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THE LAW OF OUR LAND:
CUSTOMARY INTERNATIONAL LAW AS
FEDERAL LAW AFTER ERIE

Beth Stephens*

International 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.

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

For decades, federal courts have cited this famous language for the proposition that customary international law is part of federal common law,¹ the body of unwritten rules of decision developed by federal courts in the absence of a direct constitutional or statutory provision.² If international law is part of federal law, it provides the

¹ Several Supreme Court and circuit court cases cite The Paquete Habana in this manner. E.g., First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611, 623 (1983) (“[A]s we have frequently reiterated, [international law] 'is part of our law . . . .'”); First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 763 (1972) (plurality opinion) (noting that international law is one of several applicable sources of law in federal court); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964) (“United States courts apply international law as a part of our own . . . . ”); Kansas v. Colorado, 206 U.S. 46, 97 (1907) (applying international law as part of federal common law governing relations among states); Galo-Garcia v. INS, 86 F.3d 916, 918 (9th Cir. 1996); Kadic v. Karadzic, 70 F.3d 232, 246 (2d Cir. 1995); Prinez v. Federal Republic of Germany, 26 F.3d 116, 1174-75 n.1 (D.C. Cir. 1994); In re Estate of Ferdinand Marcos Human Rights Litigation (Hilao v. Marcos), 25 F.3d 1467, 1473-74 (9th Cir. 1994); Gisbert v. United States Attorney Gen., 988 F.2d 1437, 1447 (5th Cir. 1993); In re Estate of Ferdinand Marcos (Trajano v. Marcos), 978 F.2d 493, 502 (9th Cir. 1992); Alvarez-Mendez v. Stock, 941 F.2d 956, 963 (9th Cir. 1991); Committee of United States Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 939 (D.C. Cir. 1988); Garcia-Mir v. Meese, 788 F.2d 1446, 1453 (11th Cir. 1986); Demjanjuk v. Petrovsky, 776 F.2d 571, 582 (6th Cir. 1985); Filártiga v. Peña-Irala, 630 F.2d 876, 887 (2d Cir. 1980); Fiocconi v. Attorney Gen., 462 F.2d 475, 479 n.7 (2d Cir. 1972); cf. Skiriotes v. Florida, 313 U.S. 69, 72-73 (1941) (ambiguously citing to The Paquete Habana for the proposition that “[i]nternational law is part of our law and as such is the law of all States of the Union.”).

² “The phrase federal common law refers to the development of legally binding federal law by the federal courts in the absence of directly controlling constitutional or statutory provisions.” Erwin Chemerinsky, Federal Jurisdiction 331 (2d ed. 1994). Professor Kramer offers a broad definition: “[T]he common law includes any rule articulated by a court that is not easily found on the face of an applicable statute.”
basis for federal court jurisdiction over cases raising well-pleaded international law claims. Moreover, if international law is part of federal law, it is the law of land, binding on the states pursuant to the supremacy clause; and state courts are bound to follow federal court decisions as to its meaning. This view of customary international law as federal common law, recently labeled the “modern position,” has been widely accepted.


4. The supremacy clause states:
This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
U.S. Const. art. VI.

5. Lea Brilmayer, Federalism, State Authority, and the Preemptive Power of International Law, 1994 Sup. Ct. Rev. 295, 303 (“When state and federal law conflict, it does not matter ... what sort of federal law is at issue; whether it is executive, legislative, or judicial. All federal law trumps all state law. If international law enjoys that elevated status, it will also prevail.”); Alfred Hill, The Law-making Power of the Federal Courts: Constitutional Preemption, 67 Colum. L. Rev. 1024, 1073-79 (1967) (arguing that federal judge-made law is binding on the states through the supremacy clause).


Several federal circuit courts have so held, including the Second Circuit in Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980), an international human rights case holding that “the law of nations ... has always been part of the federal common law.” Id. at
But the conclusion that the Supreme Court in *The Paquete Habana* and similar cases referred to federal law has come under attack from commentators who argue that these courts and scholars have ignored *Erie Railroad Co. v. Tompkins* and the dramatic change it wrought in the federal courts' lawmaking powers. At the time of the *Paquete Habana* decision, the federal courts still followed the now-discredited approach of *Swift v. Tyson*, applying federal court interpretations of the general common law to cases that would now be governed by state law. What if, when the Supreme Court said "[i]nternational law is part of our law," the Court meant that international law was a part of this general common law? Does the language of *The Paquete Habana*, read in light of *Erie*'s decisive rejection of the general common law, signify that international law is state law? If international law is part of state law, not federal law, the federal courts can neither use it as a basis for federal question jurisdiction nor impose their interpretations of international law on the states pursuant to the supremacy clause.

If the Supreme Court in *The Paquete Habana* was referring to the general common law, not federal law, is it possible that the judicial and scholarly claim that customary international law is federal common law is a sham, based upon a willful misreading of eighteenth and nineteenth century texts? Is the modern position no more than a strutting emperor, whose lack of clothes is rightfully exposed by scholars unencumbered by habits of deference or by the wish-fulfilling de-

885; see also *In re Estate of Marcos, Human Rights Litigation (Hilao v. Marcos)*, 25 F.3d 1467, 1473-74 (9th Cir. 1994); *In re Estate of Marcos, Human Rights Litigation (Trajano v. Marcos)*, 978 F.2d 493, 502 (9th Cir. 1992) ("It is also well settled that the law of nations is part of federal common law." (citing *The Paquete Habana*).)

8. See, e.g., *The Nereide*, 13 U.S. 388, 423, 9 Cranch 242, 263 (1815) ("[T]he court is bound by the law of nations, which is a part of the law of the land."); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 281 (1796) ("When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement."); *Chisholm v. Georgia*, 2 U.S. 419, 474, 2 Dall. 333, 407 (1793) ("[T]he United States had, by taking a place among the nations of the earth, become amenable to the laws of nations; and it was their interest, as well as their duty, to provide, that those laws should be respected and obeyed . . . .").

9. 304 U.S. 64 (1938).


12. Under the *Swift v. Tyson* regime, state court decisions interpreting issues of general common law were not binding on federal courts hearing cases based on diversity jurisdiction. *Id.* at 18-19; see discussion infra notes 143-66 and accompanying text.

As used in this article, "general common law" refers to the body of law developed by the federal courts under *Swift v. Tyson* and applied to areas otherwise governed by state law. Although there was some disagreement as to whether it was state or federal law, general common law was neither jurisdiction-granting nor supreme over state law. "Federal common law" in this article refers to common law developed by the federal courts that is both jurisdiction-granting and supreme—about which there is no doubt as to its federal law status.

sire to incorporate international law into the U.S. legal system? This, indeed, is the position taken by Professors Bradley and Goldsmith in a recent article in which they lambast courts and scholars alike for relying on “mistaken interpretations of history, doctrinal bootstrapping . . . and academic fiat” to conclude that customary international law constitutes federal common law, a position that they consider “in tension with some of our nation’s most fundamental constitutional principles.”

This fundamental question of constitutional and international law—the status of customary international law in our legal structure—is open to debate because of the Constitution’s failure to provide a direct answer. The supremacy clause states that treaties “shall be the supreme Law of the Land,” binding on all states. International law, however, includes both formal agreements, such as treaties, and customary law, which consists of unwritten rules accepted as legally binding by all or part of the international community. The supremacy clause makes no mention of the unwritten international law that has played a major role in international affairs for centuries.

Exploiting this constitutional lacuna, Bradley and Goldsmith construct an argument that is deceptively simple. They start with the assumption that, before Erie, customary international law was considered part of the general common law. Since Erie rejected the entire notion of such a body of law, they reason, no cases discussing the sta-

14. Bradley & Goldsmith, supra note 6, at 821.
15. Id. at 873. International law professors receive most of the blame in Bradley and Goldsmith’s narrative. Id. at 874-76. They note that most judges are unfamiliar with international law and thus are “heavily influenced by academic sources” in this area. Id. at 875.
16. U.S. Const. art. VI; see supra note 5.
17. Restatement (Third), supra note 7, § 102(1) (listing three sources of international law: customary law, international agreement, and general principles common to the major legal systems). As defined by the Restatement (Third), “Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.” Id. § 102(2).
18. Customary international law has dominated international relations until this century and continues to occupy an important role to this day.

Until recently, international law was essentially customary law: agreements made particular arrangements between particular parties, but were not ordinarily used for general law-making for states. In our day, treaties have become the principal vehicle for making law for the international system; more and more of established customary law is being codified by general agreements. To this day, however, many rules about status, property, and international delicts are still customary law, not yet codified.

Restatement (Third), supra note 7, part I, introductory note, at 18. The basic rules that bind nations to obey their international agreements are rooted in customary international law, id., as are, for example, key aspects of the law of the sea. See infra note 308; see also Louis Henkin, Foreign Affairs and the U.S. Constitution 232 (2d ed. 1996) (“Even now, in our third century under the Constitution and after a century of radical change in the international legal system, most of the international rights and obligations of the United States lie in unwritten, customary, international law.”).
tus of international law decided before *Erie* are of any precedential value today. Bradley and Goldsmith conclude that, after *Erie*, in the absence of direct authorization from the executive or legislative branches of government, federal courts have neither jurisdiction based on international law nor power to impose federal interpretations of international law on the states.

Such a simplified view, however, overlooks the rich and complex role international law has played in our legal system for over two hundred years. Indeed, the suggestion that *Erie* tossed the law of nations out of federal court along with the general common law rests on several misconceptions. First, the intent of the framers, incorporated into the Constitution, was to ensure respect for international law by assigning responsibility for enforcement of that law to the three branches of the federal government, including the judiciary, as well as the executive and legislative branches. The federal courts implemented this responsibility in part by interpreting and applying customary international law. Second, during the tangled reign of the general common law regime, the federal courts recognized the need for a true federal common law and began to develop such law. Although the role of international law was often unclear, it was not subsumed into the general common law. Thus, while *Erie* rejected the general common law, it upheld the federal courts' power to develop common law in areas properly governed by federal law, including international law. Finally, the rejection of international law as a form of federal law presupposes a quite radical view of state jurisdiction, implying that state courts can make independent determinations as to the content of international law and decide whether or not to obey otherwise valid, binding rules of international law.

This article offers a defense of the historical antecedents and current validity of the core of the "modern position." It argues that the determination of the content of customary international law and of whether or not it applies in a given situation is a federal question, which triggers federal court jurisdiction and on which federal court decisions are binding on the states.

This core position, emphasizing the federal status of customary international law, need not engage the ongoing debate about the place of customary international law in the hierarchy of federal law: Is customary international law subordinate to the Constitution, treaties, congressional enactments and/or executive decrees, or supreme over one or more of these? The Supreme Court has held that treaties are

20. *Id.* at 853.
21. *Id.* at 870-71.
of equal stature as statutes—the last in time governs over prior inconsistent provisions—but inferior to the Constitution. The Court has never directly decided the place of customary international law in the hierarchy. *The Paquete Habana* and other decisions, however, imply that both statutes and executive actions override inconsistent customary law, and this has been the holding of all modern court decisions. This article will accept these limitations, arguing only the federal status of customary international law.

To understand the modern status of customary international law and the significance of current citations to cases such as *The Paquete Habana*, part I explores the concept of international law current in the late eighteenth century and the manner in which such basic beliefs

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Va. J. Int'l L. 143, 147 (1984) (concluding that statutes override inconsistent customary international law); Henkin, *supra* note 7, at 1566-69 (arguing that customary international law is "equal in authority to an act of Congress," but that, in some circumstances, the President is authorized to disregard such law); Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 Va. L. Rev. 1071, 1130-53 (1985) (arguing that fundamental international law norms bind both Congress and the President).

The Restatement (Third), *supra* note 7, § 115(1) states that statutes override prior inconsistent rules of international law, including both treaties and customary international law. Comments to the section note that the effect on a statute of a later inconsistent rule of customary international law is unclear. *Id.* § 115 cmt. d. The Restatement also notes that courts have held that the President has the authority, at least in some circumstances, to disregard a rule of international law. *Id.* § 115 reporters' note 3.

23. See *The Chinese Exclusion Case*, 130 U.S. 581, 609-10 (1889); Whitney v. Robertson, 124 U.S. 190, 194 (1888); Head Money Cases, 112 U.S. 580, 598-600 (1884). But see Lobel, *supra* note 22, at 1108-10 (criticizing these cases).

24. In *The Paquete Habana*, 175 U.S. 677, 700 (1899), the Court stated, "[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations . . . ." Later, the opinion restates this conclusion, finding that courts must apply a rule of international law "in the absence of any treaty or other public act of their own government in relation to the matter." *Id.* at 708.

Lower courts have relied on each of the domestic sources listed in *The Paquete Habana* to override inconsistent customary international law. See, e.g., Galo-Garcia v. INS, 86 F.3d 916, 918 (9th Cir. 1996) (rejecting refugee's customary international law claim because Congress' "extensive legislative scheme for the admission of refugees" governed it); Gisbert v. United States Attorney Gen., 988 F.2d 1437, 1448 (5th Cir. 1993) (holding that international law is not controlling in the face of superseding federal executive, legislative, and judicial actions); Alvarez-Mendez v. Stock, 941 F.2d 956, 963 (9th Cir. 1991) (finding the court to be bound by a properly enacted statute, even if it violates international law); Committee of United States Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 939 (D.C. Cir. 1988) ("[S]ubsequently enacted statutes . . . preempt existing principles of customary international law — just as they displaced prior inconsistent treaties."); Garcia-Mir v. Meese, 788 F.2d 1446, 1453-55 (11th Cir. 1986) (finding prior executive act and controlling judicial decision sufficient to override international law).

25. Bradley and Goldsmith acknowledge that many scholars recognize the federal status of international law without also claiming for it the power to override decisions of the executive branch or Congress. Bradley & Goldsmith, *supra* note 6, at 845-46. Thus, the negative consequences they attribute such powers, *id.* at 857-58, are not necessarily consequences of the core of the modern position defended in this article.
were reflected in the text of the Constitution. Despite deep disagree-
ments about the allocation of powers between state and federal gov-
ernments, the framers showed surprising unity about the importance
of allocating control over foreign affairs to the federal government.

The unresolved differences about the constitutional division be-
tween state and federal authority worsened during the nineteenth cen-
tury, with the near collapse of the nation during the Civil War.
Entering this century, the increasing complexity and interdependence
of national political and economic relations imposed further stress on
the shifting line between federal and state areas of control. Contra-
dictory statements about the sources of emerging rules of law masked
the development of a federal common law independent of state law.
Part II analyzes this process as the courts struggled to define the
proper place of customary international law in the federal system—
some denied the possibility of nonstatutory federal law, while others
simultaneously developed and applied it.

The *Erie* decision—despite its ambiguities—resolved many of the
problems plaguing federal and state lawmaking powers and paved the
way for the proper understanding of international law as federal com-
mon law. Part III discusses the post-*Erie* development of federal
court common law powers, as well as the placement of international
law within the federal law framework. Finally, part IV explores the
implications of the modern position. Far from creating a breach
through which the federal judiciary, in collaboration with foreign pow-
ers, will impose foreign law on the unsuspecting states, customary in-
ternational law reflects the core of basic human values long treasured
in the United States, consented to by our political branches, and dem-
ocratic in origin.

I. Framing A Constitution Respectful Of The Law Of
Nations

The generation of jurists, statesmen, and political activists who
framed the Constitution firmly believed that fundamental moral prin-
ciples governed human society and placed limits upon the behavior of
both individuals and their governments. Among these rules were
those of international law, or the law of nations,\(^{26}\) binding on all sov-
ereign nations and their citizens. Concerned about the consequences
of violations of the law of nations, the framers drafted a Constitution
that empowered the national government to enforce that law, by as-
signing to the federal government control over issues touching upon

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\(^{26}\) Known as the "law of nations" until the eighteenth century. "[n]owadays, the
terms *the law of nations* and *international law* are used interchangeably." Mark W.
Janis, *An Introduction to International Law* 1 (1988); see *Restatement (Third)*, *supra*
note 7, pt. I, ch. 2, introductory note, at 41 ("the law of nations, later referred to as
international law").
foreign affairs. This was accomplished in part by allocating to the federal courts jurisdiction over cases involving international law.

A. The Binding Obligation to Obey International Law

The Law of nations, although not specially adopted by the constitution or any municipal act, is essentially a part of the law of the land. Its obligation commences and runs with the existence of a nation


To understand the intended role of the federal judiciary in enforcing international law, one must first understand how the framers of the Constitution perceived the law of nations and the obligations it imposed.27

Eighteenth century jurists and scholars viewed international law as resting upon fundamental rules of natural law, binding on all individuals and all nations, with roots in both religious principles and human reason.28 In those prepositivist years, it was generally accepted that human conduct was governed by universal norms, and that fundamental principles underlying human society provided the moral and legal foundation for all governments.29 Jurists and judges regularly referred to immutable principles to justify their views of sovereign powers and citizens’ rights.30 Bernard Bailyn describes these rights as “God-given, natural, inalienable rights, distilled from reason and justice through the social and governmental compacts.”31

These basic common law rules were considered binding on all people and all legal systems without the necessity of a legislative enactment or executive decree. In fact, they thought it self-evident that no legal code could catalogue “the great treasury of human rights.”32 To the contrary, “Laws, grants, and charters merely stated the essentials . . . They marked out the minimum not the maximum boundaries of right.”33 Although not connected to any particular sovereign, the ba-

29. Lobel, supra note 22, at 1078-83.
32. Id. at 78.
33. Id. “To claim more, to assert that all rights might be written into a comprehensive bill or code was surely . . . the insolence of a haughty and imperious minister. . . . the flutter of a coxcomb, the pedantry of a quack, and the nonsense of a pettifogger.” Id. (quoting James Otis, A Vindication of the British Colonies . . . 33 (John Harvard Library 11, 1765)). Such fundamental principles are derived from “maxims and customs . . . of higher antiquity than memory or history can reach.” 1 William Blackstone, Commentaries on the Laws of England *67.
sic rules were the product of longstanding practice and custom, consented to by many sovereigns over the course of time.34 Judges did not create or "make" such rules, but rather studied history, past practices, and the opinions of scholars and jurists, and applied their own reason to determine applicable standards.35

This body of binding norms included the law of nations, the rules governing transactions between sovereign states,36 consisting of "maxims and customs, consecrated by long use, and observed by nations in their mutual intercourse with each other as a kind of law."37 Clearly understood and accepted during the eighteenth century, the law of nations was obligatory, binding on the United States as well as all other nations. The key figures in the framing of the Constitution repeatedly stated this as a self-evident truth. In the words of the first

34. 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, 1517 (1984). Lobel argues that the most fundamental natural law norms were viewed as imposing limits on governmental powers, even in the absence of consent. Lobel, supra note 22, at 1078-95.

