood, the allocation-of-powers rationale for regarding State violations of customary international law to be preempted might be thought to prove too much, as it would suggest that all State acts that are unfriendly to foreign nations or would otherwise produce international friction are preempted. Indeed, the *Bellia-Clark* argument has obvious affinities to the much-maligned dormant foreign affairs ratio-

496 *Bellia & Clark*, *supra* note 21, at 89.

497 *See id.* at 28–29.

nale of *Zschernig v. Miller*.⁴⁹⁸ In that case, the Supreme Court found an Oregon statute to be invalid as an unconstitutional interference with the federal government's exclusive power to conduct foreign relations. What exactly about the State law made it invalid on this ground the Court did not make entirely clear, and *Zschernig* has been criticized as overbroad by many of the same scholars who have advanced revisionist views of the status of customary international law.⁴⁹⁹ Certainly, the broad claim that all State conduct that has an effect on foreign relations is preempted would invalidate too much State conduct that has traditionally been regarded as proper. In today's globalized world, almost everything that States do has at least an incidental effect on foreign relations.⁵⁰⁰ *Zschernig* remains the only case to find a State law invalid on dormant foreign relations grounds and scholars have suggested that it would not be followed today.⁵⁰¹

On the other hand, *Zschernig* has not been overruled. I have argued elsewhere that the decision's basic insight that some State action is invalid because it unduly interferes with the federal government's exclusive power to conduct foreign relations is sound.⁵⁰² The challenge is to transform that insight into workable doctrine. In *American Insurance Ass'n v. Garamendi*,⁵⁰³ the majority and dissenting opinions offered competing limiting constructions of the decision. Justice Souter, for the majority, proposed that *Zschernig* be read to establish a rule of "field preemption"⁵⁰⁴ for State conduct outside areas of traditional State regulation, but a rule of "conflict preemption" for State conduct within such areas.⁵⁰⁵ Justice Ginsburg, for the dissenters, proposed limiting *Zschernig* to State laws that "reflect[] a State policy critical of foreign governments and involve[] sitting in judgment on

498 389 U.S. 429 (1968). Bellia and Clark acknowledge the relevance of *Zschernig* in a footnote. See Bellia & Clark, *supra* note 21, at 91 n.489.

499 See Bradley & Goldsmith, *Critique*, *supra* note 9, at 865; Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1631 (1997); Ramsey, *supra* note 17, at 563–70; Young, *supra* note 444, at 36–37; Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 NOTRE DAME L. REV. 341, 357–65 (1999).

500 Young makes this point forcefully. See Young, *supra* note 19, at 420–23.

501 See Bradley & Goldsmith, *Critique*, *supra* note 9, at 865; Ramsey, *supra* note 17, at 563. But cf. Bellia & Clark, *supra* note 21, at 91 n.489 ("[T]he rationale for constitutional preemption in *Zschernig* is an extension of the rationale for preemption in *Sabbatino*.").

502 See Vázquez, *W(h)ither Zschernig?*, *supra* note 86, at 1268, 1318.

503 539 U.S. 396 (2003).

504 See *id.* at 419 n.11.

505 See *id.* at 419.

them.”⁵⁰⁶ I have proposed a construction similar to Ginsburg’s, under which State laws that single out foreign states or groups of states for adverse treatment would be preempted.⁵⁰⁷ Any of these possible rules would be workable doctrinal manifestations of *Zschernig*’s insight that the Constitution’s structure—specifically, its allocation of the power to conduct foreign relations exclusively to the federal government—implicitly preempts State laws or conduct that unduly interfere with such relations. The view that State law or conduct that violates customary international law is similarly preempted might be regarded as an additional doctrinal manifestation of this structural principle—a manifestation that, as Bellia and Clark have demonstrated, has a strong historical pedigree.

Bellia and Clark clearly do not regard the structural argument for according preemptive force to some customary international law to be dependent on the allocation of the war power to the federal government, or the fact that international law once authorized the use of force in response to violations, as they argue that the Supreme Court’s act-of-state decision in *Sabbatino* rests on this very structural argument. By the time *Sabbatino* was decided, international law no longer countenanced the use of force in response to breaches of international law by other nations.⁵⁰⁸ Noting that “[r]ules like the act of state doctrine have deep roots in the traditional perfect right of territorial sovereignty under the law of nations,”⁵⁰⁹ Bellia and Clark argue that *Sabbatino* “is best understood overall as a consequence of the Constitution’s allocation of foreign affairs powers to the political branches of the federal government.”⁵¹⁰ Indeed, they regard *Sabbatino* as making explicit for the first time what was implicit in the earlier cases: that customary norms giving rise to perfect rights of foreign states preempt State law.⁵¹¹

As a manifestation of the Bellia-Clark allocation-of-powers rationale for according preemptive force to (some) customary international law, *Sabbatino* poses serious challenges. The Court did hold that the act-of-state doctrine has its basis in domestic separation-of-powers principles, and it also held that this doctrine was binding on the States. But, as Bellia and Clark note, the Court recognized that the act-of-state doctrine was not itself a principle of international

506 See *id.* at 439 (Ginsburg, J., dissenting) (quoting HENKIN, *supra* note 230, at 164) (internal quotation marks omitted).

507 See Vázquez, *W(h)ither Zschernig?*, *supra* note 86, at 1321.

508 The U.N. Charter came into force in 1945. *Sabbatino* was decided in 1964.

509 Bellia & Clark, *supra* note 21, at 85 n.459.

510 *Id.* at 84.

511 See *id.* at 87.

law.⁵¹² Sovereign states did not have a perfect right to have foreign courts give unquestioning effect to all of their public acts performed within their territory. Thus, as Bellia and Clark note, the Court in *Sabbatino* “gave foreign sovereigns *greater* protection than they enjoyed under customary international law at the time.”⁵¹³ In this light, *Sabbatino* might be viewed as an allocation-of-powers decision having some parallels to the principle that Bellia and Clark identify (namely, that the constitutional structure prohibits State violation of customary international law conferring perfect rights on foreign sovereigns), but not as a manifestation of that principle. Indeed, *Sabbatino* would appear to be in tension with the latter principle insofar as the Court held that the public acts of foreign states within their own territory may not be challenged in certain circumstances *even if they violate customary international law*.

Bellia and Clark claim that *Sabbatino* is a manifestation of the idea that, because of its allocation of the foreign relations power to the federal government, the Constitution preempts state law that conflicts with certain norms of customary international law but not others. Specifically, they argue that the Supreme Court held that “the Constitution required federal and state courts both to adhere to a rule based on traditional notions of territorial sovereignty (the act of state doctrine), and to disregard a more recent rule of customary international law curtailing territorial sovereignty (the proffered prohibition against discriminatory, uncompensated takings).”⁵¹⁴ But this reading of the case fails to establish that the Court was requiring compliance *with the law of nations*. After all, the second, more recent norm of international law (barring discriminatory or uncompensated takings) purports to be a limitation of the first, older norm of international law (protecting the state’s territorial sovereignty). Together, they tell us that the state’s sovereignty over its own territory *does not* include the right to take the property of foreign nationals in a discriminatory fashion or without providing compensation. If the Court was insisting that federal and State courts give effect to the public acts of foreign states even when international law does not give the States a right to perform such acts, then it was not according preemptive force to any existing rule of international law.

Bellia and Clark seek to avoid this conclusion by arguing that *Sabbatino* “highlights an important point about the interaction of perfect

512 See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421 (1964).

513 Bellia & Clark, *supra* note 21, at 86.

514 *Id.* at 85–86 (footnote omitted).

rights and the Constitution over time.”⁵¹⁵ In their view, the act-of-state doctrine gives preemptive force to some norms of international law conferring rights on foreign states, unmodified by more recent norms of international law that cut back on such rights. They write:

The Court has been willing to add to, but not subtract from, the list of sovereignty-respecting default rules that courts are required to apply in order to uphold the Constitution’s allocation of powers. In *The Schooner Exchange* and *The Paquette [sic] Habana*, the Court augmented the traditional list of perfect rights with later-emerging customs favoring foreign sovereigns—namely, the immunity of foreign warships and fishing boats. Judicial adherence to these customs upheld the Constitution’s allocation of powers in much the same way as judicial adherence to the original perfect rights of sovereigns. In both cases, the rule in question avoided judicial initiation or escalation of hostilities, and thus preserved political branch control over war and peace. In *Sabbatino*, however, the Court refused to depart from a traditional rule of territorial sovereignty (historically regarded as a perfect right), even though the Court acknowledged that the community of nations no longer recognized absolute territorial sovereignty. The Court based this refusal on the Constitution’s allocation of powers as well. In effect, the Court held that any decision to abandon the traditional perfect rights of recognized foreign sovereigns would foster resentment and thus should be made by the political branches rather than the courts or the states.⁵¹⁶

Bellia and Clark here seem to envision a one-way ratchet. New rules of international law that expand the rights of foreign sovereigns are automatically added to the list of international law norms that preempt inconsistent State law, but new rules that restrict such rights do not preempt State law unless incorporated by federal statute or treaty.⁵¹⁷

This rule may or may not be appealing from a structural constitutional standpoint, but it does not capture the Court’s holding or rea-

515 *Id.* at 88.

516 *Id.* at 88–89.

517 Note that, under this theory, the preemptive force of any given norm depends not just on the nature of the norm, but on whom one is seeking to apply it against. A change in international law that expands the rights of foreign states vis-à-vis the United States correspondingly restricts the rights of the United States vis-à-vis foreign states, and vice-versa. Thus, presumably, a norm that restricts territorial sovereignty would be enforceable against the United States (and the States), while a norm that expands the rights of states would be enforceable only insofar as it favors foreign states. This means that a foreign state’s right not to have its citizen’s property taken by the United States without compensation would be enforceable, whereas the United States’ right not to have its citizen’s property taken without compensation would not be.

soning in *Sabbatino*. First, as already noted, it is difficult to read *Sabbatino* as resting on the preemptive force of any rule of international law. The Court itself denied that international law required states to give effect to the acts of other states performed within their own territory.⁵¹⁸ The Court noted that a state's courts are free to decline to give effect to the penal laws of other states.⁵¹⁹ Moreover, it is well accepted that the courts of one state may refuse to give effect to the act of another state performed within its own territory if, for example, that act contravenes the forum state's public policy.⁵²⁰ Since states are free not to give effect to the public acts of other states performed within their own territory even if those acts did not violate international law, it cannot be said that international law gives states a right to have their public acts enforced in other states' courts.

Second, the Court in *Sabbatino* did not hold that all new rules of international law that restrict foreign states' preexisting rights of territorial sovereignty were inapplicable in our courts. It was careful to limit its holding to one particular rule of international law: the one prohibiting the taking of a foreign national's property in a discriminatory fashion or without compensation. It held that norm not to be enforceable in the particular context before it because the norm touched "sharply on national nerves"⁵²¹ and was at the time the subject of considerable controversy in the international legal community, with many capital-importing states denying that it had the force of customary law.⁵²² The Court left open the possibility that a norm lacking these characteristics could be applied by State and federal courts to invalidate an act of a foreign state within its own territory. Thus, the norm's inapplicability did not turn on its age but on other factors.

518 See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421 (1964).

519 *Id.* at 413–14.

520 *Matusevitch v. Telnikoff*, 877 F. Supp. 1, 4 (D.D.C. 1995) (“[L]ibel standards that are contrary to U.S. libel standards would be repugnant to the public policies of the State of Maryland and the United States. Therefore, . . . this court declines to recognize the foreign judgment.”); *Bachchan v. India Abroad Publ’ns Inc.*, 585 N.Y.S.2d 661, 665 (Sup. Ct. 1992) (“The protection to free speech and the press embodied in that amendment would be seriously jeopardized by the entry of foreign libel judgments granted pursuant to standards deemed appropriate in England but considered antithetical to the protections afforded the press by the U.S. Constitution.”); PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES, *CONFLICT OF LAWS* § 24.44 (5th ed. 2010) (“[T]he public policy defense serves as an umbrella for a variety of concerns in international practice which may lead to a denial of recognition [of a foreign judgment]”).

521 See *Sabbatino*, 376 U.S. at 428.

522 See *id.* at 434–35.

As discussed in Part I, *Sabbatino* is best read as holding that norms of international law that do not meet certain standards of clarity or breadth of acceptance lack the force of preemptive federal law insofar as they are sought to be applied to certain acts of foreign sovereigns. The norm that had been invoked to invalidate Cuba's act in *Sabbatino* fell in this category and hence, as a matter of federal law, could not be applied to invalidate Cuba's act. On this view of *Sabbatino*, a norm of international law purporting to limit a foreign state's territorial sovereignty would be cognizable in U.S. courts if it met the Court's standard of clarity and breadth of acceptance, and both federal and State courts would be either permitted or required to apply it to invalidate the foreign state's act.

This seems to me to be the correct reading of *Sabbatino*, but only half of it is supported by the allocation-of-powers rationale for according preemptive force to customary international law. The requirement that foreign acts of state be given effect even if they clash with noncognizable norms of international law is supported by the Bellia-Clark allocation-of-powers principle⁵²³; the (possible) permissibility of invalidating foreign acts of state that clash with cognizable norms of international law is not. It is hard to imagine that the political branches' ability to conduct foreign relations will be significantly hampered by the courts' refusal to invalidate a foreign act on this ground.⁵²⁴ This part of the Court's analysis appears to be grounded instead on countervailing concerns about justice or the rule of law. But the Court's analysis here is *compatible* with the allocation-of-powers rationale that drives the rest of its analysis, the idea being that the political branches' ability to conduct foreign relations will not be unduly undermined by a failure to give effect to foreign state acts that violate clear and broadly accepted norms of customary international law, just as it is not unduly undermined by failure to give effect to foreign state acts performed outside their territory. Consequently, the

523 As discussed above, though, *Sabbatino* does not hold that any particular norm of international law has the force of preemptive federal law. See *supra* text accompanying notes 514–22.

524 This would be true, at least, where international law does not prohibit the United States from acquiescing in another state's violation of international law. For discussion of exceptions to this general rule, see Monica Hakimi, *State Bystander Responsibility*, 21 EUR. J. INT'L L. 341, 342–44 (2010). For a proposal that international law more broadly prohibit third states from actively supporting another state's violations of international law, see Lea Brilmayer & Isaias Yemane Tesfalidet, *Third State Obligations and the Enforcement of International Law*, 43 N.Y.U. J. INT'L L. & POL. (forthcoming 2011) (on file with author).

courts are free to apply such norms to advance the norms' substantive goals.

But the allocation-of-powers rationale would support the conclusion that norms of customary international law—even newly developed ones, and possibly even disputed ones—are applicable and preemptive insofar as they restrict the freedom of action of the United States or the States. Such violations do risk international friction and hence would complicate the federal government's ability to achieve foreign relations goals. If the preemptive force of these norms stems from the allocation of the foreign relations power to the federal government, then clearly these norms can be rendered inapplicable by statute or treaty. The allocation-of-powers rationale might support, but does not necessarily require, the conclusion that the norm is also inapplicable if it clashes with an act of the Executive. Bellia and Clark leave this question for another day.⁵²⁵ As discussed above, there is doctrinal support for some presidential power to override customary international law. But the allocation-of-powers argument tells us that, in the absence of authorization from the relevant combinations of the political branches, all State officials are bound.

E. The Bradley-Goldsmith-Moore Position

It might seem odd to include Bradley and Goldsmith among those proposing an intermediate position, as they spearheaded the revisionist movement. But their post-*Sosa* contribution to the debate, with coauthor David Moore, builds on the suggestion in their original critique of the modern position that it might be proper for the courts to apply customary international law as federal law even without an act of federal lawmaking (of the sort envisioned by the Supremacy Clause) that purports to accord it such status. Responding to scholars who claimed that *Sosa* embraced the modern position, they contend that *Sosa* refutes the claim “that all of [customary international law], ‘whatever [it] requires,’ is automatically incorporated wholesale into post-*Erie* federal common law.”⁵²⁶ But that, of course, leaves open the possibility that *some* customary international law has the status of federal law in the absence of incorporation by federal statute or treaty. Their post-*Sosa* article elaborates on the circumstances in which this might be the case.

⁵²⁵ See Bellia & Clark, *supra* note 21, at 75.

⁵²⁶ See Bradley, Goldsmith & Moore, *supra* note 33, at 902 (second alteration in original) (quoting Brilmayer, *supra* note 88, at 324). As discussed in Part I, *Sosa* does not refute that proposition. See *supra* text accompanying notes 234–72.

This subpart considers the circumstances in which Bradley, Goldsmith, and Moore would accept political branch authorization short of federal statute or treaty to treat customary international law as federal law. Although they insist that the circumstances in which this is proper are few and limited, their rationale for accepting these techniques would appear to extend more broadly.

Some of their examples of permissible applications of customary international law fall in the category of express or implicit incorporation by statute or treaty. For example, they rightly note that all treaties implicitly incorporate the norms of customary international law regarding treaty interpretation, as reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.⁵²⁷ Although these examples are consistent with the revisionist position, others are in tension with it.