35. See Fletcher, supra note 34, at 1517-21; Jay, supra note 27, at 822-23; Lobel, supra note 22, at 1082-83.

Today, it is easy to ridicule the notion that any body of law exists outside and independent of human lawmaking activity. From the profoundly positivist perspective of the late twentieth century, the importance the framers ascribed to the fundamental principles of the law of nations seems quaint, irrational, unscientific. Justice Holmes' biting disparagement of the common law as "a brooding omnipresence in the sky" seems to dispose of any pretense of legitimacy. Southern Pac. Co. v. Jensen, 244 U.S. 205, 221-22 (1917) (Holmes, J., dissenting). Holmes did not categorically reject judicial law-making, but angrily condemned such efforts when unconnected to an identifiable source:

I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions.... The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified.... It is always the law of some State....

Id. But, as Professor Fletcher has pointed out, both Holmes' statement and the modern reaction to it are "time- and culture-bound." Fletcher, supra note 34, at 1517. In the climate of the late eighteenth century, the time of the framing of our Constitution, and well into the nineteenth century, learned jurists accepted that they and their government were bound to obey norms of conduct that derived from historical, moral truths. See id. at 1517-18.

Professor Kramer recognizes that the common law making process was far more "sophisticated" than implied by the image of a judge looking up to the stars (or into his navel) to locate and decree predetermined rules. Rather, the common law was based on principles "forged through practice and tradition." Kramer, supra note 2, at 281. "The task of a common law court was then to mold these principles to the exigencies of the day, to preserve their essence by fitting them to evolving social customs...." Id. at 281-82.

36. Although the term "law of nations" was not always used consistently, it included as a core element the law governing "controversies between nation and nation." Jay, supra note 27, at 822 (quoting Justice James Iredell, Charge to the Grand Jury for the District of South Carolina (May 12, 1794), in Gazette of the United States (Philadelphia 1794)).

Chief Justice John Jay, echoing those of Attorney General Randolph quoted above, "[T]he United States had, by taking a place among the nations of the earth, become amenable to the law of nations." 38

The framers of the Constitution were preoccupied with enforcing the new nation's obligations, fearful that violations of international law would drag the country into war with one of the more powerful European nations. 39 Violations of the law of nations, particularly abuses committed against the citizens of other nations, were a chief cause of war in the late eighteenth century. 40 This self-interest, founded in the practical necessity of avoiding offenses that might provoke an attack, meshed neatly with the moral conviction that a sovereign state should obey the law of nations. 41

During the period of the Confederation, the weak national government faced several challenges due to its inability to enforce international norms or to speak with one voice in foreign affairs. Congress lacked the ability to punish violations of the law of nations 42 and was powerless to do more than urge the states to enforce international law and punish violators. As early as 1781, the Continental Congress passed a resolution recommending that the states provide punishment for violations of the law of nations and permit those injured to file


Chief Justice Marshall restated the same point some thirty years later, when he concluded, "[T]he Court is bound by the law of nations, which is part of the law of the land." The Nereide, 13 U.S. 388, 423, 9 Cranch 242, 263 (1815).

39. "America was, after all, a weak power with an unproven government, operating in a world in which warfare was a common form of dispute resolution and a principal element of the international aspirations motivating many nations." Jay, supra note 27, at 821, 839-40.

40. Anthony D'Amato, Comment, The Alien Tort Statute and the Founding of the Constitution, 82 Am. J. Int'l L. 62, 64 (1988) (noting that, in the eighteenth century, the "plight of individual citizens in foreign countries, and not territorial ambitions, was the major excuse for war").

41. Given the framers' belief that the law of nations was rooted in fundamental, binding principles, their commitment to enforcing that law reflected in part a sense of duty and honor. "The Framers sought to uphold the law of nations as a moral imperative—a matter of national honor." Burley, supra note 38, at 482; id. at 475 (stating that the framers understood the United States to have a "duty to propagate and enforce" international law).

civil suits. Several notorious incidents, in which foreign diplomats were assaulted and the federal government had no power to act, concerned the nation's political leaders during the 1780s. Jay complained that the federal courts had no jurisdiction over such cases. Edmund Randolph echoed this complaint in 1787, noting that, "the law of nations is unprovided with sanctions in many cases, which deeply affect public dignity and public justice." Enforcement of the law of nations was important for business and economic growth, as well as to maintain the peace. As Madison said, "We well know, sir, that foreigners cannot get justice done them in these [state] courts, and this has prevented many wealthy gentlemen from trading or residing among us."

As they approached the Constitutional Convention, then, the representatives of the thirteen states brought with them both their fundamental belief that the law of nations bound the sovereign nation to which they and their fellow citizens were giving birth, and a concern that the Constitution they were drafting adequately ensure enforcement of this sovereign obligation.

44. Casto, supra note 42, at 492-93 n.143 (listing repeated references to the Marbois affair in correspondence among the framers). For example, when the French Consul General was threatened in the home of the French Ambassador and later assaulted, the federal government had no authority to intervene to punish the perpetrator or compensate the offended diplomat. Id. at 491-94; Dodge, supra note 43, at 229-30; Randall, supra note 7, at 24-28. The Continental Congress explained to Marbois that, given the "nature of the federal union," the federal government had no power to act on his behalf. Dodge, supra note 43, at 229-30 (quoting 27 Journals of the Continental Congress 1774-1789, at 314 (Library of Congress 1912)). Shortly thereafter, Congress again urged the states to enact legislation punishing assaults on diplomats and other violations of the law of nations. Casto, supra note 42, at 493 n.144; Dodge, supra note 43, at 230 (citing 28 Journals of the Continental Congress 1774-1789, at 315 (Library of Congress 1912)). A similar incident in New York in 1787 demonstrated that the problem remained acute and unresolved. Casto, supra note 42, at 494; Dodge, supra note 43, at 230 (describing an incident in which the New York City police entered the Dutch Ambassador's home to arrest a servant).
45. Dodge, supra note 43, at 230 (citing 34 Journals of the Continental Congress 1774-1789, at 111 (Library of Congress 1912)).
46. A Letter of His Excellency Edmund Randolph, Esquire, on the Federal Constitution (Oct. 10, 1787), reprinted in 2 The Complete Anti-Federalist 86, 88 (Herbert J. Storing ed., 1981). Randolph complained that the confederacy might be "doomed to be plunged into war, from its wretched impotency to check offences against this law." Id.
47. Dodge, supra note 43, at 235-36 (quoting 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 583 (J. Elliot ed., 2d ed. 1881) (alteration in original)).
B. Implementing the Commitment to the Law of Nations

My general plan would be to make the States one as to everything connected with foreign nations, and several as to everything purely domestic.

Thomas Jefferson\textsuperscript{48}

When they set about drafting a Constitution to reformulate the terms of the union, the framers focused on the need to ensure federal control over enforcement of the law of nations.\textsuperscript{49} Throughout the 1780s, Thomas Jefferson wrote repeatedly of the need to unify control of foreign affairs in the federal government.\textsuperscript{50} A New York State court judge echoed this language: "As a nation they [the thirteen states] must be governed by one common law of nations; for on any other principles how can they act with regard to foreign powers; and how shall foreign powers act towards them?\textsuperscript{51}

Addressing the Constitutional Convention, Edmund Randolph pointed to the central government's inability to sanction violations of treaties and the law of nations as one of the chief failings of the Confederation.\textsuperscript{52} Randolph argued that the Confederation failed to provide security against foreign wars, because Congress "could not cause infractions of treaties or of the law of nations, to be punished," as a result of which, the states "might by their conduct provoke war without control [sic]."\textsuperscript{53} Hamilton also saw the problem starkly: "It seems scarcely to admit of controversy that the judiciary authority of the Union ought to extend" to all cases that "relate to the intercourse between the United States and foreign nations . . . .\textsuperscript{54} He stated the "plain proposition, that the peace of the whole ought not to be left at

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\item It is of high importance to the peace of America that she observe the laws of nations . . . and to me it appears evident that this will be more perfectly and punctually done by one national government than it could be either by thirteen separate states or by three or four distinct confederacies.
\item The Federalist No. 3, at 11 (John Jay) (Colonial Press 1901).
\item Rutgers v. Waddington (N.Y. Mayor's Ct. 1784), reprinted in 1 The Practice of Alexander Hamilton 392, 405 (Julius Goebel, Jr. ed., 1964). Judge Duane insisted that the states must be considered as one entity in relation to the law of nations. "What then must be the effect? What the confusion? [sic] if each separate state should arrogate to itself a right of changing at pleasure those laws, which are received as a rule of conduct, by the common consent of the greatest part of the civilized world." \textit{Id.} at 405-06.
\item Madison's Notes, reprinted in 1 The Records of the Federal Convention of 1787, at 19 (Max Farrand ed., rev. ed. 1937) [hereinafter Farrand]; see Dickinson, supra note 50, at 36.
\item Dickinson, supra note 50, at 36.
\item The Federalist No. 80, at 438 (Alexander Hamilton) (Colonial Press 1901).
\end{enumerate}
\end{footnotesize}
the disposal of a part.” Madison thus concluded, “This class of powers forms an obvious and essential branch of the federal administration. If we are to be one nation in any respect, it clearly ought to be in respect to other nations.”

With these concerns acutely in mind, the framers sought to design a system of government in which the federal government would have the power to guarantee the enforcement of the law of nations. In the words of Madison, “The federal Constitution forms a happy combination in this respect; the great and aggregate interests being referred to the national, the local and particular to the State, legislatures.” Dickinson later described the powers assigned to Congress as “cover[ing] the whole area of external affairs as comprehensively in its time as exceptional foresight and superior craftsmanship could cover it.” Indeed, such was the conclusion of a committed antifederalist, who viewed the central government’s extremely limited powers as including “intercourse and concerns with foreign nations.” The Constitution implemented this allocation of powers both through positive grants of authority to the national government and by barring the states from participating in foreign affairs. As the Supreme Court has adopted a similar rationale in explaining the assignment of foreign affairs powers to the federal government. See infra note 170, notes 236-41 and accompanying text, note 264.

55. Id. at 439. Hamilton continued, “The Union will undoubtedly be answerable to foreign powers for the conduct of its members; and the responsibility for an injury ought ever to be accompanied with the faculty of preventing it.” Id. The Supreme Court has adopted a similar rationale in explaining the assignment of foreign affairs powers to the federal government. See infra note 170, notes 236-41 and accompanying text, note 264.

56. The Federalist No. 41, at 228 (James Madison) (Colonial Press 1901). “This one-nation idea has become a central tenet of constitutional law governing foreign relations.” Casto, supra note 42, at 515-16. Madison also noted “the advantage of uniformity in all points which relate to foreign powers, and of immediate responsibility to the nation in all those for whose conduct the nation itself is to be responsible.” The Federalist No. 43 (James Madison), supra, at 245.

57. Given the importance of the law of nations to national affairs, the framers assumed as a matter of course that the federal government should have the ability to dominate most of the decisionmaking related to that law. Principally this result was accomplished by giving the federal government control over foreign relations, divided mainly between the executive and the Congress, but with a prominent role for the federal courts. . . . [T]he persistent idea was to provide a national monopoly of authority in order to assure respect for international obligations. Jay, supra note 27, at 829. Hamilton noted that federal legislators must be aware of the law of nations, because “as far as it is a proper object of municipal legislation, [it] is submitted to the federal government.” The Federalist No. 52, at 298 (Alexander Hamilton) (Colonial Press 1901).

58. The Federalist No. 10, at 50 (James Madison) (Colonial Press 1901).

59. Dickinson, supra note 50, at 42; see David P. Currie, The Constitution in Congress: The Third Congress, 1793-1795, 63 U. Chi. L. Rev. 1, 9-10 (1996) (noting the “widespread conviction that foreign relations was meant to be essentially a federal matter”).

60. 1 Blackstone's Commentaries, app. at 412 note E (S. George Tucker ed. & comm., 1803).

61. The Constitution grants Congress the authority to “regulate Commerce with foreign Nations,” “establish an uniform Rule of Naturalization,” “define and punish
Court said some 150 years later, “Governmental power over external affairs is not distributed, but is vested exclusively in the national government.”

The framers of the Constitution were also clear as to their intent to allocate jurisdiction over issues concerning foreign affairs to the federal courts. Thus, affairs touching on “intercourse with foreign nations” were assigned to federal jurisdiction to produce “uniformity of decision.” In the words of John Jay,

[U]nder the national government, treaties and articles of treaties, as well as 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.

Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations,” “declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water,” and “repel Invasions,” U.S. Const. art. I, § 8, while the President is to serve as “Commander in Chief of the Army and Navy of the United States,” U.S. Const. art. II, § 2, appoint ambassadors subject to Senate approval, id., and “receive Ambassadors and other public Ministers.” Id. § 3.

The states, however, were prohibited from entering into “any Treaty, Alliance, or Confederation;” or granting “Letters of Marque and Reprisal;” or, without the consent of Congress, “lay[ing] any Duty of Tonnage, keep[ing] Troops, or Ships of War in time of Peace, enter[ing] into any Agreement or Compact with another State, or with a foreign Power, or engag[ing] in War, unless actually invaded, or in such imminent Danger as will not admit of delay.” U.S. Const. art. I, § 10.

62. United States v. Belmont, 301 U.S. 324, 330 (1937). This has been the consistent holding of the Supreme Court. See, e.g., United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936) (“[T]he powers of external sovereignty [do] not depend upon the affirmative grants of the Constitution,” but rather are “vested in the federal government as necessary concomitants of nationality.”); Id. at 325-26; Holmes v. Jennison, 39 U.S. 540, 575, 14 Pet. 470, 501-02 (1840) (“Every part of [the Constitution] shows that our whole foreign intercourse was intended to be committed to the hands of the general government . . . . It was one of the main objects of the constitution to make us, so far as regarded our foreign relations, one people, and one nation . . . .”). Other commentators affirm this history. See Brilmayer, supra note 5, at 304 (“Our Constitution assigns to the federal government a virtual monopoly over international relations.”); Bradford R. Clark, Federal Common Law: A Structural Reinterpretation, 144 U. Pa. L. Rev. 1245, 1297 (1996) (“The constitutional structure strongly suggests that the states conferred all rights of external sovereignty on the federal government and retained none for themselves.”); Note, The Federal Common Law, 82 Harv. L. Rev. 1512, 1521 (1969) (“[T]he absence of a specific mention of this power in the Constitution indicates that . . . the power to deal with foreign affairs is implied by the very act of constituting a sovereign nation.”); see also discussion infra notes 230-42.


64. The Federalist No. 3, at 11-12 (John Jay) (Colonial Press 1901); see Dickinson, supra note 50, at 44; Dodge, supra note 43, at 235.
Federal jurisdiction over cases touching upon the interests of foreign governments would help avoid dragging the nation into unnecessary conflict.

The Union will undoubtedly be answerable to foreign powers for the conduct of its members; and the responsibility for an injury ought ever to be accomplished with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts . . . is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned.65

The intent of the framers was to ensure national control over foreign affairs, in part by assigning the federal courts jurisdiction over such matters.66

The Constitution, of course, contains a direct reference only to treaties, not customary international law.67 Earlier drafts included a reference to jurisdiction over cases that “arise . . . on the Law of Nations.” During the debates, this reference was removed without recorded explanation,68 leaving jurisdiction over cases “arising . . . under Treaties.”69 Instead, the federal courts were assigned Article III jurisdiction over a list of cases involving foreign affairs, including all those involving ambassadors or other diplomats, concerning admiralty and maritime law, and between U.S. states or citizens and foreign states, citizens, or subjects.70 Although modern commentators disagree about the significance of this change,71 contemporaries viewed

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65. The Federalist No. 80, at 439 (Alexander Hamilton) (Colonial Press 1901). As interpreted by later Supreme Courts, the Constitution does not grant the federal courts jurisdiction over all cases involving foreigners, as Hamilton apparently believed. The grant of diversity jurisdiction over “[c]ontroversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects,” U.S. Const. art. III, § 2, has been interpreted to exclude cases between foreigners. See Hodgson v. Bowerbank, 9 U.S. 303, 5 Cranch 169 (1809).

66. “The Convention was in substantial agreement that there must be a national judiciary and that it must have, at least in the last resort, a paramount authority with respect to the Law of Nations and treaties.” Dickinson, supra note 50, at 33. As George Mason described the sentiment at the Convention, “The most prevalent idea . . . is . . . to establish . . . a judiciary system with cognizance of all such matters as depend upon the law of nations, and such other objects as the local courts of justice may be inadequate to . . .” Letter from George Mason to Arthur Lee (May 21, 1787), reprinted in 3 Farrand, supra note 52, at 24; see Jay, supra note 27, at 830.


70. Id.

71. This editing change has been read as indicating an intent to state that the law of nations was not encompassed within the “laws of the United States.” See Weisburd, supra note 10, at 4 (quoting Filartiga v. Pena-Irala, 630 F.2d 878, 886 (2d Cir. 1980)). International law at the time, however, was not considered to be U.S. law, but rather common law binding on all nations and all courts. The language may have been de-
the list as covering the entire field of cases implicating relations with other nations and their citizens. Hamilton, for example, explained that all issues dealing with the law of nations were divided among the separate Article III categories.