First, they recognize that the statute conferring federal jurisdiction over interstate disputes can properly be read to authorize the elaboration of federal common law drawn from customary international law. In the case of interstate disputes, there are “uniquely federal interests derived from the Constitution [that] demand a federal rule,”⁵²⁸ and, in crafting these rules, the Court properly draws upon customary international law because these disputes “are directly analogous to disputes between nations.”⁵²⁹ In distinguishing this rationale for treating some customary international law as federal law from the modern position, Bradley, Goldsmith, and Moore stress that, even before *Erie*, the interstate jurisdiction clause was understood to authorize federal courts to apply federal judge-made rules without legislative authorization, whereas “[f]or over 200 years, courts have not perceived a structural need to apply [customary international law] as federal common law” more generally.⁵³⁰ They argue that the absence of a “long historical pedigree” renders the claim of structural necessity for regarding customary international law as federal law less plausible

527 Vienna Convention on the Law of Treaties arts. 31–32, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331. As Bradley, Goldsmith, and Moore note, this treaty is binding on the United States to the extent it reflects customary law, as the United States is not a party to it. Bradley, Goldsmith & Moore, *supra* note 33, at 921–22. Bradley, Goldsmith, and Moore seem to doubt the propriety of applying the customary international law of treaties to determine whether a treaty exists in the first place. To be sure, it is a stretch to say that the law concerning the existence of a treaty is relevant because it is incorporated into the treaty, when the very question is whether there even is a treaty. On the other hand, such law could easily be understood to be incorporated into the Constitution’s provisions addressing the making of treaties.

528 Bradley, Goldsmith & Moore, *supra* note 33, at 915.

529 *See id.* at 916.

530 *See id.* at 917.

in the latter case.⁵³¹ This argument overlooks the lengthy period before *Erie* in which the federal courts had jurisdiction in virtually all cases implicating customary international law and enforced their own best understanding of what that law required. Although the States were understood to have the power to depart from general commercial law, it was not clear that they were understood to have the power to override the state-to-state portion of the law of nations, and revisionists have not identified examples of the States doing so.⁵³² Given these features of the judicial treatment of customary international law before *Erie*, the “structural necessity” of treating customary international law as federal law as opposed to general law was not apparent until *Erie* interred the general law. Indeed, the long history of treating customary international law as something very different from today’s State law provides its own lengthy pedigree for its status as federal law.

Bradley, Goldsmith, and Moore also accept the federal laws conferring federal jurisdiction over admiralty cases as a source of authority for the articulation of a federal law of admiralty, “a traditional component of the law of nations that was important to the prosperity of the infant United States.”⁵³³ Here, too, they distinguish the broader claim that customary international law should be treated as federal law, noting that the Constitution’s express reference to admiralty is “in notable contrast with the treatment of the law of nations more generally.”⁵³⁴ But the contrast is not very sharp if one considers that the Constitution’s reference to admiralty comes in a jurisdictional provision and that the Founders also conferred jurisdiction on the federal courts over the categories of cases most likely to implicate the law of nations as a means of advancing their “well-documented desire to ensure that [S]tates complied with international law.”⁵³⁵ The grant of federal jurisdiction could be expected to achieve this goal given their understanding that the law of nations would be judicially enforceable, at a minimum, as general law regardless of State or federal incorporation. Bradley, Goldsmith, and Moore are willing to recognize that admiralty law has the status of federal law today even though, as they note, it was clearly held not to be federal law before *Erie*.⁵³⁶ For the reasons discussed by Bellia and Clark, the structural

531 *See id.* at 918.

532 *See supra* text accompanying notes 479–87, 491.

533 *See* Bradley, Goldsmith & Moore, *supra* note 33, at 918.

534 *See id.*

535 *See id.* at 883.

536 *See id.* at 892.

and historical case for treating the state-to-state branch of the law of nations as federal law is, if anything, stronger.⁵³⁷

Finally, and perhaps most illuminatingly, Bradley, Goldsmith, and Moore are willing to accept the federal status of some norms of customary international law if “incorporated” into U.S. law by the executive branch.⁵³⁸ As an example, they offer the norms regarding immunity for foreign states and heads of state. Before *Erie*, the courts applied these norms of customary international law as general law without authorization. At around the time that *Erie* was decided, the Supreme Court indicated that the courts were to regard case-specific executive branch statements regarding immunity as binding, and, in cases in which the executive branch had not expressed an opinion, the courts were to apply the principles of customary international law on immunity that the executive branch had accepted.⁵³⁹ In 1976, Congress codified the international law concerning the immunity of foreign states in the FSIA, but the Act is unclear regarding its applicability to heads of state or foreign officials generally.⁵⁴⁰ According to Bradley, Goldsmith, and Moore, of the courts that read the FSIA not to cover the immunity of heads of state, “some recognize [the] immunity only in the face of an explicit suggestion of immunity by the Executive,” whereas “[o]thers rely on the lack of an executive branch suggestion simply as a factor weighing against immunity.”⁵⁴¹ All, however, look for executive branch authorization “at least to some degree.”⁵⁴²

It is surprising that scholars who object to free-wheeling federal common lawmaking would be so receptive to the incorporation of customary international law into federal law by the executive branch acting alone. After all, the main objection to federal common lawmaking is that it evades the carefully wrought procedures set forth

537 See also Bederman, *supra* note 64, at 348 (“To suggest . . . that originalist grounds for exceptionalism in admiralty as ‘law of the land’ are stronger than the constitutional basis for disputes arising under the law of nations seems wholly extravagant. Put another way, there seems to be no sensible originalist argument for according [the general maritime law] greater jurisprudential status than [customary international law].”).

538 See *id.* at 935–36.

539 See *id.* at 922–23.

540 See *id.* The Court has since held that the FSIA does not address the immunity of foreign state officials. See *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010).

541 *Id.* at 924.

542 *Id.*

in the Constitution for making preemptive federal law.⁵⁴³ As explained above, the claim is that the hurdles that must be overcome to make federal law were put in place to protect the States from having their laws displaced too easily. From this perspective, “lawmaking” by the executive branch acting alone should be similarly problematic, as it does not satisfy the bicameralism requirement for federal statutes or the requirement of Senate consent to treaties.⁵⁴⁴ To attribute the preemptive force of these norms to ad hoc executive branch decision-making seems more offensive to rule-of-law values than a more generally applicable structural argument for preemption, as a retail executive incorporation regime would transform the federal courts into the federal Executive’s errand boys.⁵⁴⁵

Executive branch incorporation of customary international law with respect to the subset of customary international law that relates to the immunity of foreign states and officials (including heads of state) might perhaps be defended as an exercise of the President’s constitutional authority to send and receive ambassadors, which has been construed to give the President the power to recognize foreign states and governments as well. This recognition power has been acknowledged as the source of the President’s power to enter into executive agreements that have the force of preemptive federal law without the consent of the Senate.⁵⁴⁶ But revisionists have criticized these decisions, too, as incompatible with the aspects of the constitu-

543 See Clark, *supra* note 474; Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1 (1985); Thomas W. Merrill, *The Judicial Prerogative*, 12 PACE L. REV. 327 (1992).

544 See Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573, 1597–1607 (2007).

545 Justice Douglas used the “errand boy” language in his concurrence in *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 773 (1972) (Douglas, J., concurring in the result). A majority of the Court in that case rejected the *Bernstein* exception, under which the applicability of the act-of-state doctrine would turn on the Executive’s case-by-case determination that adjudicating the case under international law would not harm the nation’s foreign relations interests. See *id.* at 772–73; *id.* at 773 (Powell, J., concurring in the judgment); *id.* at 776–77 (Brennan, J., dissenting). The *Bernstein* exception takes its name from *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 173 F.2d 71 (2d Cir. 1949), *mandate amended by* 210 F.2d 375 (2d Cir. 1954), and *Bernstein v. Van Heyghen Freres Societe Anonyme*, 163 F.2d 246 (2d Cir. 1947).