Jay and Wilson shared the view that the enumerated categories of jurisdiction satisfied the goal of assigning all cases involving the law of nations to the federal courts.

Dickinson concludes that the supremacy clause, as approved, met "the obvious and oft expressed need for an undivided national responsibility and power in all that pertained to relations with other nations, so widely appreciated among the delegates."

Thus, there are significant indications that the framers intended the listed provisions to have the effect of assigning jurisdiction over all cases touching upon foreign affairs—including the law of nations—to the federal courts. This conclusion is consonant with the even more extensive evidence that one of the central purposes of the new Constitution was to centralize the nation's foreign affairs powers in the three branches of the federal government.

C. International Law as Common Law in Federal Courts

The framers, then, drafted and ratified a Constitution that assigned control over foreign affairs to the three branches of the national gov-
ernment. Their intent, in particular, was to assign the federal judiciary jurisdiction over cases touching upon foreign affairs in order to guarantee uniform interpretation and enforcement on issues of concern to the national polity. Given the complexity of the federal system, the lack of models, and fundamental disagreements among the framers about the relative strengths of the federal and state governments, however, the structure they designed left many details unresolved. The Constitution set forth judicial powers and the divisions between the state and federal courts in only “the broadest outline.” The structure the framers adopted was a product of their eighteenth century concepts of jurisdiction, common law, and the interrelationship between federal and state powers.

Uniformity in areas such as foreign affairs, seen as essential by the framers, was to be obtained by assigning jurisdiction over such areas to the federal courts. The Constitution assigned jurisdiction over specific areas, but left undefined the law the courts would apply to decide cases falling within those categories. Distinctions between areas of state and federal authority were determined by evaluating the subject matter at issue in a case or controversy, not by reference to the body of law applicable to that subject matter. “Having fixed the Court’s jurisdiction, the delegates assumed that the Court, having obtained jurisdiction, would exercise all functions and powers which Courts were at that time in the judicial habit of exercising.” This jurisdiction would include the power to determine the applicable law, as courts had always and traditionally done.

The potential sources of law were broad, as broad “as the matters cognizable in the federal courts.”

76. Kramer, supra note 2, at 292 (“[T]here was considerable uncertainty about what exactly the relationship between state and federal governments would be. In part, this uncertainty was intentional, and the framers deliberately left the appropriate roles of state and national governments unsettled to facilitate ratification of the Constitution and encourage further experimentation after its adoption.”); Lenner, supra note 30, at 89 (describing the Constitution’s “ambiguously worded compromises”) (quoting Steven B. Presser, A Tale of Two Judges: Richard Peters, Samuel Chase, and the Broken Promise of Federalist Jurisprudence, 73 NW. U. L. Rev. 53, 65 (1978)).
77. Jay, supra note 63, at 1265.
78. A wealth of evidence is available to demonstrate an original understanding that certain recognized bodies of law should be developed uniformly, and that interference by the states would have negative ramifications at home and abroad. But historically these areas were not “federalized” in the way implicated by the current invocation of federal common law. Uniformity was instead to be achieved by providing access to federal courts, sometimes exclusive of state courts.
Id. at 1231.
79. Id. at 1265-66.
81. Jay, supra note 63, at 1262.
82. 1 Blackstone’s Commentaries supra note 60, at app. 430; see also Fletcher, supra note 34, at 1524.
The law of nations, the common law of England, the civil law, the law maritime, the law merchant, or the lex loci, or law of the foreign nation, or state, in which the cause of action may arise, or shall be decided, must in their turn be resorted to as the rule of decision, according to the nature and circumstances of each case, respectively.\(^8\)

As much of this law was uncodified, the courts were bound to develop and apply the common law governing each of these areas.\(^8\) But the resulting law was not "federal common law," a concept which had no meaning in the late eighteenth century. Common law was neither federal nor state, as it did not pertain to any sovereign, but was common to all.\(^8\)

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\(^8\) See Alton B. Parker, *The Common Law Jurisdiction of the United States Courts*, 17 Yale L.J. 1, 6 (1907) (describing the framers' intent "that the National system of jurisprudence should be upbuilt according to such rules of the Common Law as should be found applicable"); see also Kramer, *supra* note 2, at 274 (1992) ("[T]he limited jurisdiction of the federal courts affects only the proper subject-matter of any federal common law, not the power to make such law in the first place.").

Although courts were authorized to "interpret[] the law of nations directly," they were not thereby interpreting federal law, but rather "ascertaining the law common to all courts." Blum & Steinhardt, *supra* note 7, at 58 & n.22.

The law of nations was not "law" as we usually think of it today—that is, a sovereign command. But neither was it a "brooding omnipresence in the sky." [citing Holmes.] Rather, as Swift suggests, the law of nations was an identifiable body of rules and customs developed and refined by a variety of nations over hundreds and, in some cases, thousands of years. . . . In essence, the law of nations operated as a set of background rules that courts applied in the absence of any binding sovereign command to the contrary. Because of the character of such law, federal and state courts had no occasion to characterize the various branches of the law of nations as either federal or state law. At the time it was thought to be neither.

Clark, *supra* note 62, at 1279-80 (footnotes omitted); see Brilmayer, *supra* note 5, at 302.

In Marshall's formulation, the Constitution created distinct classes of cases over which the federal courts were granted jurisdiction and to which they would apply international law where applicable; but such cases did not arise under the Constitu-
The law of nations, however, played a somewhat different role in the federal system than other areas of common law. First, federal control over foreign affairs, including federal supremacy over the law of nations, was part of the original constitutional scheme and presupposed no conflict with state control over domestic affairs. Implementation of the law of nations by federal courts thus did not trigger concerns about the intrusive consequences of federal common law powers. Federal supremacy over the law of nations did not presuppose a conflict with state control over domestic affairs. Moreover, the law of nations was, by definition, quite different from other categories of common law. General common law rules could be adopted—or not adopted—by a particular jurisdiction, and could be changed by statute without repercussions on the nation as a whole or its relations with other States. The law of nations, however, reflected the practice and consensus of the various nations of the world. Neither the United States nor any individual government could alter or amend its rules. Any nation could also disobey it, but failure to

86. The only areas in which anything resembling modern federal common law was to be applied were admiralty law and the law of nations. Both of these possessed an element of transnationality that made untenable any charge of interference with the territorial sovereignty rights of a state. More basically, federal competence in these areas was part of the original constitutional bargain. Jay, supra note 63, at 1321-22.

87. The common law “was adopted [by the states] so far only as its principles were suited to the condition of the colonies; and from this circumstance we see, what is common law in one state, is not so considered in another.” Wheaton v. Peters, 33 U.S. 591, 659, 8 Pet. 498, 555 (1834). In Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), for example, the Court applied a common law contract rule that New York State courts had declined to follow. Id. at 16-18, 16 Pet. at 11-13.

88. Vattel described the core of the law of nations as “immutable,” imposing binding obligations so that “nations can neither make any changes in it by their conventions, dispense with it in their own conduct, nor reciprocally release each other from the observance of it.” E. De Vattel, The Law of Nations Iviii (Joseph Chitty ed., 1852); see Lobel, supra note 22, at 1084-90. Professor Lobel collects persuasive evidence that jurists of the eighteenth and nineteenth centuries thought that the legislature lacked the authority to enact legislation in violation of the law of nations. Id.

The law of nations could, however, evolve over time and sovereign states could attempt to influence its development. The early U.S. administrations quite consciously tried to do so. Jay, supra note 27, at 845-46. Such efforts, of course, would have been undertaken by the federal government, not the states, as the federal government was the only actor representing the nation on the international stage.
obey rendered the disobedient nation subject to sanctions—including war—from other nations. 89

The brief debate in the Constitutional Convention about the exact wording of the clause granting Congress the power to “define and punish . . . offenses against the law of nations” 90 illustrates the framers’ understanding of the law of nations as existing independently of the United States and its legislature. 91 The issue was whether to include the power of definition, despite arguments that the implication that the United States could modify the law of nations was absurd. In Wilson’s words, “To pretend to define the law of nations which depended on the authority of all the Civilized Nations of the World, would have a look of arrogance that would make us ridiculous.” 92 The terminology was included with the understanding that “define” in context meant only to concretize and transform into legislation, not to alter the underlying content of this transnational body of law. 93

The framers’ concern about enforcement of the law of nations thus led them to draft a Constitution that guaranteed federal control over the nation’s international law obligations. Federal authority was not limited to the political branches, but also encompassed the federal judiciary, which would play a key role in interpreting and implementing the law of nations. International law could not be left to the diverse decisions of the states and their judiciaries, for the states were neither responsible for its implementation nor accountable on an international level for its violation.

As the relationship between state and federal lawmaking powers became increasingly strained during the late nineteenth and early twentieth centuries, the place of customary international law became unclear, a confusion resolved only by the combined holdings of Erie 94

89. During the Washington presidency, when Great Britain requested permission to move troops across U.S. territory as part of a conflict with Spain, Washington sought written opinions on the responses open to the United States under the law of nations. Jay, supra note 27, at 840. The responses, Jay observes, “were designed to show whether particular options would give another power a basis to declare war.” Id.


91. Madison’s Notes, in 2 Farrand, supra note 52, at 615.


93. Lobel, supra note 22, at 1093-94 (noting that participants in the debate about the “define and punish” clause expressed concern about the implication that the national legislature had authority to “define” the law of nations).

The power to “punish” offenses seems to have been included in order to make clear that the subject was one of federal rather than state concern; the power to “define” them was added because of a conviction that the law of nations was “often too vague and deficient to be a rule.

See Currie, supra note 59, at 13 (quoting Mr. Govr. Morris, in 2 Farrand, supra note 52, at 615) (additional citations omitted).

and Sabbatino. The federal courts, however, never completely lost sight of their historic role as the interpreter of international law.

II. INTERNATIONAL LAW AS FEDERAL LAW PRE-Erie

The elegant constitutional structure—a product of compromise that avoided resolving some of the fundamental disagreements among its framers—provoked immediate controversy over the relative powers of the state and federal governments. Impassioned battles over the role of the central government eventually led to decades of secession, war, and Reconstruction, during which basic concepts of federal-state authority were in dispute. The federal courts sought—often unsuccessfully—to forge a consensus as to their role in governing the fractious body politic. As the nineteenth century drew to a close, the dominant general common law paradigm became increasingly inadequate to meet the needs of a national economy and a nation playing an increasingly powerful role in international affairs. Erie put it to rest to general approbation in 1938. The judicial decisions crafted during this pre-Erie period include the beginnings of the "true" federal common law that eventually emerged. Norms of international law joined a small category governed by a common law that increasingly resembled federal common law, although the legal theories of the day prevented courts from clearly labeling it as such.

A. General Common Law and the Tensions Between National and State Interests

Battles over the extent of federal powers began almost immediately after the ratification of the Constitution. The proposal to establish a national bank prompted howls of protest from Republicans, who argued that it exceeded the federal government’s constitutional powers. The Alien and Sedition Acts sparked similar outrage. Congress sought to justify the Sedition Act in part by arguing that the federal government had an implied power to penalize acts that might

96. Jay, supra note 63, at 1244-46; Lenner, supra note 30, at 89 (noting that the battle over the federal government’s right to establish a national bank “reveal[ed] a profound clash over the nature of federal-state relations”).
lead to sedition—an expansive interpretation of the "necessary and proper" clause that would justify federal punishment of virtually any conduct.  

The debate surrounding federal court jurisdiction over common law crimes raged for decades. Several early prosecutions for violations of neutrality assumed that the federal government could prosecute individuals for violations of the law of nations. "Every leading official in the Washington Administration, including Jefferson, asserted that it was unlawful for American citizens to act contrary to their country's obligations under the law of nations." The issue, however, became entwined in the battle over the powers of the federal government. The common law of the time was far-reaching, governing matters of daily life. Furthermore, it was assumed that the powers of the separate branches of the federal government were co-extensive. Thus, acknowledging federal court jurisdiction over all of the common law would have constituted a broad expansion of federal government powers. Although the federal judiciary supported the concept of common-law crimes, opponents of expansive federal powers accused the federalists of seeking to dominate the states through federal jurisdiction over the common law.

By the time the issue of jurisdiction over common law crimes reached the Supreme Court in 1812, the Jeffersonian majority on the Court used the case as a vehicle for blocking further expansion of federal authority at the expense of the states. Jurisdiction over common law crimes would imply powers that were "indefinite, applicable to a great variety of subjects," and form the basis for the broad-ranging powers similar to the common law powers of the British

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99. See, e.g., Talbot v. Janson, 3 U.S. (3 Dall.) 133, 161 (1795) (holding that the federal government can prosecute individuals who violate the law of nations); Chisholm v. Georgia, 2 U.S. 419, 474, 2 Dall. 363, 408 (1793) (same); Henfield's Case, 11 F. Cas. 1099, 1104-05 (C.C.D. Pa. 1793) (No. 6360) (Grand Jury Charge of Wilson, Cir. J.); Jay, supra note 27, at 825-26 (citing Charge to the Grand Jury for the District of South Carolina (May 12, 1794) (Justice James Iredell), in Gazette of the United States (Philadelphia) (May 12, 1794); Charge to the Grand Jury for the District of Virginia (May 22, 1793), in 3 The Correspondence and Public Papers of John Jay 480 (H. Johnston ed., 1891); Charge to the Grand Jury for the District of New York (Apr. 4, 1790), in New Hampshire Gazette (Portsmouth 1790)).
100. Jay, supra note 63, at 1246-50.
101. Id.; Fletcher, supra note 34, at 1522-24. As explained by St. George Tucker: [I]t be true that the common law of England, has been adopted by the United States in their national, or federal capacity, the jurisdiction of the federal courts must be co-extensive with it; or, in other words, unlimited: so also, must be the jurisdiction, and authority of the other branches of the federal government; that is to say, their powers respectively must be, likewise, unlimited.
1 Blackstone, Commentaries, supra note 60, at app. note E.
104. Id. at 33.
courts. The decision rejecting such authority received only lukewarm support from the Court, which unsuccessfully invited efforts to seek a reversal in a later case. But the principle that federal courts have no power to define common law crimes remained. Soon thereafter, in *Wheaton v. Peters*, the Supreme Court declared broadly that "there can be no common law of the United States." This dicta, however, had little impact on the ongoing debate. Federal courts continued to exact substantial common law powers, while critics continued to predict that federal common law would be the means by which the federal government usurped the powers of the states.

In *United States v. Coolidge*, 14 U.S. 415, 1 Wheat. 191 (1816), the Court indicated that it was willing to reconsider *Hudson*, given that "a difference of opinion has existed, and still exists among the members of the court." *Id.* at 416, 1 Wheat at 192. Neither the attorney general nor the defendant chose to argue *Coolidge*, however, so the Court followed its prior decision in *Hudson*. *Id.*. Recent articles indicate that the *Hudson* decision may have been more a result of the controversy surrounding the issue of seditious libel than a rejection of federal common law. Kramer, supra note 2, at 278-79; Gary D. Rowe, Note, *The Sound of Silence: United States v. Hudson & Goodwin, the Jeffersonian Ascendancy, and the Abolition of Federal Common Law Crimes*, 101 Yale L.J. 919 (1992).

Currie notes the distinction between the issues raised by *Hudson* and debates about the constitutional status of the law of nations: "Hudson was a garden-variety libel case, explainable in part by the legitimate fear that federal prosecution would undermine states' rights; no one argued that foreign relations should be left to the states." Currie, supra note 59, at 13.

*Wheaton*'s statement about the common law was not necessary to the decision in the case, which was governed by a federal statute. Describing this "unfortunate" language as dicta, one early twentieth century commentator viewed it as a product of nineteenth century controversies about states rights. Parker, supra note 84, at 11. Parker concluded that neither the Supreme Court nor lower federal courts relied on *Wheaton*, and that the decision had not limited in any way the lawmaking powers of the federal courts, which had continued, as before, to "avail[ ] themselves of our great storehouse of Common Law principles." *Id.*

*Wheaton* also contributed to the Marshall Court's assertion of federal supremacy, holding that the Constitutional grant of federal authority over copyright law superseded any state common law copyright protections. *Id.* at 1291.

"As long as the potential for expansion of jurisdiction remained, the nightmare of a vast expansion of the federal establishment could be brought back to mind."
The battle over the federal common law had little impact on the contemporaneous incorporation of international law rules by the federal courts. The Supreme Court repeatedly held that international law was a part of U.S. law and continued to apply it in a broad range of cases. For example, in the early case of *Chisholm v. Georgia*, Chief Justice John Jay explained that the law of nations was binding upon the national government and within the jurisdiction of the federal courts:

[In their national character and capacity, the United States were responsible to foreign nations for the conduct of each State, relative to the laws of nations, and the performance of treaties; and there the inexpediency of referring all such questions to State Courts, and particularly to the Courts of delinquent states became apparent. . . . These were among the evils which it was proper for the nation, that is, the people of all the United States, to provide by a national judiciary, to be instituted by the whole nation, and to be responsible to the whole nation.]

Similar conclusions about federal jurisdiction over issues of international law were expressed in the official opinions of various U.S. attorney generals. Later cases continued to apply such international rules as a matter of course, in the absence of statutory authorization. Many involved the law of prize, an area the Constitution as-

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111. 2 U.S. 419, 2 Dall. 363 (1793).
112. Id. at 474, 2 Dall. at 407.
113. See, e.g., 11 Op. Att'y Gen. 297, 299 (1865) ("That the laws of nations constitute a part of the laws of the land is established from the face of the Constitution, upon principle and by authority."); 7 Op. Att'y Gen. 495, 503 (1855) ("The laws of the United States [include] the Constitution, treaties, acts of Congress, equity and admiralty law, and the law of nations, public and private, as administered by the Supreme Court, and Circuit and District Courts of the United States, and, in certain cases, regulations of the Executive Departments," all of which are distinct from "the common law" administered by the "courts of the several States."); 1 Op. Att'y Gen. 566, 570 (1822) (stating that the laws of the United States include "not merely the constitution, statutes, and treaties of the United States, but those general laws of nations which govern the intercourse between the United States and foreign nations"); 1 Op. Att'y Gen. 68, 69 (1797) ("The common law has adopted the law of nations in its fullest extent, and made it a part of the law of the land."); 1 Op. Att'y Gen. 26, 27 (1782) ("The law of nations, although not specially adopted by the constitution or any municipal act, is essentially a part of the law of the land."). But see 5 Op. Att'y Gen. 691, 692 (1802) ("The law of nations is considered as a part of the municipal law of each State."), an opinion "completely in contradiction to earlier opinions by Federalist Attorneys General." Jay, supra note 27, at 844 n.115.
114. See, e.g., Jecker v. Montgomery, 59 U.S. (18 How.) 110, 112 (1855) (holding that the law of nations is part of the domestic law of every nation). See also commentary published after the decisions in *Hudson* and *Coolidge*, analyzing the earlier grand jury charge and decision in *Henfield's Case*, 11 F. Cas. 1099 (1793), and distinguishing federal common law authority over violations of the law of nations from such authority over other areas of law.

The law of nations, being the common law of the civilized world, may be said, indeed to be a part of the law of every civilized nation; but it stands on other and higher grounds than municipal customs, statutes, edicts, or ordinances. It is binding on every people and on every government. It is to be
signed federal jurisdiction and in which the federal courts regularly developed common law rules. In *Talbot v. Janson*, for example, Justice Iredell declared that the law of nations is a part of "our own law" and applied that law to determine jurisdiction over a ship captured as prize. Some years later, Chief Justice Marshall applied the law of nations to determine the validity of a confiscation as a prize of war, stating that, in the absence of alternative instructions from Congress, "the Court is bound by the law of nations, which is part of the law of the land." The relevance of the law of nations was recognized as well in a non-prize case, *Ware v. Hylton*, which applied the laws of war to determine the validity of Virginia's attempt to confiscate debts.

During the same time period, the Supreme Court regularly applied the presumption that congressional enactments should be interpreted, when possible, consistently with international law. As initially stated in *Murray v. Schooner Charming Betsy*, this oft-repeated presumption holds that "an act of congress ought never to be construed to violate the law of nations if any other possible construction remains." This presumption indicates that the Court viewed international law as a backdrop to all legislation, ever-present in legislative carried into effect at all times under the penalty of being thrown out of the pale of civilization or involving the country into a war. . . . Whether there is or not a national common law in other respects this universal common law can never cease to be the rule of executive and judicial proceedings until mankind shall return to the savage state.

Id. at 1122 n.6. The commentator concludes that, if *Hudson* and *Coolidge* cannot be distinguished from the earlier *Henfield's Case*, the law announced in *Henfield* should be considered controlling, given the authority of the many jurists who assented to it and the lack of argument in either *Hudson* or *Coolidge*. Id. 115. "The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction . . . ." Const. art. III, § 2.

116. 3 U.S. (3 Dall.) 133 (1795).

117. Id. at 161.

118. The Nereide, 13 U.S. 388, 423, 9 Cranch 242, 263 (1815); see also Thirty Hogsheads of Sugar v. Boyle, 13 U.S. 191, 198, 9 Cranch 118, 122 (1815) ("The law of nations is the great source from which we derive those rules, respecting belligerent and neutral rights, which are recognized by all civilized and commercial states throughout Europe and America."); The Rapid, 12 U.S. 155, 162, 8 Cranch 92, 96 (1814) (applying the law of nations to determine whether a citizen's property was subject to confiscation, noting that "[t]he law of prize is part of the law of nations"); Talbot v. Seeman, 5 U.S. 1, 36-38, 1 Cranch 1, 22-24 (1801) (applying the law of nations to determine whether the recapture of a vessel seized as prize by the French entitled the recapturer to a "salvage" award).

119. 3 U.S. (3 Dall.) 199 (1796).

120. Id. at 281 ("When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement.").

121. 6 U.S. 64, 2 Cranch 34 (1804).

122. Id. at 117-18, 2 Cranch at 67; see Ralph G. Steinhardt, *The Role of International Law As a Canon of Domestic Statutory Construction*, 43 Vand. L. Rev. 1103, 1135-1143 (1990) (reviewing the application of the *Charming Betsy* principle in subsequent cases).
deliberations and enforceable by the courts through statutory construction.

By the mid-nineteenth century, the federal courts had developed the model of federal/state powers over the common law which dominated until *Erie*, some ninety years later. *Swift v. Tyson*\(^\text{123}\) held that, in matters of general law not governed by state statutes and not concerning local issues such as ownership of property, federal courts were not bound by state court decisions.\(^\text{124}\) While greatly reviled in the twentieth century, Professor Fletcher has shown that it was noncontroversial at the time it was decided, reflecting a regime which was already in place and functioned reasonably well to resolve many issues touching on the economic life of the nation.\(^\text{125}\) In areas affecting national concerns, however, the general common law regime worked well only to the extent that state and federal courts arrived at similar decisions in a reasonably foreseeable manner. The system began to break down when increasing disparities between state and federal decisions collided with the national economy's growing need for uniformity.\(^\text{126}\) Furthermore, general common law never provided a satisfactory rule of law for topics clearly within federal control. In response to the obvious need, the notion of a true federal common law began to emerge in several areas, including suits between states, interstate commerce, and international law. Each of these addressed national themes, with problems that were not resolved by legislation. Although not fully realized until *Erie*, "this kind of judge-made law had its pre-*Erie* antecedents, and the conceptual basis for it was clear long before *Erie.*"\(^\text{127}\)

\(^{123}\) 41 U.S. (16 Pet.) 1 (1842).

\(^{124}\) See id. at 16-18.

\(^{125}\) Fletcher, *supra* note 34, at 1513-14. Fletcher points out that Story's son, in a biography describing Justice Story's leading opinions, did not even mention *Swift v. Tyson*. Id. at 1514. The increasingly national and international economy required uniformity in applicable rules. "The law respecting negotiable instruments may be truly declared . . . to be in a great measure, not the law of a single country only, but of the commercial world," *Swift v. Tyson*, 41 U.S. at 19. Several factors rendered important a federal role in the development of the law governing such issues. Many of the states published judicial opinions only irregularly at best, and the quality of their judiciaries varied widely. See Paul M. Bator et al., eds., *Hart & Wechsler's The Federal Courts and the Federal System* 775 (3d ed. 1988); Fletcher, *supra* note 34, at 1555 n.204, 1555-57. Moreover, the states represented varying economic interests, and their decisions were often colored by the self interest of their local citizens. Fletcher, *supra* note 34, at 1566.

In some areas, the *Swift* regime produced a uniform body of law that greatly simplified multistate legal interactions. Fletcher documented the well-respected body of law governing marine insurance, which was developed by the federal courts in the nineteenth century. *Id.* at 1554. In other areas, self-interest and regional variations prevailed. In debtor-creditor law, for example, the tensions among states and the refusal to follow the federal decisions led to increasing chaos. *Id.* at 1556.

\(^{126}\) See discussion supra notes 99-110 and accompanying text.

\(^{127}\) Hill, *supra* note 5, at 1036 n.67. Judges and commentators throughout the nineteenth and early twentieth century recognized that the federal law they were
The Supreme Court, for example, had long recognized disputes between states over boundaries or water rights as falling within an area of federal control to which federal law applied. Such cases cast the choice of law issue in clear relief, for it obviously would be inappropriate to apply the law of either state. Instead, the Court drew an analogy to sovereign states and applied the law of nations to decide issues such as the location of borders defined by rivers.\textsuperscript{128} The Court reasoned that, because the states each stand on "the same level" with an "equality of right," a state "can impose its own legislation on no one of the others, and is bound to yield its own views to none."\textsuperscript{129} The Supreme Court was thus bound to develop a body of law to govern its decisions, "in such a way as will recognize the equal rights of both."\textsuperscript{130} In so doing, the Court "[was] practically building up what may not improperly be called interstate common law."\textsuperscript{131} For example, in a dispute between Kansas and Missouri over the exact location of a border defined by a river, the Court searched for a decision based on principles of international law, national law, and state law—all part of the judicially crafted body of law.\textsuperscript{132}

Some two decades later, the Court invoked common law powers to apply a federal rule of law, even though the states party to the dispute making had ramifications beyond that of the interpretation of a purely state-based general common law. Robert von Moschzisker, for example, in a 1926 article quoted from this 1843 New York state case:

\begin{quote}
[T]here is no room for doubt, but that to a limited extent the common law . . . prevails in the United States as a system of national jurisprudence. It seems to be a necessary consequence — that in a matter which by the Union has become a national subject, to be controlled by a principle co-extensive with the United States, in the absence of constitutional or congressional provision on the subject, it must be regulated by the principles of the Common Law, if they are pertinent and applicable.
\end{quote}


\textsuperscript{128} In \textit{Howard v. Ingersoll}, 54 U.S. 380, 13 How. 409 (1851), the Court decided a dispute about the exact boundary between Georgia and Alabama by applying a rule of the law of nations governing river borders: When a state is formed through a grant of territory by a pre-existing state, with a river as the border, the entire river falls within the territory of the pre-existing state. \textit{Id.} at 411-12, 13 How. at 441-43. The Court noted that the issue was governed by a "principle of national law." \textit{Id.} at 413, 13 How. at 443. The \textit{Howard} Court, \textit{id.} at 412, 13 How. at 442-43, noted that the rule had been first set out by Marshall in \textit{Handly's Lessee v. Anthony}, 18 U.S. 374, 379-80, 5 Wheat. 172, 174-75 (1820), where Marshall referred to it as a rule "established by the common consent of mankind." \textit{Handly's Lessee}, 18 U.S. at 380, 5 Wheat. at 174.

\textsuperscript{129} Kansas v. Colorado, 206 U.S. 46, 97 (1907).

\textsuperscript{130} \textit{Id.} at 98.

\textsuperscript{131} \textit{Id.}

\textsuperscript{132} "Sitting, as it were, as an international, as well as a domestic tribunal, we apply Federal law, state law, and international law, as the exigencies of the particular case may demand." \textit{Id.} at 97 (quoting opinion on demurrer in the same case, 185 U.S. 125, 146-47 (1902)); see also \textit{Manchester v. Massachusetts}, 139 U.S. 240, 266 (1891) (applying international law principles to determine the limits of state control over territorial waters and fisheries).
agreed upon a common rule, different than that adopted by the Supreme Court. In Connecticut v. Massachusetts,\textsuperscript{133} Connecticut sought to enjoin Massachusetts from diverting water from the watershed of the Connecticut River to meet the needs of Boston and other cities.\textsuperscript{134} Both states recognized the common-law doctrine that each riparian owner had a right to the unimpaired, undiminished flow of the river.\textsuperscript{135} The Court, however, declined to apply the law common to the two states, holding instead that the controversy must be governed by the developing "interstate common law" identified in Kansas v. Colorado.\textsuperscript{136} The Supreme Court crafted this uniquely federal law to accommodate the national needs of the growing population, not just to recognize the quasi-sovereign equality of the states.\textsuperscript{137}

In this period in which the federal courts were bound by Swift v. Tyson, the common law rules governing disputes between states were of a completely different nature than Swift's general common law.\textsuperscript{138} Federal needs and interests governed, even in the face of agreement between the contending states about alternative rules of law. In these cases, the Court had begun the development of a "true" federal common law.

Similarly, federal common law applied in cases decided by the Court of Claims, "the one court in the Union . . . that deals at all times with matters of national concern arising under the Constitution and laws of the United States."\textsuperscript{139} In Moore v. United States, the Supreme Court held that, in the absence of congressional instructions to the contrary, cases brought before the Court of Claims should be gov-

\textsuperscript{133} 282 U.S. 660 (1931).
\textsuperscript{134} \textit{Id.} at 662.
\textsuperscript{135} \textit{Id.}
\textsuperscript{136} \textit{Id.} at 670-71. The federal government's search for a fair resolution of the controversy necessitated application of a fair rule, not just the rule in effect in either state. \textit{See Note, The Federal Common Law,} 82 Harv. L. Rev. 1512, 1520 (1969) (stressing the federal government's need to ensure the "just settlement of disputes between its component parts").
\textsuperscript{138} The post-\textit{Erie} implications of this line of cases will be examined \textit{infra} at notes 220-27 and accompanying text, as set forth in the famous water rights case decided the same day as \textit{Erie}, \textit{Hinderlider v. La Plata River & Cherry Creek Ditch Co.}, 304 U.S. 92 (1938) (holding that federal common law controls water rights disputes between states and affords federal question jurisdiction).
\textsuperscript{139} \textit{Parker, supra} note 84, at 14.
erned by the common law, "the system from which our judicial ideas and legal definitions are derived."[140]

The increasingly interconnected national economy led the courts to articulate the need for a national common law in other areas, while nevertheless unable to break free from Swift to articulate it fully. Efforts to develop a federal law governing interstate businesses such as transportation and communication illustrate the strains undermining the Swift v. Tyson regime. In Baltimore & Ohio Railroad Co. v. Baugh,[141] for example, the Court applied its own interpretation of the general common law to determine an employer's liability to an employee injured by the negligence of another. The state had a clear common law rule governing the issue, which the Court declined to follow:

> [I]t is a question in which the nation as a whole is interested. . . . Commerce between the States is a matter of national regulation, and to establish it as such was one of the principal causes which led to the adoption of our Constitution. . . . The lines of this very plaintiff in error extend into half a dozen or more States . . . . As it passes from State to State, must the rights, obligations, and duties subsisting between it and its employees[ sic] change at every state line?[142]

The Court's reasoning made clear the need for uniform, national rules governing the liability of industries that span many states. The Court's resolution, however, is totally nonresponsive to the problem it articulates: Suits in state courts will be decided by the varying rules in each state; litigants' rights will vary depending on what state they are in and whether or not they trigger diversity jurisdiction; and state rules will govern, in any event, where the rule has been codified by statute. The contrast between the problem and the unsatisfactory solutions available to both the majority and the dissent foretell the tensions that gave rise to the Erie decision forty-five years later.

During those years, the Supreme Court continued to struggle with the clash between national needs and the limitations of federal law-making power in contradictory decisions lacking coherent explanations as to the source of their legal authority. In Western Union Telegraph Co. v. Call Publishing Co.,[143] the Court considered a complaint from a company that charged higher rates than its competitor. Western Union argued that no law prohibited discriminatory pricing pol-

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140. 91 U.S. 270, 273-74 (1875).
141. 149 U.S. 368 (1893).
143. 181 U.S. 92 (1901).
cies. The states were precluded from regulating the telegraph business because of its role in interstate commerce; therefore, the telegraph company argued, with no congressional statute on point and no federal common law, the entire field was left unregulated. The Supreme Court rejected this argument, applying the common law rule requiring equal charges for comparable communication services.

The Western Union decision strongly reaffirmed national control over interstate commerce, stating that "[t]his court has often held that the full control over interstate commerce is vested in Congress, and that it cannot be regulated by the States." The Court also noted that prior opinions had stated that "there is no Federal common law different and distinct from the common law existing in the several States," quoting at length from its 1888 opinion in Smith v. Alabama. "There is no common law of the United States in the sense of a national customary law distinct from the common law of England as adopted by the several States, each for itself, applied as its local law, and subject to such alteration as may be provided by its own statutes." These truisms, however, left the Court in danger of painting itself—and the country—into the corner so ably constructed by counsel for the telegraph company: If the states could not regulate interstate commerce, how could state common law apply to this case?

In constructing an exit from this tight corner, the Court was forced to define a kind of common law that differed in significant respects from the general common law. Despite the affirmation of the Smith v. Alabama holding that there is no federal common law and that general common law constitutes state law, the Court proceeded to apply a national common law that was not subject to state statutory control.

But it is an entirely different thing to hold that there is no common law in force generally throughout the United States, and that the countless multitude of interstate commercial transactions are subject to no rules and burdened by no restrictions other than those expressed in the statutes of Congress.

144. Id. at 100.
145. Id.
146. 124 U.S. 465, 478 (1888).
148. Id. "A determination in a given case of [the local common law] may be different in a court of the United States from that which prevails in the judicial tribunals of a particular State . . . but the law as applied is none the less the law of that State." Smith v. Alabama, 124 U.S. at 478. The Smith decision, however, stressed the local health and safety concerns underlying the state rule at issue in that case, a requirement that railroad engineers obtain a state license. Smith, therefore, is consistent with the distinction emerging in Western Union: While local common law is state law, the federal courts are authorized to apply federal common law to areas requiring national rules, in the absence of congressional regulation. Id. at 478-79.
149. Western Union, 181 U.S. at 101.
Defining the common law as "principles and rules of action" culled from "usages and customs of immemorial antiquity," the Court concluded that common law principles "are operative upon all interstate commercial transactions except so far as they are modified by Congressional enactment." Although phrasing this holding in the terms of the general common law, the Court stepped outside that framework in a crucial respect: The common law applicable to interstate commerce could be modified only by Congress, not by state statute. In an area subject to exclusive federal control, the Court began to formulate what later be recognized as "true" federal common law.