546 See *United States v. Pink*, 315 U.S. 203, 229 (1942); *United States v. Belmont*, 301 U.S. 324, 330 (1937).

tional structure that they assert are offended by according federal status to customary international law.⁵⁴⁷

An alternative explanation of the immunity decisions would be to read them as assuming that customary international law has the force of federal law for structural reasons, but that the courts are to hew closely to the executive branch's positions out of deference to its superior expertise and responsibilities in this area. The proper scope and contexts of judicial deference to the Executive on questions of customary international law are beyond the scope of this Article. The Court does not accord nearly as much deference to the Executive in other contexts. For example, in the context of the act-of-state doctrine, the Court has refused to treat the views of the Executive regarding the content of international law as binding.⁵⁴⁸ But perhaps a more deferential approach is warranted for the immunity issue because it bears upon jurisdiction rather than the merits, or because immunity is more closely tied to the President's recognition power.⁵⁴⁹

The recent *Samantar* decision may suggest that the Court favors an executive incorporation approach with respect to immunity issues. As discussed above, the executive branch there argued that foreign officials were entitled to a "common law" immunity whose contours were to be determined by reference to "[p]rinciples adopted by the Executive Branch, informed by customary international law."⁵⁵⁰ The Court agreed that the immunity of foreign officials was "governed by the common law."⁵⁵¹ Although it did not discuss the content or status of this immunity, it did describe the pre-FSIA regime as one in which the courts followed the executive branch's case-specific suggestions of immunity and, if the executive branch declined to express its views on the case, "a district court inquired 'whether the ground of immunity is one which it is the established policy of the [State Department] to

547 See Young, *supra* note 19, at 415–17, 432; see also Clark, *supra* note 544, at 1647–48 (arguing that the Court's modern reliance on *Belmont* and *Pink* to support an expansive view of sole executive agreements is mistaken).

548 See *supra* note 214.

549 The greater deference that the courts gave to the executive branch on questions of immunity in the pre-FSIA era may also have stemmed from the unsettled nature of the relevant international law at the time, which was moving from a rule of absolute immunity to one of restrictive immunity. See Yelin, *supra* note 85. As discussed below, it is appropriate for the courts to follow the executive branch's views with respect to norms of international law that are unsettled or evolving, as the executive branch speaks for the nation on the international plane regarding how such law should develop. See *infra* text following note 608.

550 See Brief for the United States as Amicus Curiae Supporting Affirmance, *supra* note 196, at 8.

551 See *Samantar v. Yousuf*, 130 S. Ct. 2278, 2284 (2010).

recognize.’”⁵⁵² The prominent role given to the executive branch in the pre-FSIA regime, as the Court described it, may suggest that the courts apply customary international law in this context as filtered through the executive branch. If so, the question would remain whether the contemplated filtering role is peculiar to the immunity context, given its close link to the recognition power, or is more broadly applicable. Very likely, the Court did not mean to express any view about the nature of the executive branch’s role regarding the immunity enjoyed by foreign officials,⁵⁵³ much less about its role regarding other areas of customary international law. Since the issue before them was merely whether the FSIA applied, and since the Justices who joined or concurred in Justice Stevens’s opinion had previously expressed varying views concerning the domestic status of customary international law,⁵⁵⁴ the opinion is best read to leave all of these questions open.⁵⁵⁵

552 *Id.* (alteration in original) (quoting *Republic of Mexico v. Hoffman*, 324 U.S. 30, 36 (1945)).

553 *But cf.* Statement of Interest of the United States, *supra* note 197, at 6 (citing *Samantar* for the proposition that, when the State Department has taken a position regarding the immunity of a foreign official in the particular case, “the court should accept and defer to the determination that Defendant is not immune from suit”).

554 *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 697 (2004) (Souter, J., delivering the opinion of the Court, with Part IV joined by Stevens, O’Connor, Kennedy, Ginsburg, and Breyer, JJ.); *id.* at 739 (Scalia, J., concurring in part with Rehnquist, C.J., and Thomas, J., joining).

555 It might perhaps be argued that the Court’s references to a “common law” of immunity rather than a customary international law of immunity shows that it was not contemplating the judicial enforcement of customary international law at all, even as filtered through the executive branch, but was instead recognizing an executive branch power to make law, untethered to customary international law, based on the President’s authority to conduct foreign relations. This reading seems implausible. The executive branch does not have the power to immunize a private party from suit, no matter how greatly it would advance the nation’s foreign relations. Presumably, the executive branch is, at the very least, required to defend its suggestion of immunity by reference to international law as it exists or as the executive branch would like it to evolve. And, in fact, the State Department does explain its suggestions of immunity by reference to international law. *See* Letter from Harold Hongju Koh, Legal Adviser to the Dep’t of State, to Tony West, Assistant Att’y Gen., Re: *Yousuf v. Samantar*, Civil Action No 01-13760 (E.D. Va.) (Feb. 11, 2011), *reprinted in* Statement of Interest of the United States of America, *supra* note 197, exhibit 1. If a link to international law is required, then it would appear that the common law that the courts are enforcing is (at least) customary international law as filtered through the executive branch. Indeed, the opinion in *Samantar* appears to use the term “common law” as a synonym for customary international law, perhaps reflecting the “settled” view that customary international law is federal common law. *See Samantar*, 130 S. Ct. at 2289 (“[O]ne of the primary purposes of the FSIA was to codify the restrictive theory of sovereign immunity, which Congress recognized as consistent with extant

In any event, the executive incorporation regime, as applied by the Supreme Court in pre-FSIA immunity cases, is closer to the modern position than to the revisionist one. Adherents of the modern position recognize that the executive branch speaks for the United States at the international plane regarding the content of customary international law and that the courts generally defer to the executive branch when interpreting such law, especially when the law is in flux. The executive incorporation thesis thus appears to differ from the modern position only insofar as it would altogether disable the courts from disagreeing with the executive branch's position regarding the content of customary international law.⁵⁵⁶ The difference appears to be between absolute and significant deference to the Executive. An across-the-board rule of absolute deference would appear to conflict with the Supreme Court's approach to the application of customary international law in other contexts and, thus, presumably does not apply outside the context of immunity for foreign officials (if even then).⁵⁵⁷ But the more significant point, for present purposes, is that the two approaches are far closer to each other than to the approach that revisionists had attributed to Judge Hand with approval, under which the issue would be governed by State law.

* * * *

In sum, the intermediate positions are problematic to the extent that they leave the question of the applicability and interpretation of customary international law to the States, which they would all do to some extent. Ramsey's position is not intermediate at all, as he would apparently regard customary international law as always nonpreemptive unless incorporated by statute or treaty, whereas Bradley and Goldsmith's original critique left room for the application of such law

international law. We have observed that a related purpose was '*codification of international law* at the time of the FSIA's enactment,' and have examined the relevant common law and international practice when interpreting the Act. Because of this relationship between the Act and *the common law that it codified*, petitioner argues that we should construe the FSIA consistently with the common law regarding individual immunity, which—in petitioner's view—was coextensive with the law of state immunity and always immunized a foreign official for acts taken on behalf of the foreign state." (emphasis added) (citations omitted) (quoting *Permanent Mission of India to United Nations v. City of N.Y.*, 551 U.S. 193, 199 (2007)).

556 Perhaps the thesis would also disable the courts from applying a norm of customary international law on which the executive branch has not yet taken a position, but this situation is highly unlikely to arise.

557 For example, in *Sabbatino*, the Court preferred to declare customary international law inapplicable to a whole category of cases than to adopt a rule of absolute deference. *See supra* note 214.

as federal law if incorporated by the executive branch. Young, Aleinikoff, and Bradley, Goldsmith, and Moore would, to varying degrees allow customary international law norms not incorporated by treaty or statute to be treated as federal law in certain circumstances, but (except for Aleinikoff, who is not clear on this point) would accord it such force only in very limited circumstances. In addition, the specific proposals of Ramsey, Young, and Aleinikoff pose significant problems of application. Bellia and Clark offer a persuasive structural argument for according the force of preemptive federal law to some categories of customary international law, but fail to appreciate the full implications of their own argument.

III. THE MODERN POSITION, REDUX

Parts I and II showed that the modern position is more faithful to the constitutional structure, the Founders' intent, and pre-*Erie* doctrine than is the revisionist position. But my defense of the modern position so far has assumed that customary international law has remained static over that period. This Part considers another prong of the revisionist argument: that the modern position should be abandoned because the customary international law of today differs in relevant respects from the state-to-state portion of the law of nations as known to the Founders. Revisionists note two important differences. First, customary international law today relies to a lesser extent on consistent state practice. Second, modern customary international law extensively addresses how a state may behave toward its own nationals. I conclude that the first difference might warrant a generally applicable limitation for the application of customary international law along the lines of the limitation articulated in *Sabbatino* and *Sosa*, but it does not justify a wholesale rejection of the modern position. This limitation should also assuage concerns deriving from the second difference between historic and modern customary international law.