The cases cited by the Court in Western Union pointed out the ambiguity about the state or federal nature of this common law. The court cited to one case applying common law principles and public policy without identifying the applicable norms as state or federal. The Court, however, also cited Murray v. Chicago & N.W. Ry. Co., in which District Judge Shiras offered an exhaustive review of Supreme Court cases analyzing the common law, concluding that the federal courts are empowered to develop common law principles governing "matters of national control." Judge Shiras reasoned that the Constitution had divided responsibility for various areas or subjects between national and state governments, with the federal government in charge of all "subjects affecting the country or people at large," while the states were allocated responsibility "over all that are local, or which do not require a uniform system or law for their proper regulation." Within each of these areas, the courts were to apply the relevant body of law, be it common law or statute, admiralty or equity: "[E]ach subject carries with it the law or system appropriate thereto." In areas of exclusive federal control, the courts were to apply common law in the absence of congressional directives. In areas

150. Id. at 102 (quoting Black's Law Dictionary 232).
151. Id.
152. By contrast, under the Swift v. Tyson regime, federal courts applied state statutes to cases governed by state law.
153. Western Union, 181 U.S. at 102-03.
154. In Bank of Kentucky v. Adams Express Co., 93 U.S. 174 (1876), the Court found a delivery service liable for the negligence of the railroad to which it entrusted plaintiff's package, despite a bill of lading disclaiming liability. Id. at 182. In formulating a common law rule, the Court relied on prior Supreme Court cases, as well as cases from several states and Great Britain. Id. at 180, 184, 186-88. The Western Union decision also cites a third case, Interstate Commerce Commission v. Baltimore & Ohio Railroad Co., 145 U.S. 263 (1892), which relied on custom and analogous English decisions to interpret the Interstate Commerce Act. Western Union, 181 U.S. at 102.
155. 62 F. 24 (1894).
156. Id. at 33.
157. Id. at 29.
158. Id. at 32.
of state control, federal courts applied common law only in the absence of state regulation:

[A]s to all matters of national importance over which paramount legislative control is conferred upon congress, the courts of the United States . . . have the right to declare what are the rules deductible from the principles of general jurisprudence which control the given case, and to define the duties and obligation of the parties thereto. . . . [T]he binding force of the principles of this common law, as applied to matters affecting the entire people, and placed under the control of the national government, is not derived from the action of the states, and is no more subject to abrogation or modification by state legislation than are the principles of the law of nations or of the law maritime.

Although not labeled "federal common law," the law applied by Judge Shiras possessed the basic characteristics of such law: It was a product of the federal courts that supported federal jurisdiction, was binding on the states, and was independent of state law, be it statutory or judge-made. In Western Union, the Court shied away from the full implication of its citation to Murray, denying that the common law principles it applied constituted "a body of law distinct from the common law enforced in the States." Despite this denial, the Court clearly applied a body of law with characteristics different from those of the general common law qua state law.

By 1916, the Court came one step closer to recognizing the federal nature of this common law. In Southern Express Co. v. Byers, the Court declared that rights and liabilities in interstate commerce were governed by "acts of Congress, the bill of lading and common law principles accepted and enforced by the Federal courts." Noting that the state courts had split on whether a carrier was liable for

159. Id. Judge Shiras recognized that the Supreme Court decision in Smith v. Alabama, 124 U.S. 465, 478 (1888), stated that there was no federal common law, but pointed to the Court's important qualification: "The interpretation of the Constitution and of federal statutes and treaties constituted national common law. He concluded that this language must be read to authorize application of federal common law principles to interstate commerce and other areas within national control. Murray, 62 F. at 33-37.

160. Murray, 62 F. at 42.

161. Western Union Tel. Co. v. Call Publ'g Co., 181 U.S. 92, 103 (1901).

162. See Jay Conison, What Does Due Process Have to Do With Jurisdiction?, 46 Rutgers L. Rev. 1071, 1162-63 (1994) (arguing that both Western Union and Murray "postulated that the Constitution had implicitly allocated common lawmaking responsibility—sometimes exclusively, sometimes concurrently—between federal and state courts" (citing Murray, 62 F. at 31-32)). "This postulate involved a new view of the federal courts' role, in which there would be 'national control over subjects affecting the country and the people as a whole, and wherein uniformity of rule and control is desirable, if not indispensable, and . . . state control over subjects of local interests.'"


164. Id. at 614.
mental suffering only, the Court overturned a state court decision awarding such damages, finding that the "long-recognized common law rule permitted no recovery." These decisions reflect the tentative beginnings of federal common law, applicable to areas within the jurisdiction of the federal courts and binding on the states.

In the absence of a formal recognition of federal court common lawmaking power, a fundamental problem became increasingly clear: Issues of national concern, within Congress' power, could not be governed solely by state law in areas where Congress had not legislated. Much less did it make sense to allow state statutes to govern, while applying federal common law. The rationales advanced by the courts supported national rulemaking, while the still-dominant legal theories prohibited it.166

B. International Law and the General Common Law

Judge Shiras in Murray used international law as the model for his incipient federal common law, stating, "The subject-matter of dealing with other nations is conferred exclusively upon the national government, and of necessity all questions arising under the law of nations ... are committed to the national government."66 Clear lines were difficult during the era governed by Swift v. Tyson. Although international law traditionally had been viewed as neither state nor federal, interpretation and application of international law had been seen as a federal task. As in cases addressing national commerce and utilities, the general common law provided an inadequate model, because such law was neither jurisdiction granting nor binding on the states. Despite the confused conceptual foundation, the Supreme Court applied a consistently federal body of law in some areas and pointed toward the development of federal common law in others.

In areas such as immigration and naturalization, for example, the supremacy of federal law had long been recognized. Federal supremacy over these issues rested upon the fundamental allocation

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165. Id. at 615.
166. The federal courts responded to this tension in part by increasingly finding a congressional intent to dominate the field, thus authorizing development of federal common law rules. See Western Union Tel. Co. v. Speight, 254 U.S. 17, 18-19 (1920) (overruling a state court definition of "interstate" commerce and applying a federal court definition); Adams Express Co. v. Croninger, 226 U.S. 491, 505-06 (1913) (finding that an amendment to the Interstate Commerce Act demonstrated congressional intent to occupy the field governing liability for loss in shipment and to eliminate "the uncertainties and diversities of rulings" prevalent before the amendment).
167. Murray, 62 F. at 32.
168. See, e.g., Chinese Exclusion Case (Chae Chan Ping v. United States), 130 U.S. 581 (1889) (upholding federal authority over immigration); Chy Lung v. Freeman, 92 U.S. 275 (1875) (holding unconstitutional a state statute regulating immigration).
of authority over areas touching upon foreign affairs.\textsuperscript{169} As the court noted in \textit{Chy Lung}, the federal government, not the states, would be held accountable for problems triggered by the regulation of immigration, or any other areas touching foreign relations. The federal government, therefore, also had authority over such relations and the power to bar the states from taking actions for which the nation as a whole would be held accountable.\textsuperscript{170} \textit{Chy Lung} invalidated a state statute solely on the basis that it overstepped state powers over immigration.

Immigration had traditionally been understood to fall into that narrow sector governed solely by federal law.\textsuperscript{171} Thus, the courts had little difficulty developing a body of federal law governing immigration, in the absence of congressional authorization, despite the rhetoric of no federal common law.

Federal control over admiralty and maritime law had long included application of international law rules.\textsuperscript{172} The supremacy of federal common law in this area was firmly established in the pre-	extit{Erie} period by \textit{Southern Pacific Co. v. Jensen}.\textsuperscript{173} The Court found that through the grant of federal jurisdiction over "cases of admiralty and maritime jurisdiction" the Constitution also directed that such cases be governed by uniform, national law.\textsuperscript{174} The Court quoted extensively from an earlier decision that found it "unquestionable" that the Constitution intended

\begin{itemize}
\item \textsuperscript{169} "For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power." \textit{Chinese Exclusion Case}, 130 U.S. at 606.
\item \textsuperscript{170} If a foreign nation protested over the treatment of its citizens seeking to enter the United States,
\begin{itemize}
\item \[upon whom would such a claim be made? Not upon the State of California; for, by our Constitution, she can hold no exterior relations with other nations. It would be made upon the government of the United States. If that government should get into a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer, or all the Union?\]
\end{itemize}
\textit{Chy Lung}, 92 U.S. at 279.
\item \textsuperscript{171} "[S]ome kinds of governmental action affect our relations with foreign nations so intimately and sensitively that they must be deemed to be within the exclusive competence of the federal government." \textit{Hill}, supra note 5, at 1048.
\item \textsuperscript{172} See cases cited supra notes 120, 122, 124; David J. Bederman, \textit{The Feigned Demise of Prize}, 9 Emory Int'l L. Rev. 31, 51-52 (1995) ("[F]rom time immemorial, when a national court adjudicated a case of a maritime capture it was obliged to follow international law. This is, of course, what gave prize proceedings their legitimacy."); see also Berizzi Bros. v. S.S. Pesaro, 271 U.S. 562 (1926) (applying international rules to determine federal court jurisdiction over a commercial vessel owned by a foreign sovereign); American Ins. Co. v. Canter, 26 U.S. 511, 545-46, 1 Pet. 388, 414 (1828) (stating that admiralty cases "are as old as navigation itself; and the law admiralty and maritime, as it has existed for ages, is applied by our courts to the cases as they arise").
\item \textsuperscript{173} 244 U.S. 205 (1916).
\item \textsuperscript{174} Id. at 214-15.
\end{itemize}
a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been intended to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states.\(^7\)

The *Jensen* Court invalidated a state statute regulating workers’ compensation and applied instead a federal common law rule, despite Chief Justice Holmes’ famous, impassioned dissent.\(^7\) Although maritime law has evolved from a body of largely customary international law through extensive codification,\(^7\) federal control remains firmly entrenched.\(^7\)

A handful of cases raising issues of customary international law in other spheres, however, led to contradictory results. An early case arising out of the Civil War produced the only Supreme Court statement that interpretation and application of the laws of war, a branch of international law, did not raise an issue of federal law. In *New York Life Insurance Co. v. Hendren*,\(^7\) the Court refused to review a state court decision concerning the effect of the Civil War upon the validity

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\(^7\) Id. at 215 (quoting The Lottawanna, 88 U.S. (21 Wall.) 558, 575 (1874)).

\(^{176}\) Jensen, 244 U.S. at 218. The dissent includes Holmes’ oft-quoted attack on common law as a “brooding omnipresence in the sky,” see supra note 35, an argument that was soon adopted by the Court in cases raising state law issues. See Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). However, as Prof. Weinberg argues, the issues in Jensen and other admiralty cases are quite different from those raising state law questions.

T\[he truth is that, in Jensen, Holmes was wrong. He did not understand that Jensen, an admiralty case, raised federal, not state, issues, or that the Court, far from applying the law of a “brooding omnipresence in the sky,” had identified the governing sovereign as the nation.\]

Louise Weinberg, *Federal Common Law*, 83 Nw. U. L. Rev. 805, 826 (1989). Weinberg proposes that this “misunderstanding” explains the fact that the majority opinion in *Erie* cites two other Holmes dissents on this issue, but does not cite his dissent in Jensen. See Erie, 304 U.S. at 69 n.1 (citing, inter alia, Black & White Taxicab Co. v. Brown & Yellow Taxicab Co., 276 U.S. 518, 532 (1928) (Holmes, J., dissenting); Kuhn v. Fairmont Coal Co., 215 U.S. 349, 370 (1910) (Holmes, J., dissenting)). “When the time came for Brandeis to pay intellectual homage to Holmes’ role in revealing the ‘fallacy’ of *Swift v. Tyson*, Brandeis resorted not to Jensen, but to two of Holmes’ other well-known dissents.” Weinberg, supra, at 826.

\(^{177}\) See Henkin, supra note 7, at 1560 n.22 (tracing the development of admiralty law from a body of international “general maritime law” to congressional codification of rules applicable to internal waters and private disputes).

\(^{178}\) Since *Jensen*, the Court has expanded the areas in which state law can apply without interfering with federal interests and has indicated dissatisfaction with the inconsistent application of the lines between zones of state and federal control. Steven F. Friedell, *Searching for a Compass: Federal and State Law Making Authority in Admiralty*, 57 La. L. Rev. 825, 840-45 (1997). Nevertheless, the basic premise of federal common law power has not changed: Maritime law remains today “a species of judge-made federal common law.” Yamaha Motor Corp., U.S.A. v. Calhoun, 116 S. Ct. 619, 624 (1996).

\(^{179}\) 92 U.S. 286 (1875).
of a life insurance policy, ruling that the case presented "questions of general law alone." The Court formulated the issue in the case as "the effect, under the general public law, of a state of sectional civil war upon the contract of life insurance," and concluded that application of the laws of war did not present a federal question unless it was contended that they had been "modified or suspended" by the laws of the United States. This strange result was attacked in a dissent, which argued that the rights and responsibilities of U.S. citizens under the laws of war, whether based upon "written or unwritten" rules, are governed by the "laws of the United States.

The Hendren decision, however, may be understood as part of the Court's effort to avoid the flood of cases challenging contracts formed during the Confederacy. In a series of cases concerning contracts payable in Confederate currency, the Court established that such contracts were valid and raised no federal question if they involved simple business arrangements, rather than attempts to aid the rebellion. The Supreme Court thus drew a distinction between domestic acts that were governed by general principles of contract law and therefore subject to state jurisdiction, and acts of rebellion, subject to federal jurisdiction. A similar line was observed in a series of cases holding that, by forming the Confederate government, the states violated the constitutional prohibition against the formation of alliances or confed-

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180. Id. at 286.
181. Id.
182. Id. at 288 (Bradley, J., dissenting). Justice Bradley pointed out that the case also raised a federal question as to the legal effect on private obligations of a war conducted by the United States government. Id. at 287-88.
183. The Supreme Court denied that the validity of a contract payable in Confederate currency presented a federal question, where such claims could be resolved on the basis of "general principles by which courts determine whether a consideration is good or bad ... [and which] we are not authorized to review." Delmas v. Insurance Co., 81 U.S. (14 Wall.) 661, 666 (1871). Relegating the issue to the category of general common law, the Court said, "Like in many other questions of the same character, the Federal courts and the State courts, each within their own spheres, deciding on their own judgment, are not amenable to each other." Id.

As explained in a line of cases addressing the validity of Confederate contracts, Delmas raised no federal question because it involved a standard contract question, not a question of constitutional or international law. The Court carefully distinguished cases involving contracts payable in Confederate currency when that was the only means of exchange permitted by the secessionist states, as in Thorington v. Smith, 75 U.S. (8 Wall.) 1, 7-12 (1868), from those where the contract was voluntarily designed to assist the unconstitutional Confederate cause, as in Hanauer v. Woodruff, 82 U.S. (15 Wall.) 439, 449 (1872) (invalidating a contract payable in war bonds and distinguishing Thorington due to "the difference between . . . submitting to a force which could not be controlled, and voluntarily aiding to create that force"). The latter category, including contracts in which "the parties intended, in the payments that were made, to aid the rebellion," did raise federal questions. Dugger v. Bocock, 104 U.S. 596, 603 (1881); see New Orleans Water-Works Co. v. Louisiana Sugar Ref. Co., 125 U.S. 18, 28-39 (1888) (explaining the jurisdictional questions at issue in these cases).
As a result, all acts by the Confederate Congress violated the Constitution and challenges to those acts did raise federal questions.

Over forty years later, the Court faced a series of cases challenging the validity of acts committed by the rebel forces in Mexico. In *Oetjen v. Central Leather Co.*, the Court accepted jurisdiction over a case challenging the legal effect of the seizure of property by a rebel army in Mexico. The plaintiff claimed ownership of a shipment of leather hides confiscated by forces under the command of General Francisco (Pancho) Villa. By the time the case reached the Supreme Court, the U.S. executive branch had recognized the insurgent government. On appeal from the decision of the New Jersey state courts, the Supreme Court recognized the issue as a federal question supporting federal jurisdiction. The Court held that the subsequent recognition of the revolutionary Mexican government by the executive branch rendered the seizure a public act of a foreign sovereign, and thus not subject to challenge under the act of state doctrine.

184. U.S. Const. art. I, § 10 ("No State shall enter into any Treaty, Alliance, or Confederation . . . .").
186. 246 U.S. 297 (1918).
187. Id. at 299.
188. The Court first rejected application of a treaty, the Hague Convention of 1907, finding that it applied only to international conflicts and, in any event, had not been violated. Id. at 301-02. But the Court declined to rest its decision on the treaty analysis, stating that, "[S]ince claims similar to the one before us are being made in many cases in this and in other courts, we prefer to place our decision upon the application of three clearly settled principles of law . . . ." Id. at 302. The Court then proceeded to enunciate and apply the act of state doctrine. Id. at 302-04.
189. Id. at 302-03. Under a jurisdictional statute in effect from 1922 to 1928, the Supreme Court held that a district court decision granting sovereign immunity did not present a federal question requiring direct appeal to the Supreme Court. Wulfson v. Russian Socialist Federated Soviet Republic, 266 U.S. 580 (1924). The statute, Act of Sept. 14, 1922, ch. 305, 42 Stat. 837, repealed by Act of Jan. 31, 1928, ch. 14, § 1, 45 Stat. 54, required direct appeal to the Supreme Court where "the jurisdiction of the District Court as a federal court" was at issue. Smyth v. Asphalt Belt Ry. Co., 267 U.S. 326, 327 (1925). Where a district court dismissed a case on jurisdictional grounds that did not challenge the federal court's authority to hear the case, however, a standard appeal to the Circuit Court of Appeals was proper. Id. at 327-28; see Oliver Am. Trading Co. v. Mexico, 264 U.S. 440, 442 (1924) (holding that direct appeal to the Supreme Court is required "whenever there is in controversy the power of the court, as defined or limited by the Constitution or statutes of the United States, to hear and determine the cause"). In *Oliver*, the federal court had the power to hear the case under diversity jurisdiction; the district court applied principles of sovereign immunity to dismiss the case against Mexico. *Oliver*, 264 U.S. at 441-42. The Supreme Court held that this application of the "general law" of sovereign immunity did not trigger direct appeal to that Court. Id. at 442-43. Given that federal jurisdiction over the case was not at issue, this result was proper under the governing statute. See Timken Roller Bearing Co. v. Pennsylvania R.R. Co., 274 U.S. 181, 185-86 (1927) (finding no jurisdictional issue triggering direct appeal where a district court is vested with jurisdiction pursuant to diversity of citizenship).
These contradictory results reflect the tensions of an era in which the governing legal theory provided no explanation for the existence of federal common law, at the same time that the need for such law became increasingly pressing. At the time of the drafting of the Constitution, the framers saw international law as neither state nor federal, a view that maintained vigor throughout the nineteenth century. The framers were confident that they could protect the nation's international law obligations by assigning jurisdiction over such cases to the federal courts. By the beginning of the twentieth century, this structure no longer worked. Fears of federal despotism had produced rulings flatly denying the possibility of federal common law, while general common law had acquired the attributes of state law—neither jurisdiction-granting nor supreme over state judicial decisions and subject to override by the state legislatures.

The tensions arising from the attempt to apply a general common law model to resolve issues of national concern produced a complex and at times contradictory body of case law. Some commentators resolved the contradiction by concluding that general common law rules enunciated by the federal courts were binding on the states,\textsuperscript{90} a solution

In a later case, however, the Court cited the Oliver decision in dismissing an appeal from a state court involving a question of sovereign immunity. Wulfsohn, 266 U.S. at 580. This unexplained citation and the refusal to hear the Wulfsohn appeal indicated a view that issues of sovereign immunity are not governed by federal law and do not trigger federal question jurisdiction. See Weisburd, supra note 10, at 39-40. This result is difficult to reconcile with the oft-repeated language about foreign relations and the federal government: Decisions as to the immunity of a foreign government or its representatives are at least as likely as immigration disputes to provoke problems between this country and other nations, and the government liable for any violations is, clearly, the federal government. As noted by Professor Weisburd in an article otherwise critical of federal judicial lawmaking, Oliver seems wrongly decided because it addresses "the formal relations between the United States and another government in that government's capacity as a sovereign entity." Id. at 40 n.247. Focusing on jurisdictional questions, the Court ignored the federalism issues raised by the cases.\textsuperscript{Id.}

Some years later, Justice Frankfurter criticized the "contradictory and confusing" rulings on sovereign immunity issued by the New York courts, including the Wulfsohn decision. United States v. Pink, 315 U.S. 203, 236 (1942) (Frankfurter, J., concurring). Frankfurter warned that application of local rules to transactions "entangled in international significance," id. at 238, would frustrate U.S. foreign policy, id. at 236-42. "In our dealings with the outside world, the United States speaks with one voice and acts as one, unembarrassed by the complications as to domestic issues which are inherent in the distribution of political power between the national government and the individual states." Id. at 242.

Various theories were proposed to explain this result. Justice Story, for example, "seems to have thought" that general common law rules addressing "general" (rather than "local") issues "were applying general 'federal law,'" not state law. Henry J. Friendly, In Praise of Erie—And of the New Federal Common Law, 39 N.Y.U. L. Rev. 383, 391-92 n.45 (1964). Other commentators accepted that federal common law addressed issues of state law, but viewed federal court decisions on such issues as binding on state courts. See, e.g., Parker, supra note 84, at 12-13; Henry Schofield, Swift v. Tyson: Uniformity of Judge-Made State Law in State and Federal Courts, 4 Ill. L. Rev. 533, 546 (1910).
tion clearly rejected by the Supreme Court in *Delmas v. Insurance Co.* 191 Nevertheless, in areas demanding formulation of national rules, the courts proceeded to develop what can only be called federal common law. 192

The status of international law was particularly problematic, given the pressing need for uniformity and the federal government's accountability for any violations of international norms. In practice, this system avoided more serious ramifications largely because the state courts generally followed the Supreme Court's lead on those international issues in which the Court chose not to intervene. 193 Sprout, writing in 1932, summarized the confusion regarding international law, concluding that the conflicting views expressed in the federal decisions were irreconcilable. 194


192. The Restatement (Third) states that, during this pre-*Erie* time period, federal and state courts reached independent decisions regarding international law and that such decisions in the state courts were not subject to Supreme Court review. Restatement (Third), supra note 7, pt. I, ch. 2, introductory note at 41. As we have seen, this model was followed in some areas, but not in others. Further, it is consistent with the view that international law was neither federal nor state law, but general law applied equally by both. As the theoretical framework justifying non-federal, non-state law was replaced with a predominantly positivist approach, the problem of classification became more urgent, but was not conclusively resolved until the decision in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). See discussion infra Part II.C.

193. Hill, supra note 5, at 1042-59. For example, New York cases evaluating the impact of Soviet property confiscations followed Supreme Court guidance. See, e.g., Dougherty v. Equitable Life Assurance Soc'y, 193 N.E. 897 (N.Y. 1934) (applying the Supreme Court holding in *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918), to find that subsequent recognition of the Soviet government rendered prior actions the public acts of a sovereign government); M. Salimoff & Co. v. Standard Oil Co., 186 N.E. 679 (N.Y. 1933) (interpreting international law consistently with Supreme Court holdings on point); see also Schulz v. Raimes, 164 N.Y.S. 454 (1917) (allowing an enemy alien to sue in state courts in the absence of federal legislative or executive guidance to the contrary). State court decisions evaluating the impact of the Mexican revolution on property rights followed Supreme Court guidance; but, although some did so as a legal obligation, others did not. *Compar* Monte Blanco Real Estate Corp. v. Wolvin Line, 85 So. 242 (La. 1920) (following Supreme Court holdings as to the relevance of the United States' recognition of the new Mexican government and act of state doctrine) with *Cia. Minera Ygnacio Rodriquez Ramos v. Bartlesville Zinc Co.*, 275 S.W. 388 (Tex. 1925) (following Supreme Court rulings, but implying that state courts have the right to determine law independently).

194. Sprout, supra note 68, at 292. Sprout began his article with a truism: "Every student of international law knows that the federal courts in the United States apply rules derived from international law." Id. at 280. He then explored several theories to explain this result. Id. at 280-88. He concluded that the courts failed to distinguish between international law as a body of law independent of the municipal law of any nation and international law in some more general sense as a set of topics that have international overtones, but upon which local governments may legislate.

[F]ederal courts...have treated international law as a branch of the municipal common law, and hence as State law. Yet these same courts have distinguished, in a great variety of instances, between the subject-matter of these two bodies of law, between the parties whose legal relations are defined by each, and between the sources of the authority of their respective rules and
It is not surprising that these questions of state and federal lawmaking powers produced confused holdings. During the nineteenth century, basic issues of federal-state powers had been called into question.\(^1\)\(^9\) Even the supremacy of congressional statutes was challenged: As late as 1858, a state attempted to block federal court enforcement of a federal statute, the Fugitive Slaves Act.\(^1\)\(^9\)\(^5\) In 1860, the Court held that federal courts did not have the power to order state courts to comply with constitutionally mandated extradition requests.\(^1\)\(^9\)\(^7\) In overruling the decision over 100 years later, the Court noted that at the time *Dennison* was decided, "the practical power of the Federal government [was] at its lowest ebb since the adoption of the Constitution."\(^1\)\(^9\)\(^8\)

The nation soon thereafter descended into the Civil War, fought, in part, over conflicting views of federalism.\(^1\)\(^9\)\(^9\) Putting the pieces back together again and resolving issues raised by the post-war constitutional amendments occupied the Court for many decades thereafter.\(^2\)\(^0\)

This was the confused body of case law and commentary upon which *Erie* set to work, triggering a decades-long process of working principles. The only possible conclusion seems to be either that the courts have been hopelessly inconsistent in this matter, or that they have distinguished, perhaps without conscious realization of the fact, between international law considered merely as a legal subject-matter constituting a branch of municipal jurisprudence, and international law considered as an independent legal system beyond the ambit of municipal law.

*Id.* at 292.

\(^1\)\(^9\)\(^5\) During the seventy years following the ratification of the Constitution, the federal and state governments repeatedly clashed over the extent of their overlapping powers, with frequent state efforts to resist or nullify federal enactments. *See generally* John J. Gibbons, *Federal Law and the State Courts, 1790-1860*, 36 Rutgers L. Rev. 399 (1984) (reviewing many disparate examples of state court refusals to enforce federal law).

\(^1\)\(^9\)\(^6\) Ableman v. Booth, 62 U.S. (21 How.) 506 (1858). For many years, states' rights advocates argued that the states had the right, under the Constitution, to refuse to enforce federal statutes that they believed violative of the Constitution. *See Gibbons*, *supra* note 195, at 416-18 (discussing the debates over these issues). With more success, the Southern states successfully blocked congressional interference with slavery in the territories. Scott v. Sandford, 60 U.S. (19 How.) 393 (1856). In 1947, the Supreme Court was forced to reiterate the supremacy of federal legislation when the Rhode Island state courts refused to enforce the federal price control statute, labeling it the penal statute of a foreign state. Testa v. Katt, 330 U.S. 386 (1947).

\(^1\)\(^9\)\(^7\) Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1860).


\(^1\)\(^9\)\(^9\) *See generally* Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. Rev. 863, 872 (1986) (asserting that the "fundamental constitutional issue central to the Civil War [was] whether ultimate sovereignty was constitutionally delegated to the national or to the state governments").

out which areas of the old general common law constituted state law, and which federal.

III. THE TRANSFORMATION TO FEDERAL COMMON LAW

The significance of the language used by the Supreme Court in The Paquete Habana—"international law is part of our law"—must be understood in light of this confused history of the general common law, state law, and the emerging federal common law. Overnight, Erie restructured the relationship between state and federal law and state and federal courts. Dozens of decisions were either implicitly overruled or rendered of little or no precedential value. At the same time, many other decisions suddenly found their rightful place in constitutional history, for Erie also afforded a new significance to cases that had foreshadowed the development of federal common law. As Erie made possible the development of true federal common law, the courts built upon the foundation laid by cases decided under the pre-Erie general common law rubric.\textsuperscript{201} Not only did the Supreme Court hold that international law cases are governed by federal common law, it did so by citing cases such as The Paquete Habana, clarifying that in the international law context, "our law" is and was federal, not state, law.

A. Erie and Federal Common Law

By the time of the Erie decision, the problems with the Swift v. Tyson\textsuperscript{202} regime were well-documented. State courts repeatedly de-

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\textsuperscript{201} Bradley and Goldsmith reassert their simplified view of the eighteenth and nineteenth century status of customary international law in their article in this volume. Curtis A. Bradley & Jack L. Goldsmith, The Current Illegitimacy of International Human Rights Litigation, 66 Fordham L. Rev. 319, 331-36 (1997). They correctly list several points on which we agree. As to the early historical stages of our debate, for example, we apparently agree that the framers were deeply committed to the judicial enforcement of international law, but that the Constitution does not specifically articulate the means by which they expected such law to be enforced. I review this history at length, however, to demonstrate the framers' view that such a reference was not necessary because international law would be enforced by the federal courts as an obligation of the new nation—enforced as a result of a choice-of-law analysis, not as a result of an explicit jurisdictional grant.

This approach, although both functional and theoretically consistent in the early decades of our history, encountered difficult structural problems in the late nineteenth and early twentieth century. Thus, while we three agree that the Supreme Court pre-Erie categorized customary international law as general common law, they attribute too much significance to this label. As they acknowledge, some of the pre-Erie general common law cases are now understood to have applied federal common law. Although the analytic framework of the time did not call such law "federal," modern Supreme Court decisions have recharacterized that pre-Erie law as federal law. Bradley and Goldsmith continue to misinterpret the significance of this body of precedent, because they impose upon it the labels and concepts of their late-twentieth century view of federalism, leading to a cramped misreading of a complex jurisprudence.

\textsuperscript{202} 41 U.S. (16 Pet.) 1 (1842).
}
clined to follow the rules of general law adopted by the federal courts, creating exactly the disparities Swift had hoped to prevent. 203 The sheer volume of litigation across the country rendered the Supreme Court incapable of offering guidance in the vast majority of cases. 204 The injustice and unforeseeability of a system in which substantive rules turned on the fortuity of diversity of citizenship undermined respect for the law and presented a hurdle for the expansion of national commercial ventures. 205 With the gradual erosion of belief in the common law as a body of natural law independent of sovereign authority, the general common law was vulnerable to derisive criticisms such as Justice Holmes' reference to "a brooding omnipresence in the sky." 206

Unfortunately, when the Court seized the opportunity to unravel the knots created by almost a century of the general common law, its murky decision left unresolved the scope of the federal courts' remaining common law powers. The uncertain constitutional analysis of Erie provided several generations of scholars ammunition for widely divergent views: the federal courts have no common law powers, 207 the common lawmaking powers of the federal courts are as extensive as those of Congress, 208 and almost every variation in between. 209

204. Friendly, supra note 190, at 405 ("The growth of the country multiplied the nation's judicial business far beyond the capacity of any single court to preserve uniformity by the force of example."). In 1875, Congress authorized federal jurisdiction over cases arising under federal law, Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470, (currently codified at 28 U.S.C. § 1331 (1994)), thus increasing the caseload of the federal courts and curtailing the Supreme Court's ability to review cases arising under state law. The federal courts' caseload also increased dramatically with the adoption of the Fourteenth Amendment and the explosion of federal legislation in the 1930s. Martha A. Field, Sources of Law: The Scope of Federal Common Law, 99 Harv. L. Rev. 881, 901-02 (1986); Friendly, supra note 190, at 406.
205. See supra notes 143-62 and accompanying text (discussing the importance attributed to national rules governing national affairs by Baltimore & Ohio Railroad Co. v. Baugh, 149 U.S. 368 (1893), and Western Union Telegraph Co. v. Call Publishing Co., 181 U.S. 92 (1901)).
207. See, e.g., Martin H. Redish, Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutional" Perspective, 83 Nw. U. L. Rev. 761 (1989) (arguing that federal courts have no power to make common law). As others have noted, this view has little support in the literature or the case law. See Brown, supra note 209, at 248 (stating that Redish "has not convinced anyone else" of his views).
208. See, e.g., Weinberg, supra note 176 (arguing that federal court power to make common law extends to all areas within the federal government's control). Professor Weinberg, the main proponent of the view that the federal courts have common lawmaking powers coextensive with the legislative powers of Congress, see Weinberg, supra note 176, at 813 ("The judiciary must have presumptive power to adjudicate whatever the legislature and the executive can act upon.") acknowledges that her views have not been accepted. Id. at 806.
209. See, e.g., George D. Brown, Federal Common Law and the Role of the Federal Courts in Private Law Adjudication, A (New) Erie Problem, 12 Pace L. Rev. 229, 252-57 (1992) (providing a summary of various approaches); Field, supra note 204, at 924-
Despite these contradictory views, a discernible middle ground has emerged that rejects the two extremes while agreeing on the basic premise: Federal courts do have the power to develop federal common law, but only in the limited areas authorized by the Constitution or congressional enactment.\footnote{210}{That \textit{Erie} permits development of federal common law is widely accepted.\footnote{211}{Indeed, judicial decision-making would be virtually impossible without some room for lawmaking. Statutes, after all, as well as the Constitution, must be interpreted and applied to new and unexpected situations.\footnote{212}{Also widely accepted, however, is the view that federal court lawmaking power is neither unlimited nor as wide-ranging as that of Congress.\footnote{213}{Both separation of powers and federalism constraints require that federal courts limit their potentially intrusive lawmaking to areas in which such powers have been authorized by the Constitution or by statute. Such was the holding of \textit{Erie}, in the oft-quoted line, “Except 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.”\footnote{214}{This recognition of distinct state and federal spheres of authority, govern-}

\footnote{27}{(concluding that \textit{Erie} is ambiguous as to the extent of federal court lawmaking power and the possible limits on that power); Kramer, \textit{supra} note 2, at 264-65.\footnote{210}{See Brown, \textit{supra} note 209, at 252-54.\footnote{211}{Richard H. Fallon, Jr., et al., Hart and Wechsler’s The Federal Courts and the Federal System 744 (4th ed. 1996) (“There is no longer serious dispute that the body of federal law legitimately includes judge-made law . . . .”).\footnote{212}{The Supreme Court recognized early on that judicial decisions interpreting the Constitution, treaties, and statutes constituted a body of federal common law. Smith v. Alabama, 124 U.S. 465, 478-79 (1888) (holding that interpretation of the Constitution and of federal statutes and treaties constituted national common law). Professor Kramer has cogently explained the need for some common law through statutory interpretation: [Why let courts make common law in a representative democracy? In part, the answer must be that judge-made law is unavoidable. That is, courts must make a certain amount of common law simply because there is no clear line between ‘making’ and ‘applying’ law, between commands that are clear on the face of a statute and those made through an exercise of judgment and creativity. Deciding individual cases thus generates some common law because the process of adjudication necessarily entails articulating rules to elaborate and clarify the meaning and operation of statutory texts. Kramer, \textit{supra} note 2, at 269. Even Martin Redish, arguing that the federal courts are barred from all federal common lawmakering, recognizes that the “textual or historical ambiguity” of some statutes will require “judicial resolution on the basis of the court’s own assessment of the competing social and political policies” underlying the legisla-}

\footnote{213}{\textit{See} Fallon et al., \textit{supra} note 211, at 757 (“Most judges and commentators believe that the federal courts’ power to fashion law is considerably more limited than that of Congress.”). The Supreme Court has consistently so held. \textit{See}, e.g., Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981) (“[T]he Court has recognized the need and authority in some limited areas to formulate what has come to be known as ‘federal common law.’”); Wheeldin v. Wheeler, 373 U.S. 647, 651 (1963) (stating that areas in which federal common law is authorized are “few and restricted”).\footnote{214}{\textit{Erie R.R. Co. v. Tompkins}, 304 U.S. 64, 78 (1938).}
erned by the law—statutory or decisional—of the appropriate sovereign, is one of the lasting strengths of the *Erie* decision. As Judge Friendly explained in his famous 1964 article, *Erie* straightened out the roles of state and federal law in a manner that was “so beautifully simple, and so simply beautiful” as to seem both obvious and long overdue.\(^{215}\) State law—statutory or decisional—was to control state issues. Federal law—statutory or decisional—was to control federal issues and was to be binding on the states.\(^{216}\)

Within this middle ground, the ongoing debate centers on the degree of constitutional or statutory authorization necessary to permit federal court lawmaking. There is little dispute over federal court development of common law where explicitly authorized by the Constitution or Congress.\(^{217}\) Moreover, both the Supreme Court and many commentators have recognized “enclaves” of federal authority where common lawmaking is implicitly authorized.\(^{218}\) The structure of the Constitution strongly supports the view that federal courts are authorized to develop federal common law where necessary to carry out the assigned responsibilities of the federal government.