A. *The New Ways of Making Customary International Law*

The revisionists' challenge to the federal status of customary international law has usually been coupled with an attack on the "new" forms of international law.⁵⁵⁸ The traditional view was that customary international law was formed over a long period of time

⁵⁵⁸ See, e.g., Bradley & Goldsmith, *Critique*, *supra* note 9, at 855, 869–70; Young, *supra* note 19, at 389. See generally Bradley & Goldsmith, *Current Illegitimacy*, *supra* note 9, at 319.

through consistent state practice coupled with *opinio juris*, that is, the understanding that the practice was being undertaken out of a sense of legal obligation. Revisionists have noted that, in recent years, the requirements for creating customary international law have been considerably eased.⁵⁵⁹ The length of time necessary to form a new rule has become shorter, to the point that today it is sometimes recognized that custom can form instantly.⁵⁶⁰ Relatedly, they note, the requirement of consistent state practice has given way to an understanding that custom can develop through statements or declarations of states not necessarily coinciding with state practice, such as their votes on nonbinding U.N. resolutions.⁵⁶¹ As a result of the recognition of these new and easier ways of producing international law, the possibility of claiming the existence of many new norms of customary international law has grown enormously, thus increasing significantly the potential preemptive effect of this law.⁵⁶²

One possible response to this concern is to point out that these developments are controversial even within the international legal community.⁵⁶³ However, this response merely brings to the fore the problem of the indeterminacy of much customary international law.⁵⁶⁴ The fact that international jurists cannot agree on what it takes to produce a rule of customary international law is hardly comforting.

To reassess the status of customary international law because of changes in its nature or content since the Founding is certainly legitimate. The domestic legal force of customary international law, unlike that of treaties, is not specified in the constitutional text. The modern position is based on an inference from the constitutional structure, and changes in the content or nature of such law might bear on the

559 As noted above, at the time of the Founding the law of nations was regarded as having, in part, a natural law foundation and not thought to be "made" at all. See *supra* note 369 and accompanying text. To that extent, the difference between the old and new customary international law is even starker.

560 See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 n.2 (1987) (recognizing the concept of coastal state economic rights over the continental shelf as so quickly accepted after its announcement in 1945 that it became "instant custom[]"); Bin Cheng, *Custom: The Future of General State Practice in a Divided World*, in THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW 513, 532 (R. St.J. Macdonald & Douglas M. Johnston eds., 1986).

561 See, e.g., Bradley & Goldsmith, *Critique*, *supra* note 9, at 839.

562 Revisionists make a point of describing the exorbitant claims that are occasionally made in the name of customary international law. See, e.g., *id.* at 841.

563 See, e.g., Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 435 (1983).

564 See generally, e.g., MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA (1989) (describing such indeterminacy).

structural analysis. For example, such changes might reasonably lead to a reevaluation of the extent to which State violations of such law would compromise the federal government's achievement of the nation's foreign relations goals or the extent to which treating such law as preemptive would improperly shift the balance of federal-State power.

The revisionists' concerns about the indeterminacy of customary international law and the easing of the requirements for recognizing new norms of customary international law do seem germane to the structural argument for regarding such law as preemptive. The greater the indeterminacy of the law, the broader the power of judges to hold the laws of the States invalid. Although the indeterminacy of the norms does not necessarily result in judicial lawmaking,⁵⁶⁵ such indeterminacy could in practice lead to broader preemption. Judicial deference to the executive branch on questions about the content of such law might alleviate such concerns, but it would raise a concern about circumvention of the bicameralism requirement. This latter concern is exacerbated by the possible loosening of the requirement of state practice. The executive branch is the nation's primary voice on the international stage regarding the content of customary international law.⁵⁶⁶ According preemptive effect to law that is "made" by executive branch statements would appear to give the executive branch a degree of lawmaking power that is at least in tension with the Constitution's carefully wrought procedures for creating preemptive federal law.⁵⁶⁷

But these problems do not afflict all of customary international law. Many norms are well-established and valid under standards that virtually all international jurists would endorse.⁵⁶⁸ The fact that there is disagreement at the margins, and that certain of the controversial theories of international law formation are problematic in themselves, does not justify the denial of federal status to norms of customary international law that are well settled under uncontroversial theories.

565 See *supra* text accompanying notes 73–74.

566 See HENKIN, *supra* note 230, at 42–45.

567 Cf. *infra* text accompanying notes 606–08 (arguing that States are required to adhere to the executive branch's interpretation of customary international law in incorporating as State law international legal norms that lack the force of supreme federal law).

568 Professor Goldsmith has come close to denying that customary international law exists at all. See JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 42–43 (2005). But he has recognized that, for example, the immunity of foreign state officials exists and has the status of customary international law. See Bradley & Goldsmith, *supra* note 199, at 16.

A limitation along the lines of what the *Sabbatino* Court imposed for the application of customary international law to invalidate the acts of foreign states within their own territory seems well tailored to address this problem. As noted, the Court held that norms that were disputed and touched sharply on national nerves could not be applied in this context. The Court in *Sosa* applied a similar standard to identify the norms that could support a federal common law action for damages. Although the *Sabbatino* limitation only applies to violations of customary international law attributable to foreign states, and the similar limitations articulated in *Sosa* were only found applicable to actions for damages, and may only apply when the acts of foreign states are being challenged, the concerns discussed in this section may justify a broader holding that only norms of customary international law that satisfy a heightened standard of clarity and acceptance count as preemptive federal law.⁵⁶⁹ Such a holding would be consistent with the structural rationale for according customary international law the status of preemptive federal law. The structural argument is based on the concern that violations will produce international friction and thus hinder the accomplishment of foreign relations goals. Denying preemptive force to debatable norms would not produce significant friction, it might be claimed, precisely because the status of the norms on the international plane is itself unclear.

Applying this heightened standard of clarity and acceptance across the board, however, might be problematic in a different respect. Such an approach would sometimes result in the application of a narrow rule in circumstances in which the Executive favors a broader rule.⁵⁷⁰ For example, the Executive may wish to enjoy a broad immunity in the courts of other states, but, if other states favor a narrower rule and our courts applied the narrower rule (because the broader rule is disputed), the Executive would be on weak ground in claiming the broader immunity when the United States or its officials are sued in the courts of other states. It may thus be preferable in some contexts for the courts to follow the Executive's position if the Executive favors a disputed rule. In *Sabbatino*, rule-of-law concerns led

569 This may be what Chief Judge Hand had in mind when he suggested that a State's violation of a "well-established" principle of international law might raise a federal question. See *supra* text accompanying note 193.

570 A rule is "narrow" or "broad," as I use these terms in the text, as measured against the extent to which they restrict the rights of sovereign states. A narrow rule leaves states with less freedom or discretion, whereas a broader rule leaves states with more. Thus, a rule prohibiting the taking of the property of aliens unless accompanied by prompt, adequate, and effective compensation is narrower than a rule permitting such takings.

the Court to prefer a heightened standard, but there the Executive favored a narrower rule than what the Court believed was universally accepted. Where the Executive favors according foreign states a narrower discretion than what well-accepted international law accords, following the Executive's position in cases challenging the acts of foreign states would produce rule-of-law problems *and* exacerbate international friction. Where the Executive prefers a rule giving sovereign states *broader* rights than what well-accepted international law accords them (as in the immunity example), then following the Executive in cases seeking to apply the rule to foreign states would raise rule-of-law concerns but would not produce international friction. It may thus be appropriate for the courts to follow the Executive in the latter context but not the former.⁵⁷¹

A heightened standard of clarity and breadth of acceptance would reduce the range of norms of customary international law having preemptive effect, but, in contrast to the approach favored by revisionists, well-established norms of customary international law would continue to have preemptive effect. A noteworthy example is one that was implicated in the *Sosa* case but not considered by the Supreme Court. Mr. Alvarez-Machain claimed that Mr. Sosa's actions violated the rule of customary international law prohibiting the officials or agents of one nation from exercising police power on the territory of another nation without the latter nation's consent, but the court of appeals dismissed this claim. While acknowledging that "[f]ew principles in international law are as deeply rooted as the general norm prohibiting acts of sovereignty that offend the territorial integrity of another state,"⁵⁷² the court held that the right belonged to Mexico and thus Alvarez-Machain lacked standing to assert it.⁵⁷³ For reasons that I have addressed at length elsewhere, the court's standing hold-

571 In cases challenging the acts of the States, a policy of following the Executive's preferences where it favors a rule restricting the discretion of the States would not produce international friction, but would raise greater federalism concerns, particularly in cases involving a State's treatment of its own citizens. For this reason, it may be appropriate for the courts to apply a heightened standard of clarity and breadth of acceptance for norms restricting the discretion of the States even if the Executive favors a disputed rule.

572 *Alvarez-Machain v. United States*, 331 F.3d 604, 615 (9th Cir. 2003) (citing 1 L. OPPENHEIM, OPPENHEIM'S INTERNATIONAL LAW § 119 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992)), *rev'd on other grounds sub nom.* *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); see F.A. Mann, *Reflections on the Prosecution of Persons Abducted in Breach of International Law*, in INTERNATIONAL LAW AT A TIME OF PERPLEXITY 407, 407 & n.2 (Yoram Dinstein & Mala Tabory eds., 1989)).