The Supreme Court’s view that *Erie* permits federal court lawmaking in areas constitutionally committed to the federal government became clear in a decision issued the same day as *Erie*, addressing a conflict between private parties over water rights ceded by one state to another.\(^{219}\) The Supreme Court applied “federal common law” to

\(^{215}\) Friendly, *supra* note 190, at 422.

\(^{216}\) *Id.*

\(^{217}\) See, e.g., *Texas Indus.*, 451 U.S. at 642 (“Federal common law also may come into play when Congress has vested jurisdiction in the federal courts and empowered them to create governing rules of law.”); *National Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 688 (1978) (“The legislative history [of the Sherman Act] makes it perfectly clear that [Congress] expected the courts to give shape to the statute’s broad mandate by drawing on common-law tradition.”); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457 (1957) (holding that the Labor Management Relations Act empowers the courts to develop a common law of labor-management relations); *see also* Brown, *supra* note 209, at 253 (discussing delegated authority to make law); Thomas W. Merrill, *The Common Law Power of Federal Courts*, 52 U. Chi. L. Rev. 1, 43-46 (1985) (stating that federal judicial lawmaking is appropriate if authority has been either expressly or impliedly delegated). Although the finding that such a delegation has occurred may be debated, the power to so delegate is rarely challenged.

\(^{218}\) *See, e.g.*, Brown, *supra* note 209, at 252-53 (federal common lawmaking authorized in “a limited number of enclaves”).

\(^{219}\) *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938). *Hinderlider* involved a dispute over rights to the waters in the La Plata River, which flowed south from the mountains of Colorado into New Mexico. *Id.* at 97. An 1898 Colorado court proceeding awarded the La Plata Ditch Company the right to divert a set amount of water from the river. *Id.* at 98. In 1925, however, Congress approved a Compact between New Mexico and Colorado in which the two states agreed to apportion the flow of the river between them during the months when the river’s flow was inadequate to meet the needs of all users in both states. *Id.* at 96-97. As a result of this agreement and in order to guarantee New Mexico its share of the river flow, the Colorado State Engineer periodically blocked the flow of water to the Ditch Com-
resolve the case: "For whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive."\textsuperscript{220} In support of the application of federal common law, the Court cited \textit{pre-Erie} cases that had relied on "interstate" common law without labeling it state or federal.

\textit{Hinderlider} thus clarified several aspects of the post-\textit{Erie} status of the federal common law. First, the Court recognized that the federal courts' power to develop common law survived \textit{Erie}. Quoting the powerful words of Justice Holmes, \textit{Erie} vehemently rejected the existence of "a transcendental body of law outside any particular State," insisting that all law be tied to "some definitive authority behind it."\textsuperscript{221} The application of federal common law in \textit{Hinderlider} made clear that the Court was not rejecting the entire concept of federal court lawmaking, but rather the particular kind developed under the rubric of \textit{Swift v. Tyson} and the general common law. Common law tied to a "definitive authority" survived, whether the authority of a state or of the federal sovereign. \textit{Erie}'s positivism did not reject all federal court lawmaking, but only common lawmaking in areas not within the powers of those courts.

Second, the federal common law developed in \textit{Hinderlider} was recognized as jurisdiction-granting and its application presented a federal question.\textsuperscript{222} In this suit between private parties, the Court based jurisdiction not on the interstate compact,\textsuperscript{223} but rather on the state court's failure to follow "federal common law" doctrines governing equitable distribution of water between the states.\textsuperscript{224} Third, \textit{Hinderlider} relied on cases decided before \textit{Erie}, cases that appeared to apply the general common law, but which, with the hindsight of \textit{Erie}, are now understood to have applied federal common law.\textsuperscript{225}

Finally, \textit{Hinderlider} recognized an area of permissible federal common law authority that grows out of the structure of the Constitution, not an explicit constitutional authorization. Although the federal courts are allotted jurisdiction over disputes between the states, the

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\item Id. at 99. In a suit by the Ditch Company, the Colorado Supreme Court held that the Compact improperly interfered with the Ditch Company's right to a certain amount of the river flow and ordered a halt to any interference with the company's water rights. \textit{Id.}
\item Id. at 110.
\item Id. at 79 (quoting \textit{Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.}, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).
\item \textit{Hinderlider}, 304 U.S. at 110; see \textit{Hill}, \textit{supra} note 5, at 1075-76.
\item Id. at 109-10 (citing \textit{People v. Central R.R.}, 79 U.S. (12 Wall.) 455, 456 (1870)).
\item Id. at 110.
\item \textit{See Weisburd, \textit{supra} note 10, at 41 n.248 (describing \textit{Hinderlider} as "recharacterizing [the] general law issue of Kansas as [a] federal common law issue").
\end{itemize}
\end{footnotesize}
Court did not rely on this jurisdictional grant to justify the development of federal common law, but rather the needs of the federal system of government. The justification for federal common lawmaking in *Hinderlider* was structural: Given that the United States is composed of fifty equal states with discrete legal systems, disputes between states must be governed by federal law, not by the law of any particular state. Further, the needs of the nation as a whole may require application of uniform rules distinct from those in effect in the states party to the dispute.

In the absence of a governing positive enactment, the federal courts thus must develop and apply federal common law to uniquely federal problems. As reaffirmed more recently by the Supreme Court,

[A] few areas, involving "uniquely federal interests," are so committed by the Constitution and the laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts — so-called "federal common law." Cases implicating foreign relations constitute one of these areas in which the structure of the U.S. government requires that federal law govern, a topic central to the questions addressed in this article, and to which I now turn.

**B. Foreign Affairs, International Law, and Federal Common Law**

Control over foreign affairs in our federal system is assigned to the federal government, the only entity recognized internationally as a sovereign state. The Supreme Court acknowledged federal supremacy over foreign affairs shortly before *Erie*, in *United States v. Curtiss-Wright Export Corp.*, in which Justice Sutherland reasoned that "the powers of external sovereignty" were "vested in the federal government as necessary concomitants of nationality." The Constitution, Sutherland concluded, was based upon the "irrefutable postulate that though the states were several their people in respect of foreign affairs were one." Despite extensive criticism of Curtiss-Wright's

226. *Hinderlider*, 304 U.S. at 110; see cases cited supra notes 212-18.
229. The power to regulate relations among the states and the power to control relations with foreign States are both necessary attributes of a federal government. "The two fundamental requirements of a federal union are that it be able to avoid internal rupture by settling disputes of its component parts and that it be able to act in a unified fashion, as a nation, when it faces abroad." *Note, The Federal Common Law*, 82 Harv. L. Rev. 1512, 1520 (1969).
231. *Id.* at 318.
232. *Id.* at 317.
historical analysis, its holding as to federal supremacy over foreign affairs reflects basic principles of federalism.\textsuperscript{233}

The Court has frequently used similar principles to explain post-
\textit{Erie} federal supremacy over issues touching upon foreign affairs. In \textit{Hines v. Davidowitz},\textsuperscript{234} for example, the Court held unconstitutional a state statute requiring aliens to carry registration cards. The Court relied upon the supremacy of federal authority over "the general field of foreign affairs," of which immigration and related issues are just one example, a supremacy to which the Court has "given continuous recognition."\textsuperscript{235}

The Federal Government, representing as it does the collective interests of the forty-eight states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties. "For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power."\textsuperscript{236} Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference. As Mr. Justice Miller well observed of a California statute burdening immigration: "If [the United States] should get into a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer, or all the Union?"\textsuperscript{237}

Similar statements were made in cases evaluating the effect on state property laws of federal diplomatic agreements,\textsuperscript{238} perhaps most famously by Justice Sutherland in \textit{U.S. v. Belmont}: "In respect of all international negotiations and compacts, and in respect of our foreign

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  \item \textsuperscript{233} See, e.g., Harold Hongju Koh, The National Security Constitution 94 (1990) (detailing the "withering criticism" of \textit{Curtiss-Wright}'s historical analysis); see also Henkin, supra note 18, at 19 (noting that "challenging [Justice Sutherland's] history does not necessarily destroy his constitutional doctrine"). Henkin notes that, despite its weaknesses, \textit{Curtiss-Wright} "has been cited with approval in later cases, and remains authoritative doctrine." \it Id. at 20. "Whatever the theory, then, there is virtually nothing related to foreign affairs that is beyond the constitutional powers of the federal government." \it Id. at 21.
  \item \textsuperscript{234} 312 U.S. 52 (1941).
  \item \textsuperscript{235}  Id. at 62.
  \item \textsuperscript{236} \it Id. at 63 (quoting \textit{The Chinese Exclusion Case}, 130 U.S. 581, 606 (1889); 2 Memoir, Correspondence and Miscellanies from the Papers of Thomas Jefferson 230 (1829); \textit{The Federalist No. 42} (James Madison)).
  \item \textsuperscript{237} \textit{Hines}, 312 U.S. at 63-64 (citing \textit{Chy Lung v. Freeman}, 92 U.S. 275, 279 (1875)) (additional citations omitted).
  \item \textsuperscript{238} See \textit{United States v. Pink}, 315 U.S. 203, 233 (1942) ("We repeat that there are limitations on the sovereignty of the States. No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively.")
\end{itemize}
relations generally, state lines disappear. As to such purposes the State of New York does not exist.\(^2\)

Federal supremacy over foreign relations also requires federal supremacy over the interpretation of international law. Judge Jessup pointed this out in 1939, just one year after the *Erie* decision:\(^2\)

The duty to apply [international law] is one imposed upon the United States as an international person. The several states of the Union are entities unknown to international law. It would be as unsound as it would be unwise to make our state courts our ultimate authority for pronouncing the rules of international law.\(^2\)

As Jessup recognized, although pre-*Erie* decisions addressing international law left unclear the federal status of such law, the logic of the federal/state legal divide indicated that customary international law was federal law, not state law.\(^2\)

The Supreme Court resolved the issue in 1964, twenty-five years after Jessup's article,\(^2\) in its landmark decision in *Banco Nacional de*

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239. 301 U.S. 324, 331 (1937); see Brilmayer, *supra* note 5, at 304-07; 332-36 (discussing the exclusion of states from foreign affairs powers); Henkin, *supra* note 18, at 13.

Foreign affairs are national affairs. The United States is a single nation-state and it is the United States (not the states of the Union, singly or together) that has relations with other nations; and the United States Government (not the governments of the states) conducts those relations and makes national foreign policy.

*Id.*


241. *Id.* at 743; see *Koh, supra* note 7, at 2362-66.

242. Given the confusing set of precedents decided under the rubric of the general common law, one of the tasks after *Erie* was to recategorize common law doctrines previously lumped together as general common law, specifying which of the earlier holdings addressed issues of state common law and which addressed federal common law. *See, e.g.*, Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943) (holding that the U.S. government's right to collect on a check governed by "federal law merchant" developed under *Swift v. Tyson*, rather than by local Pennsylvania law); Friendly, *supra*, note 190, at 408-21 (providing additional examples). Friendly concludes, "[A] not insignificant part of Story's 'general law' is already under the sway of the new type of federal common law . . . ." Friendly, *supra* note 190, at 421.

243. In the interim, one lower federal court decision addressed the issue. Bergman v. De Seyes, 170 F.2d 360 (2d Cir. 1948). *Bergman* considered the claim to immunity of a French diplomat on his way to an assignment in Bolivia. While in transit through New York, De Seyes was served on a state claim, which he then removed to federal court. Judge Learned Hand held that, because the defendant was served while the case was in the state court, New York law governed the validity of service and any claims as to diplomatic immunity. *Bergman* concluded that New York law on the issue was not clear and resolved the question through an analysis of international law, stating that it was conducting the analysis that the New York courts would have done. *Id.* at 361-63. *But see Clark, supra* note 62, at 1317-21 (criticizing Judge Hand's reasoning); Henkin, *supra* note 7, at 1558-59 (same).

*Bergman* has been cited for its holding that state law governed diplomatic immunity. *See, e.g.*, Bradley & Goldsmith, *supra* note 6, at 828, 834; Brilmayer, *supra* note 5, at 302 n.18; Alfred T. Goodwin, *International Law in the Federal Courts*, 20 Cal. W.
Cuba v. Sabbatino.\textsuperscript{244} \textit{Sabbatino} held that disputes involving foreign affairs and international law are governed by federal common law in the absence of controlling legislative or executive branch actions. The Court based this holding upon pillars of both separation of powers and federalism: Separation of powers requires judicial deference to the political branches of government, while federalism mandates that federal law govern issues affecting foreign affairs. The two are, of course, closely intertwined, both addressing the federal government's need to limit the players involved in the foreign policy arena, so that the U.S. government can implement a coherent foreign policy. Thus, the legislative and executive branches can order the judicial branch to follow their lead, while the federal government as a whole orders the states off the field entirely. Since 	extit{Sabbatino} addressed exactly the issue at the heart of this article, the decision will be discussed in some detail.

In \textit{Sabbatino}, the Cuban government sought to collect payment for a shipment of sugar expropriated from a corporation largely owned by U.S. residents. Representatives of the original owners argued that the expropriation violated international law, and that U.S. courts should therefore refuse to recognize the Cuban government's claim. Cuba asserted that, because the expropriation was a public act committed by a sovereign state within its own borders, the courts were barred from examining the validity of the expropriation under the act of state doctrine.\textsuperscript{245} With the case in federal court on the basis of diversity

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244. 76 U.S. 398 (1964).
245. "The act of state doctrine in its traditional formulation precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory." \textit{Id.} at 401. \textit{Underhill v. Hernandez}, 168 U.S. 250 (1897), first set forth the basic rationale for the doctrine: "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory." \textit{Id.} at 252. The act of state doctrine was narrowed in \textit{W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.}, 493 U.S. 400 (1990), where the Court found it inapplicable to a suit alleging that a company had obtained contracts through bribery of Nigerian officials. \textit{Id.} 409-10. The Court em-
\end{footnote}
jurisdiction,\textsuperscript{246} the Court turned first to the issue of what law governed. Although it appeared that New York followed the federal approach to the act of state doctrine,\textsuperscript{247} the Court declined to apply New York law or to duck the choice-of-law determination. "[W]e are constrained to make it clear that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law."\textsuperscript{248} The Court then referred directly to the analysis presented by Jessup:

> It seems fair to assume that the Court did not have rules like the act of state doctrine in mind when it decided \textit{Erie R. Co. v. Tompkins} [sic]. Soon thereafter, Professor Philip C. Jessup, now a judge of the International Court of Justice, recognized the potential dangers were \textit{Erie} extended to legal problems affecting international relations. He cautioned that rules of international law should not be left to divergent and perhaps parochial state interpretations. His basic rationale is equally applicable to the act of state doctrine.\textsuperscript{249}

The Court addressed directly the precedential value of act of state cases decided before \textit{Erie}, cases that had not specified the source of the applicable law.\textsuperscript{250} Despite the apparent reliance of those decisions on general common law, the \textit{Sabbatino} court found that the act of state doctrine had been governed by federal law even before \textit{Erie}, noting that the earlier cases "used language sufficiently strong and broad-sweeping to suggest that state courts were not left free to develop their own doctrines (as they would have been had this Court merely been interpreting common law under \textit{Swift v. Tyson}, supra)."\textsuperscript{251}

\textit{Sabbatino} also defined the relationship between the act of state doctrine and international law, a holding that dismayed advocates of

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  \item phasized that the doctrine does not bar judicial review of "cases and controversies that may embarrass foreign governments," but only requires that "the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid." \textit{Id.} at 409; see Restatement (Third), supra note 7, § 443(1) (defining the act of state doctrine in U.S. law).
  \item \textsuperscript{246} \textit{Sabbatino}, 376 U.S. at 421.
  \item \textsuperscript{247} We could perhaps in this diversity action avoid the question of deciding whether federal or state law is applicable to this aspect of the litigation. New York has enunciated the act of state doctrine in terms that echo those of federal decisions decided during the reign of \textit{Swift v. Tyson}, 16 Pet. 1 . . . . Thus our conclusions might well be the same whether we dealt with this problem as one of state law or federal law.
  \item \textit{Id.} at 424-25 (citations omitted). Note that the Court here refers to federal decisions during the \textit{Swift} era as determinative of federal law on this issue. \textit{Id.} at 424.
  \item \textsuperscript{248} \textit{Id.} at 425.
  \item \textsuperscript{249} \textit{Id.} (citation omitted).
  \item \textsuperscript{250} \textit{Id.} at 426.
  \item \textsuperscript{251} \textit{Id.}
the supremacy of international law. The Court ruled that the act of state doctrine applied even where the acts in question allegedly violated international law. In the ongoing debate whether international law was binding on the political branches of our federal government, Sabbatino came down in favor of the government’s authority to determine the domestic application of international law. On the federalism question, however, Sabbatino’s answer is clear and explicit: The federal government controls our relations with the rest of the world, including the interpretation of international law. Indeed, the Sabbatino holding regarding the primacy of the federal political branches also strengthens the role of the federal judiciary. Sabbatino leaves no doubt that issues of international law and foreign affairs are federal questions, requiring uniform federal solutions.

The Supreme Court in Sabbatino thus resolved a question central to the role of international law in the federal system: Issues affecting international relations or rules of international law are governed by federal, not state law. In reaching this result, the Court also made clear that cases decided before Erie, at a time when the courts did not distinguish between federal and state common law, may nonetheless have developed rules of law that were supreme over state law. Just as Hinderlider recharacterized the law applied in pre-Erie decisions concerning interstate borders and water rights as a precursor of federal common law, Sabbatino opened the possibility that pre-Erie international law cases applied a precursor of federal common law. Such cases must be closely examined to evaluate whether the Court intended that state courts be bound to follow its interpretation of the applicable law or “left free to develop their own doctrines.”

Post-Erie, the Court made clear, such areas of federal supremacy are common: “We are not without other precedent for a determination that federal law governs; there are enclaves of federal judge-made law which bind the States.” Examples include enclaves defined by statute, such as labor-management relations or those that touch upon “uniquely federal interests.” Just as the Court has fashioned federal common law in the absence of statutes to govern state disputes

252. See Koh, supra note 7, at 2363 (suggesting that Sabbatino “cast a profound chill upon the willingness of United States domestic courts to interpret or articulate norms of international law”).