573 *Alvarez-Machain*, 331 F.3d at 615–16.

ing was erroneous.⁵⁷⁴ The court's reasoning would equally deny diplomats standing to assert diplomatic immunity, since such immunity is, as a matter of international law, a right of the states and not of the individual.⁵⁷⁵ But the fact that the sending state may waive the diplomat's immunity has never been thought to mean that the diplomat lacked standing to assert the immunity in the absence of waiver. Similarly, the fact that Mexico may consent to the exercise of police power by U.S. agents on its soil should not deprive the victim of an unlawful exercise of extraterritorial police power of standing to invoke the relevant rule of international law in our courts in the absence of consent. Indeed, the court of appeals' analysis would have the paradoxical effect of restricting the range of domestically enforceable norms of customary international law to a subset of such norms—those relating to human rights—that the revisionists have expressed particular concerns about, and which for the most part did not even exist before *Erie*, when all agree that customary international law was commonly applied by the courts.⁵⁷⁶

Because Alvarez-Machain prevailed in the court of appeals on other grounds and did not cross-petition for certiorari,⁵⁷⁷ the standing issue was not before the Supreme Court in *Sosa*. Had it considered the claim, the Court would presumably have reversed, just as it recently reversed the court of appeals' similar holding in *United States v. Bond*⁵⁷⁸ that an individual lacks standing to enforce Tenth Amendment limitations because that Amendment protects States, not individuals.⁵⁷⁹ Had the Court reversed the standing holding in *Sosa*, it would surely have agreed with the court of appeals that this norm of customary international law satisfied the heightened standard of clarity and breadth of acceptance that it adopted in that case. The fact that Mr. Sosa was acting at the behest of an official of the executive branch raises the question whether there was a "controlling executive act" precluding the enforcement of the norm, an issue beyond the scope of this Article.⁵⁸⁰ But there should be no question that, had *Sosa* been

574 See Vázquez, *supra* note 172, at 1086–97.

575 See Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes art. 32(1), *opened for signature* Apr. 18, 1961, 23 U.S.T. 3227, 3241, 500 U.N.T.S. 95 ("The immunity from jurisdiction of diplomatic agents . . . may be waived by the sending State.").

576 See Vázquez, *supra* note 172, at 1094–95.

577 See *Sosa*, 542 U.S. at 699 (noting that the Ninth Circuit found for Alvarez-Machain on both his Alien Tort Statute and Federal Tort Claims Act claims); Brief in Opposition to Petition for Writ of Certiorari, *Sosa*, 542 U.S. 692 (No. 03-339).

578 581 F.3d 128 (3d Cir. 2009), *rev'd*, No. 09-1227 (U.S. June 16, 2011).

579 *Bond v. United States*, No. 09-1227 (U.S. June 16, 2011).

580 See *supra* text accompanying notes 223–32.

acting at the behest of the State of California, or had he been an official of the State of California, his actions would have violated a norm of international law meeting any conceivable standard of clarity and breadth of acceptance, and would accordingly have been redressable under the standard suggested herein. If the revisionist view were adopted, on the other hand, California's violation of this well-established principle of international law would not be judicially redressable.

In sum, revisionists have raised some valid concerns stemming from the indeterminacy of some modern customary international law and uncertainties about the process for forming new customary law rules, but the solution they propose is overbroad. A better-tailored response would simply limit the range of preemptive customary international law to those norms that satisfy a heightened standard of clarity and breadth of acceptance—a standard that the Court has already adopted in two narrow settings.⁵⁸¹ In certain contexts, this heightened standard may have to be coupled with an executive-deference approach. But a wholesale rejection of the modern position is unwarranted.

B. *The New Topics Addressed by Customary International Law*

Some revisionists have also noted that the customary international law of today differs from the international law of the Founders' time in that it addresses how a nation treats its own nationals.⁵⁸² International law has always addressed how nations may behave toward individuals. But, before the Second World War, international law addressed individuals almost exclusively by limiting how one nation could treat the citizens of another nation. After World War II, with the broad recognition of an international law of human rights, international law came to address more extensively the behavior of nations toward their own citizens.

But the international law of human rights implicates the structural reasons for according preemptive force to customary international law no less than the older topics covered by customary

581 In a recent book chapter, Kenneth Randall and Chimène Keitner describe the subset of customary international law that the Court found enforceable in *Sabbatino* and *Sosa* as "supernorms" and they suggest that the Court has already adopted a broader rule limiting enforcement of customary international law to this subset. See Kenneth C. Randall & Chimène I. Keitner, *Sabbatino, Sosa, and "Supernorms,"* in *LOOKING TO THE FUTURE* 559 (Mahnoush H. Arsanjani et al. eds., 2011). For the reasons discussed above, I do not think it is correct to say that the Court has already embraced this as a general limitation.

582 See, e.g., Young, *supra* note 19, at 368, 420.

international law do. Even though human rights law is based on the idea that individuals have certain rights by virtue of their humanity, one consequence of viewing these norms as part of international law is the recognition that one nation's violations of these norms is the concern of the world community. A nation's obligations under the international law of human rights are obligations *toward other states*, not just toward individuals.⁵⁸³ Thus, the United States' violation of these norms is as likely to produce international friction—and thus to complicate the nation's pursuit of foreign relations goals—as its violation of other norms of customary international law.

The growth of human rights law does implicate a different sort of concern relevant to the debate about the modern position. Such norms are more likely to relate to areas that have traditionally been regulated by the States, and in some respects may relate to matters that have been thought to be constitutionally reserved to the States. According preemptive effect to international human rights norms thus risks a far broader preemption of State law than had been traditionally associated with customary international law.⁵⁸⁴ It is likely, however, that this concern would be adequately addressed by limitations along the lines of those articulated in *Sabbatino* and *Sosa*, if extended beyond the particular contexts of those cases. The human rights norms that most concern the revisionists are actually highly controversial within the international legal community. For example, revisionists frequently invoke the claimed norm prohibiting the imposition of the death penalty for crimes committed by juveniles.⁵⁸⁵ As noted above, if this is a norm of customary international law, it is likely that the United States is exempt from it as a persistent objector.⁵⁸⁶ If only norms meeting a high threshold of clarity and acceptance were

583 See RENÉ PROVOST, INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW 222 (2002) ("Human rights as a whole . . . are generally considered to generate *erga omnes* or *erga omnes partes* obligations for states."); Barcelona Traction, Light & Power Co. (Belgium v. Spain), 1970 I.C.J. 3, ¶¶ 33–34 (Feb. 5, 1970) ("By their very nature [the obligations of a State towards the international community as a whole] are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes* . . . Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination."). For this reason, the international law of human rights corresponds to the state-to-state branch of the Founding era's law of nations, not the law merchant or general commercial law.

584 See Young, *supra* note 19, at 420–23 (advancing this argument forcefully).

585 See *id.* at 474.

586 See *supra* note 426 and accompanying text.

deemed to have preemptive force, it is very likely that the human rights norms that would preempt State law would largely duplicate prohibitions imposed on the States by the Constitution. (Indeed, that is currently the case with respect to the claimed norm of customary international law prohibiting the juvenile death penalty.⁵⁸⁷)

If, contrary to my argument, the customary international law of human rights were regarded as too different from the more traditional kind of customary international law because of its greater overlap with subjects traditionally reserved to the States, or for some other reason, the solution would be to deny preemptive force to this subset of customary international law, not to reject the modern position altogether. Such an approach would continue to accord preemptive force to the more traditional sorts of customary international law, such as the norm that was erroneously dismissed from the *Sosa* case before it reached the Supreme Court. The Court's analysis in *Sosa* of the claimed human rights violation before it suggests that it agrees with my conclusion that a heightened standard of clarity and breadth of acceptance suffices to protect the relevant constitutional interests and that a categorical exclusion of human rights norms from the range of preemptive federal law is unwarranted.

IV. STATE INCORPORATION OF CUSTOMARY INTERNATIONAL LAW

Revisionists maintain that customary international law has the force of law in this country only to the extent that it has been affirmatively incorporated as such. It has the force of federal law if incorporated by the federal political branches, ordinarily through federal statute or treaty. In the absence of federal incorporation, it has the force of State law if incorporated by the States. This Article so far has addressed only the first part of that claim and concluded that the better answer from the perspective of constitutional history and structure is that customary international law has the status of preemptive federal law, with some exceptions for suits challenging the conduct of foreign states and some federal officials. I have argued further that the revisionists' arguments based on the differences between the customary international law of today and the state-to-state branch of the law of nations as known to the Founders can be adequately addressed by limiting the scope of preemptive customary international law to norms satisfying requirements along the lines of those articulated in *Sabbatino* and *Sosa*.

587 See *Roper v. Simmons*, 543 U.S. 551, 575–79 (2005).

I now consider the second part of the revisionist claim: that, to the extent a norm of customary international law lacks the force of preemptive federal law, the States have the power to incorporate it as State law. Contrary to the apparent assumption of the revisionists, State incorporation of customary international law norms that do not have the force of preemptive federal law could potentially cause a structural problem of its own. The scope of this problem would be broader if, as revisionists argue, customary international law does not generally have the force of preemptive federal law. If only disputed or unclear norms lack such status, the scope of the problem would be narrower, but the problem would nevertheless exist. This Part identifies the structural problem and argues that the solution is either to prohibit States from incorporating customary international law as State law or to recognize the jurisdiction of the Supreme Court to review the State courts' interpretations of customary international law even when such law is applicable to the case only as State law. I conclude that the latter solution is preferable and consistent with Article III.

It is clear that federal law limits the power of States to incorporate customary international law as State law at least in some contexts. For example, *Sabbatino* holds that certain norms of customary international law may not be applied as a basis for invalidating the acts of a foreign state performed within its own territory. The reason is that the failure to give effect to the act of state would hinder the political branches' pursuit of the nation's foreign relations interests. The Court in *Sabbatino* explicitly held that the State courts, no less than the federal courts, were prohibited from applying these norms in this context.⁵⁸⁸ The State courts' failure to give effect to such acts of state would be just as likely to hinder the federal government's conduct of foreign relations. Thus, the constitutional structure disables the States from incorporating certain norms of customary international law as State law against foreign states acting within their own territory.

The Court in *Sosa* did not directly address whether the States were permitted to recognize a right of action for damages to enforce norms of international law not meeting the heightened standard of clarity and breadth of acceptance that it articulated. The Court's analysis, however, strongly suggests a negative answer, at least with respect to certain defendants. In limiting the federal right of action to this subset of customary international law norms, the Court in *Sosa* expressed concern about the foreign relations sensitivities of extending the right of action to less-well-established norms and the

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

potential interference with the “discretion of the Legislative and Executive Branches in managing foreign affairs” that could result.⁵⁸⁹ These same structural concerns would result from the recognition and enforcement of State law rights of action. Thus, it would appear that a State Alien Tort Claims Act with less stringent requirements than contemplated by *Sosa* would be preempted by the same structural constitutional concerns that led the Court to limit the federal right of action.

It is true that the Court in *Sosa* expressed concerns about foreign relations sensitivities in discussing claims alleging the violation of international law by *foreign* officials abroad (a situation very similar to that in *Sabbatino*).⁵⁹⁰ Its reasoning may not apply beyond a *Filartiga*-type situation, where customary international law is sought to be applied to the acts of foreign officials. But, to the extent that a State right of action were made applicable to *federal* officials, the interference with federal functions would appear to be even more direct and hence more problematic. As discussed above, customary international law as federal law does not bind certain federal officials in certain contexts. Surely, the extent to which federal officials are bound is purely a matter of federal law.

That leaves a State’s incorporation of customary international law to bind its own officials. On the surface, it may seem that a State’s incorporation of customary international law to bind itself poses no problem from a structural constitutional standpoint.⁵⁹¹ But a closer examination reveals a potential problem resulting from the process under international law for creating new rules of customary international law. The traditional rule has been that customary international law is formed through consistent state practice performed out of a sense of legal obligation. As noted by revisionists, newer theories have gained some recognition under which customary international law may be formed through the public statements of states indicating their views about what is required by customary international law. If States were free to incorporate customary international law as State law in circumstances where such law lacks the status of federal law, even if only to bind their own officials, then State courts would be making pronouncements about what international law requires in certain contexts. Such decisions would constitute state practice and evi-

589 See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004).

590 See *supra* text accompanying notes 254–55.

591 Cf. Fletcher, *supra* note 19, at 670 (“If a [S]tate court decides that the death penalty should be forbidden in prosecutions brought under [S]tate law, such a decision is entirely that [S]tate’s business [regardless of whether it is made on the basis of customary international law].”).

dence of *opinio juris* under the traditional approaches to the formation of customary international law. Additionally, such decisions are a “subsidiary means for the determination of rules of [customary international] law.”⁵⁹² Under the newer approaches, State court decisions would be even more likely to be relevant to the formation of new rules of customary international law. Such State court pronouncements about what international law requires would thus contribute to the formation of new rules that could, in turn, bind the federal government.

It is well accepted that the decisions of domestic courts count as state practice for the purpose of forming customary international law. As explained by the International Law Association (ILA) in its *Statement of Principles Applicable to the Formation of General Customary International Law*, “[d]omestic courts . . . are organs of the State, and their decisions should also be treated as part of the practice of the State. For example, a determination that international law does or does not require State immunity to be accorded in a particular case, or the extraterritorial application of a domestic law.”⁵⁹³ State courts are as much “domestic courts” for international law purposes as federal courts. Their actions are as attributable to the nation for purposes of state responsibility as those of federal courts.⁵⁹⁴ According to the ILA’s *Statement of Principles*, “[t]he activities of provinces within a federation, or of other subordinate local authorities” may constitute state practice “if the entity concerned acts with the authority of the (federal) State, or if the latter adopts its acts.”⁵⁹⁵ “A [federal] State’s failure to prevent the conduct in question can amount, for present purposes, to tacit adoption . . . (whether or not the [national government] is in a position, under its constitutional law, to change the rules in question).”⁵⁹⁶ Thus, if the U.S. Constitution were construed to permit the States to incorporate customary international law as State law, then State pronouncements about what customary international law requires would count as state practice. The Constitution would, in such circumstances, be understood to delegate to the States the power to take positions on what customary international law requires in these contexts, and the States’ decisions would be considered to have been tacitly adopted by the federal government, even if the federal courts had no power to review those decisions.

592 Statute of the International Court of Justice art. 38(1)(d), June 26, 1945, 59 Stat. 1055, 1060, 33 U.N.T.S. 993.

593 ILA STATEMENT OF PRINCIPLES, *supra* note 71, at 18 (footnote omitted).

594 See Responsibility of States, *supra* note 94, art. 4 & cmt. 6.

595 ILA STATEMENT OF PRINCIPLES, *supra* note 71, at 16–17.

596 *Id.* at 17.

Such decisions could thus contribute to the evolution of new rules of international law that would bind the federal government even if it disagreed with them. If a State court ruled that customary international law imposes a particular rule, then the State court's decision, in combination with the practice of other states, could wind up crystallizing into a new rule of international law. The likelihood of that happening is perhaps remote, since it would require action by numerous other nations in conjunction with that of the State court, and the federal government could make statements disagreeing with the State court decision, thus diluting the impact of the State court decision internationally. But if the rule did come into being, the State court's decisions in conflict with the federal view might compromise the United States' ability to claim persistent objector status.

A second scenario is more likely to occur: the State court might decide that a norm of customary international law does *not* exist even though the federal government believes that it does or should exist. In this way, the State court judgment could contribute to the evisceration of an existing norm of international law. Since it takes less state practice to vitiate a rule of international law than to establish one,⁵⁹⁷ the State's conduct is more likely to have the feared effect. Additionally, a State court's decision could hinder the federal government's efforts to establish a new rule of international law. Although the federal Executive's position will usually be accorded more weight in this context, "the internal uniformity or consistency which is needed for a State's practice to count towards the formation of a customary rule may . . . be prejudiced."⁵⁹⁸

The ability of States to incorporate customary international law as State law would thus interfere with the federal government's conduct of foreign relations by hindering its ability to establish norms that it champions and, potentially, by contributing toward the establishment of norms that it does not favor, and which could ultimately bind it. In the context of dormant foreign affairs preemption, the "one-voice" argument has often been criticized,⁵⁹⁹ and the Court itself has distanced itself from the argument in related contexts.⁶⁰⁰ But the "one-voice" argument has particular resonance with respect to customary international law because of the way customary international law evolves. State court decisions regarding the requirements of custom-

597 See Carlos M. Vázquez, *Withdrawing from International Custom: Terrible Food, Small Portions*, 120 YALE L.J. ONLINE 269, 279–80 (2011), <http://www.yalelawjournal.org/images/pdfs/955.pdf>.

598 ILA STATEMENT OF PRINCIPLES, *supra* note 71, at 18.

599 See, e.g., Ramsey, *supra* note 17, at 561–63; Young, *supra* note 19, at 447–50.

600 See *Barclays Bank v. Franchise Tax Bd.*, 512 U.S. 298, 320–24 (1994).

ary international law may dilute the federal government's voice when it speaks in favor of a particular norm, and may even contradict and eventually bind the federal government to norms it opposes.

There are two possible solutions to this problem. The first would be to deny the States the power to incorporate customary international law as State law in a manner that requires State judicial or administrative officials to issue pronouncements about what customary international law requires. The second, more limited, approach would permit such incorporation, but would recognize the power of the Supreme Court to review the decisions of State courts or administrative agencies about what customary international law requires, even when such law is relevant to the case only because it has been incorporated into State law.

Under the first approach, the Supreme Court would simply strike down any State law incorporating customary international law in the manner described. The standard for finding norms of customary international law to be preemptive federal law would thus function as a ceiling as well as a floor. In other words, States would be required to comply with and enforce norms satisfying the standard and prohibited from incorporating norms that do not satisfy it. To be clear, the States would *not* be precluded from legislating out of a belief that legislation is necessary to carry out international law. Thus, they would be free to prohibit the execution of minors out of a belief that customary international law prohibits such executions, even if their belief is mistaken. The structural problem arises when the State courts make pronouncements about the content of international law. Thus, a statute prohibiting penalties that would violate customary international law would be invalid insofar as it is construed to apply to norms that do not meet whatever standard is adopted for giving preemptive effect to customary international law norms, whereas a statute that prohibited the execution of minors would not be invalid, even if it was motivated by a mistaken belief that such executions violate customary international law. Because only public acts count as state practice for purposes of customary international law formation,⁶⁰¹ a State legislature's motive for enacting a law would not cause the same structural problem as a State court's decision that particular conduct violates customary international law.⁶⁰²

601 See ILA STATEMENT OF PRINCIPLES, *supra* note 71, at 15 ("Acts do not count as practice if they are not public.").

602 The structural problem would perhaps arise if the legislature's motive were memorialized in a formal document, such as a legislative report or the statute's preamble, but only in diluted form.

The second approach would address the structural problem by permitting the Supreme Court to review the State courts' interpretations of customary international law. This approach seems preferable to the first. The structural problem arises only if the State courts have interpreted international law erroneously, but the State courts may well have gotten the international law right. To be sure, the Supreme Court may lack the expertise to decide disputed or unsettled questions of customary international law. But, in this context, the Court's role would be simply to follow the executive branch's interpretation of customary international law. The particular structural problem arises because the State's action will contribute to the formation of a norm that could come to bind the federal government. Because the President speaks for the nation at the international plane concerning the content of customary international law,⁶⁰³ the problem disappears if the Executive agrees with the State court's interpretation of what international law requires.

A possible obstacle to Supreme Court review of State court decisions in this context would be Article III of the Constitution. The Supreme Court clearly has jurisdiction to review the State courts' interpretations of federal law, but in this context, by hypothesis, customary international law is being applied as State law. True, the Supreme Court can review federal issues embedded in State law causes of action.⁶⁰⁴ It is thus clear that the Supreme Court can review State court decisions even if the remedy being sought in the case is available only by virtue of State law. But in such cases there is no doubt that the issue being reviewed is one of federal law. Here, by hypothesis, the relevant norm lacks the status of preemptive federal law.

But, once we take account of the structural constitutional basis for Supreme Court review in this context, we see that the Article III problem is illusory. Assume that Congress passed a statute preempting State laws incorporating an erroneous interpretation of customary international law. Clearly, Supreme Court review of the State court's interpretation of customary international law would be consistent with Article III under such circumstances. The same would be true if the statute preempted State laws incorporating an interpretation of international law that differed from that espoused by the executive branch.

603 See HENKIN, *supra* note 230, at 43–44.

604 See *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005) (stating that cases arising under State law in which a federal issue is embedded may “arise under” federal law for purposes of the original jurisdiction of the district courts).

My claim here is that State court interpretations of disputed or controversial norms of customary international law that differ from that of the executive branch regarding the content of such law are problematic from the perspective of the constitutional structure. In other words, the Constitution itself accomplishes what the federal statute posited above would accomplish.⁶⁰⁵ The case thus “arises under” the Constitution, which establishes that the federal Executive speaks for the nation regarding the content of customary international law in this context

I argued in Part II that a rule-of-law problem would arise if the courts simply followed the Executive’s views about the content of customary international law.⁶⁰⁶ Because of its concern that the content of the law enforced by the courts would change with each successive administration, and that the courts would then be reduced to the Executive’s errand boys, the Court in the act-of-state context preferred to declare whole categories of customary international law judicially unenforceable in the face of certain acts of foreign states.⁶⁰⁷ For the same reason, I argued above that a broader exclusion of disputed or unclear norms of customary international law from the range of preemptive federal law might be preferable to a regime in which the courts simply followed the Executive on a case-by-case basis.⁶⁰⁸ In the context of State incorporation of customary international law norms that lack the status of preemptive federal law, however, it is proper to treat the Executive’s views as binding. If my analysis in Part III were followed, then, by hypothesis, the problem under discussion would arise only with respect to disputed or unsettled norms of customary international law. The structural constitutional concern is that a State’s pronouncement regarding the content of customary international law will inhibit the Executive’s efforts towards future crystallization of a norm or will contribute to the crystallization of a norm that the Executive opposes. Because the Constitution allocates to the Executive the power to take positions on customary international law for the purpose of contributing to the possible future crystallization of the norm, it is appropriate to treat the Executive’s views as binding in this context. Additionally, the concerns expressed in Part III about judicial law-making are inapplicable in this context, as the courts are involved at all only because the States have made international law

605 True, the State statutes we are positing do not expressly incorporate any particular interpretation of international law, but the statutes as construed by the State courts do.

606 See *supra* text accompanying note 545.

607 See *supra* note 214.

608 See *supra* text accompanying note 545.

relevant by incorporating it as State law. The states will have “made” the law, and the federal courts would only be enforcing a constitutional limitation on their ability to do so. (As noted, judicial review in this context may be conceived as merely the enforcement of a constitutional rule prohibiting States from incorporating into State law an interpretation of a disputed or controversial norm of customary international law that differs from that of the Executive Branch.) Under such circumstances, it seems unproblematic for the courts to follow the Executive.

* * * *

In sum, there is a potential structural problem with permitting the States to incorporate as State law norms of customary international law that lack the force of preemptive federal law: State pronouncements about what customary international law does and does not require may, over time and in conjunction with the statements and practice of other states, wind up undermining norms that the federal government favors, or establishing norms that the federal government does not endorse and which could eventually bind the federal government. The structural problem can be cured, however, by recognizing that, as a matter of federal constitutional law, States lack the power to incorporate interpretations of disputed or evolving rules of customary international law that differ from those espoused by the federal government. The theory would be that the Constitution allocates to the federal government the power to speak for the nation concerning disputed or evolving norms of customary international law, and state court pronouncements regarding the content of such law conflict with this constitutional allocation of power to the extent that they differ from that of the federal government. If so, then the Supreme Court would have jurisdiction to review any state court decision interpreting such norms of customary international law to ensure that they comport with the federal government’s views, even if the norm is relevant to the case solely because of a State has incorporated it as State law.

CONCLUSION

This Article has shown that the modern position concerning the status of customary international law is more consistent with constitutional structure, original intent, and pre- and post-*Erie* doctrine than the revisionist position. It has shown further that an intermediate status for customary international law is untenable, and that all of the specific intermediate proposals that have been advanced save that of

Bellia and Clark are highly problematic. The analysis of Bellia and Clark, under which the preemptive force of some norms of customary international law results from an inference from the constitutional structure, is basically sound but, rather than being an intermediate position, it supports the modern position.

The revisionists have raised valid concerns about the differences between the relevant portion of the law of nations as known to the Founders and the customary international law of today, but these concerns justify a limitation of the modern position, not its rejection. The concerns would be met if the range of norms of customary international law having preemptive effect were restricted to those meeting a heightened standard of clarity and breadth of acceptance.

The revisionist position is also potentially problematic insofar as it would permit the States to incorporate as State law norms of customary international law that lack the status of preemptive federal law. Such incorporation poses a structural problem to the extent that the State courts' pronouncements about the requirements of international law differ from those of the federal Executive. This problem can be addressed either by disabling the States from incorporating such norms as State law in a manner that produces State judicial or administrative pronouncements about what this law requires or by recognizing the Supreme Court's power to review the State courts' interpretations of customary international law even when its applicability to the case derives entirely from State law incorporation. The latter solution is preferable and consistent with Article III.