253. In Sabbatino, the Supreme Court ratified the “federal common law of international relations.” Merrill, supra note 217, at 56 n.238.


256. Id. (citing Textile Workers Union of Am. v. Lincoln Mills, 353 U.S. 448 (1957)).

257. Sabbatino, 376 U.S. at 426 (citing Clearfield Trust Co. v. United States, 318 U.S. 363 (1943); D’Oench, Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447 (1942)).
over boundaries and water apportionment, federal courts must do so in the area of international relations, because of the federal interest at stake. The Court found support for the decision that federal law governs from the “[v]arious constitutional and statutory provisions . . . reflecting a concern for uniformity in this country’s dealings with foreign nations and indicating a desire to give matters of international significance to the jurisdiction of federal institutions.”258

The problems surrounding the act of state doctrine are, albeit for different reasons, as intrinsically federal as are those involved in water apportionment or boundary disputes. The considerations supporting exclusion of state authority here are much like those which led the Court in United States v. California, 332 U.S. 19 [(1947)], to hold that the Federal Government possessed paramount rights in submerged lands though within the three-mile limit of coastal States. We conclude that the scope of the act of state doctrine must be determined according to federal law.259

The comparison with United States v. California260 is instructive. In a dispute between the State of California and the federal government over the control of the seabeds lying within three miles of shore, the Court found that the protection and control of the three-mile belt “has been and is a function of national external sovereignty.”261 In litigation concerning rights to the sea, the Court declared, the federal government appears in part in “its capacity as a member of the family of nations,”262 for the proper management of the sea “is a question for consideration among nations as such, and not their separate governmental units.”263 The states are no more competent to assert dominion in this area than they are to wage war or otherwise assume responsibility for national security,264 because “national interests, responsibility, and therefore national rights are paramount.”265

258. Sabbatino, 376 U.S. at 427 n.25.
259. Id. at 427 (footnote omitted).
261. Id. at 34.
262. Id. at 29.
263. Id. at 35.
264. [A]s peace and world commerce are the paramount responsibilities of the nation, rather than an individual state, so, if wars come, they must be fought by the nation. . . . The state is not equipped in our constitutional system with the powers or the facilities for exercising the responsibilities which would be concomitant with the dominion which it seeks.
Id. at 35-36 (citing Chy Lung v. Freeman, 92 U.S. 275, 279 (1875)).
By analogy, then, the Supreme Court in *Sabbatino* placed the act of state doctrine, as well as other "legal problems affecting international relations" and "rules of international law," on the same plane as control over the seabeds and other issues governed by the federal government as a sovereign nation. Such issues must be controlled by federal law, not "left to divergent and perhaps parochial state interpretations." This choice-of-law decision is central to *Sabbatino*'s holding that the act of state doctrine affects our nation's relationships with other sovereigns and thus must be followed by the judiciary. Were the act of state doctrine merely a domestic choice-of-law rule, a state court would be free to apply its own law and might choose to disregard the doctrine. The Supreme Court felt "constrained" to decide the choice-of-law issue because the federal nature of the issue was fundamental to its holding as to the reach of the act of state doctrine.

Subsequent Supreme Court cases have not questioned this basic construct. Shortly after the *Sabbatino* decision, the Court employed similar reasoning to declare unconstitutional an Oregon statute that conditioned inheritance rights on a showing that the foreign heir has a right under the laws of the home country to receive the proceeds of the estate "without confiscation." Petitioners, citizens of East Germany, were denied their inheritance on the basis of this requirement. The Court found the statute to be "an intrusion by the State into the field of foreign affairs," declaring that "foreign affairs and international relations" are "matters which the Constitution entrusts solely to the Federal Government." Although probate issues have traditionally been regulated by the states, the Court found that such authority

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267. Id.
268. Had the Court merely applied New York law in this diversity case, the ruling would not have been binding on the courts of any other state.
269. Bradley and Goldsmith insist that *Sabbatino*'s federalism is dicta and that the decision is really based on separation of powers concerns. Bradley & Goldsmith, supra note 6, at 859-60. They miss the interconnection between the two. Underlying the holding that the dictates of separation of powers bar the judiciary from meddling in areas of international relations reserved to the executive branch, is an equally important holding that the states as well are barred from such meddling. Federalism decrees that control over foreign affairs is assigned to the federal government; separation of powers determines how the three federal branches share that responsibility.
271. Id. at 432.
272. Id. at 436. The Court cited a series of state cases in which similar provisions were used to justify denying inheritance rights to citizens of countries considered unfriendly to the United States. Id. at 435 n.6, 436, 437 n.8, 438-40. One California judge was quoted as saying, "No, I won't send any money to Russia," taking "judicial notice that Russia kicks the United States in the teeth all the time." Id. at 437 n.8.
gives way to the federal government’s paramount control over foreign affairs.\textsuperscript{273}

Even where the Court has found an area to be within the powers of the state to regulate, foreign affairs implications have sufficed to afford federal jurisdiction. In \textit{Skiriotes v. Florida},\textsuperscript{274} for example, the Court reviewed a state court criminal conviction for a violation of a state statute prohibiting the use of diving equipment to harvest sponges within three nautical miles of the Florida coast. Supreme Court jurisdiction over the appeal rested on the claim that Florida had exceeded its powers by regulating conduct occurring outside the state’s territorial waters. The Court upheld the Florida statute after finding that it did not conflict with international law.

Federal control over international relations continues to justify foreign affairs as one of the “few and restricted” areas in which the courts are authorized to formulate federal common law.\textsuperscript{275}

There is, of course, no “federal general common law.” Nevertheless, the Court has recognized the need and authority in some limited areas to formulate what has come to be known as “federal common law.” These instances are “few and restricted,” and fall into essentially two categories: those in which a federal rule of decision is “necessary to protect uniquely federal interests,” and those in which Congress has given the courts the power to develop substantive law.\textsuperscript{276}

The concededly narrow field in which development of federal common law is authorized includes “international disputes implicating . . . our relations with foreign nations.”\textsuperscript{277} Foreign affairs constitute an “enclave” in which such law making is permitted.\textsuperscript{278}

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\item \textsuperscript{273} \textit{Id.} at 440-41. The Court held that state regulations governing the distribution of estates “must give way if they impair the effective exercise of the Nation’s foreign policy,” whether or not the underlying concerns are governed by treaty. \textit{Id.} “If there are to be such restraints, they must be provided by the Federal Government.” \textit{Id.} at 441.

[T]he Oregon Legislature has framed its inheritance laws to the prejudice of nations whose policies it disapproves and thus has trespassed upon an area where the Constitution contemplates that only the National Government shall operate. . . . [T]he conduct of our foreign affairs is entrusted under the Constitution to the National Government, not to the probate courts of the several States.

\textit{Id.} at 442-43 (Stewart, J., concurring).

\item \textsuperscript{274} 313 U.S. 69 (1941).
\item \textsuperscript{275} Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981).
\item \textsuperscript{276} \textit{Id.} (citations omitted).
\item \textsuperscript{277} \textit{Id.} at 641. Others include disputes between states and admiralty. \textit{Id.}
\item \textsuperscript{278} Judicial lawmaking in the area of foreign affairs does not raise the same federalism questions as such lawmaking in other areas because, “[i]n these contexts, the Constitution makes federal sovereignty exclusive and completely preempts state law, thereby eliminating the federalism constraints . . . .” \textit{Kramer, supra} note 2, at 288 nn.84.

The “widely accepted” middle ground of the federal common law debate recognizes that federal court lawmaking power is limited, but maintains that it exists where authorized by Congress or the Constitution and in “a limited number of enclaves” or
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The federal common law governing foreign affairs recognizes the key role played by the political branches of the federal government. Common law "is necessarily informed . . . by articulated congressional policies," as well as by international law principles. These two pillars define the status of international law as federal law: Interpretation of international law norms is a federal question, and the views of the legislature and the executive are to be afforded great weight in determining the appropriate application of such norms. Far from contradictory, federalism and separation of powers mesh tightly, confirming that international law issues are governed by federal, not state law, and that the political branches of the federal government play a key role in interpreting such law.


279. First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 623 (1983). In a dispute turning on whether to pierce the corporate veil of a Cuban corporation, the Supreme Court found the issue governed by federal common law and declined to apply New York or Cuban law. Id. at 621-22. Instead, the Court applied the principle enunciated in Sabbatino, holding that "matters bearing on the Nation's foreign relations 'should not be left to divergent and perhaps parochial state interpretations.'" Id. at 622 n.11 (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964)). Citing once again The Paquete Habana's holding that international law "is part of our law," the Court concluded that the case before it was governed by "principles . . . common to both international law and federal common law." Id. at 623. That common law, however, "is necessarily informed both by international law principles and by articulated congressional policies." Id. Thus, the Court held that cases raising international law issues are federal questions, governed by federal common law. In addition, federal common law's incorporation of international law is "informed" by federal policies articulated by the legislative branch. This conclusion reflects the separation-of-powers concerns highlighted in Sabbatino. Foreign relations issues are both federal questions and primarily assigned to the political branches; therefore, although federal law governs, the judiciary should show deference to legislative and executive interpretations of international law obligations. See supra note 273.

280. The result of this deference arguably reflects, at times, a marked willingness to twist international law principles to protect U.S. government policies. See, for example, Justice Blackmun's critique of the Supreme Court's decisions in United States v. Alvarez-Machain, 504 U.S. 655 (1992), and Sale v. Haitian Cits. Council, Inc., 509 U.S. 155 (1993), in which he concluded that the majority opinions "reflect a disturbing disregard on the part of the Supreme Court of its obligations when construing international law." Blackmun, supra note 7, at 45. The heart of these cases, nevertheless, is the refusal to defer to international norms when evaluating statutes and executive actions, not a rejection of either the federal status of such norms or their validity in the absence of contrary political branch action. Lawrence Lessig's cursory citation of such cases, all interpreting statutes and executive actions, thus does not support his suggestion that recent Supreme Court opinions lend support to the Bradley and Goldsmith critique of the modern position. Lawrence Lessig, Erie-Effects of Volume 110: An Essay on Context in Interpretive Theory, 110 Harv. L. Rev. 1785, 1811 & n.112 (1997).

281. In Boos v. Barry, 485 U.S. 312 (1988), for example, the Court noted "that the United States has a vital national interest in complying with international law." Id. at 323. Evaluating a local District of Columbia statute that limited the right to demonstrate in the vicinity of a foreign embassy, the Court compared the D.C. statute to a less restrictive provision enacted by Congress. Id. at 324-29. Noting that Congress "is
C. Rehabilitating The Paquete Habana

At the time the Supreme Court wrote the now-famous *Paquete Habana* words, "international law is part of our law," the federal courts employed different categories of common law without clearly distinguishing among them. The *Swift v. Tyson* regime generated general common law, permitting the federal courts to undertake independent review of issues that otherwise fell within the control of state law. The federal courts also applied a kind of supreme federal common law in a handful of areas that clearly fell under national control, although the evolving federal-state judicial structure could not explain or justify this emerging federal common law. *Erie*’s clear division between state and federal court lawmaking powers made possible the development of “true” federal common law. In *Sabbatino* and

the body primarily responsible for implementing our obligations” in this area of international law, *id.* at 324, the Court relied upon the “congressional judgment” that the D.C. statute was not the least restrictive means to protect foreign diplomats and thus not required by international law. *Id.* at 329. As a result, the Court held that the local statute violated constitutional free speech protections, reserving judgment on whether international law could ever require adjusting the balancing of interests required by the First Amendment “to accommodate the interests of foreign officials.” *Id.* at 324.

In *Barclays Bank PLC v. Franchise Tax Board of California*, 512 U.S. 298 (1994), the Court considered a challenge to a method of calculating taxes on foreign corporations that had prompted repeated complaints from foreign governments. One of the questions raised by the case was whether the state statute impermissibly violated Congress’ constitutional control over foreign commerce by imposing a taxation scheme that Congress had not explicitly authorized. *Id.* at 302-03. Did California’s statute interfere with the government’s ability to speak with “one voice” in foreign affairs? The Court found no interference with congressional foreign affairs powers because Congress had implicitly authorized the taxation scheme by considering and rejecting repeated attempts to prohibit such taxation. *Id.* at 324-47. Prior decisions, the Court said, held that explicit authorization was not necessary. “Congress may more passively indicate that certain state practices do not ‘impair federal uniformity in an area where federal uniformity is essential.’” *Id.* at 323 (quoting *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 (1979)). While reading the tea leaves of congressional debates, reports, and rejected legislation is a convoluted means by which to determine congressional intent, the Court nevertheless adhered to the basic principle that, in areas touching upon foreign affairs and international law, deference is paid to the political branches. Here, in an area delegated by the Constitution to Congress, the implicit authorization of Congress is sufficient to validate the state practice.

See also *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993), in which the Court acknowledged that international law might bar the assertion of jurisdiction over foreign corporations where a conflict between U.S. and foreign law made it impossible to comply with both. *Id.* at 794-99. Finding no such conflict, the Court did not consider whether it would decline to exercise jurisdiction where such a conflict did exist. *Id.* at 799. The four-judge dissent, however, found that international law did bar the assertion of jurisdiction. *Id.* at 812-21 (Scalia, J., dissenting). Applying the presumption of *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118, 2 Cranch 34, 67 (1804) (stating that, “[A]n act of congress ought never to be construed to violate the law of nations if any other possible construction remains”), the dissent would have held that Congress could not have intended to assert jurisdiction in this case, as such a conclusion would violate international law. *Hartford Ins.*, 509 U.S. at 815 (Scalia, J., dissenting).

282. The Paquete Habana, 175 U.S. 677, 700 (1900).
later cases, the Supreme Court applied this new framework, clarifying that international law issues are governed by federal law, constituting an area of federal concern over which federal courts have jurisdiction and about which federal court decisions are binding on the states. These Supreme Court decisions have assigned international law its place on the federal side of the great post-\textit{Erie} divide between federal and state law.

What then is the precedential value of the holding of \textit{The Paquete Habana} with which we started this article? Written at a time when the status of the general common law and the distinction between state and federal common law were unclear, the opinion does not specify the characteristics of the law of which international law forms a part. Most federal common lawmaking fell within the general common law rubric; but, by the end of the nineteenth century, the federal courts had begun to develop true federal common law. Although they were unable to label it as such under the prevailing legal theories, such law was jurisdiction-granting and supreme over state law. The bare fact that a federal court decision on common law grounds predated \textit{Erie} does not, by itself, indicate that it constituted state law; proper understanding of such law requires an analysis of the area of law and the consequences intended by the Court.

Viewed in this larger context, it is clear that the Court in \textit{The Paquete Habana} did not mean that international law was state law. The Supreme Court had regularly applied international law as federal common law where appropriate, including disputes between states and cases raising the act of state doctrine, the laws of prize, or other admiralty cases. In each area, the common law developed by the Supreme Court constituted a form of federal common law. \textit{The Paquete Habana} fits comfortably within this diverse set of cases. The case concerned the laws of prize, specifically determining whether a fishing boat belonging to a citizen of the enemy could be seized as a prize of war. Such issues had long been viewed as governed by international law and as raising issues of federal, not state, law.

Finally, the modern import of the language in this ninety-seven-year-old Supreme Court opinion depends not only on what the Supreme Court intended when it wrote those now famous words, but also on how succeeding generations of judges have understood and applied those words in light of subsequent developments. \textit{Erie} rewrote our concepts of federal and state common law. How have the courts read the common law language in \textit{The Paquete Habana} after \textit{Erie}?

On this the Supreme Court has led the way: The Court has cited the language in \textit{The Paquete Habana} as evidence that international
law is part of federal law. This modern interpretation of the Paquete Habana language is stated clearly and without reservation in Banco Nacional de Cuba v. Sabbatino, discussed at length in part III, in which the Court cited The Paquete Habana in support of the proposition that "it is, of course, true that United States courts apply international law as a part of our own in appropriate circumstances . . . ." Whether a particular case presents "appropriate circumstances" may be subject to considerable debate, but such questions are without a doubt "federal." Sabbatino's holding on the issue is most certainly not limited to the act of state doctrine and the separation of powers issues triggered by that doctrine. To the contrary, the case holds that federal law must govern "legal problems" affecting international relations, in order to ensure that "rules of international law should not be left to divergent and perhaps parochial state interpretations."

Almost twenty years later, the Court again cited the same language from The Paquete Habana for the same proposition, noting that "as we have frequently reiterated," international law ""is part of our law . . . ." The Court applied federal common law rules incorporating both international law principles and "articulated congressional policies" to arrive at a federal, not state, resolution of a matter that touched upon foreign affairs. Relying on and paraphrasing Sabbatino, the Court repeated that "matters bearing on the Nation's foreign relations 'should not be left to divergent and perhaps parochial state interpretations.'"

283. As Professor Henkin said ten years ago, "In the eighty-seven years since The Paquete Habana, the Court repeatedly has emphasized that international law is the law of the land, and it has given effect to principles of customary international law as the law of the United States." Louis Henkin, The Constitution and U.S. Sovereignty: A Century of Chinese Exclusion and Its Progeny, 100 Harv. L. Rev., 853, 873 (1987).


285. Id. at 423. The Court also cites for this holding The Nereide, 13 U.S. 388, 423, 9 Cranch 242, 263 (1815) (holding that, in the absence of statute directing otherwise, "the court is bound by the law of nations, which is a part of the law of the land"); and Ware v. Hylton, 3 U.S. (3 Dall.) 199, 281 (1796) ("When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement."). In Ware v. Hylton, Justice Wilson distinguished between state and federal authority over matters implicating foreign affairs, concluding that Virginia could not enforce a statute canceling debts owed to British citizens, although Congress could have done so. Ware, 3 U.S. (3 Dall.) at 281 ("Congress . . . clearly possessed the right of confiscation, as an incident of the powers of war and peace . . . .").

286. Sabbatino, 376 U.S. at 425.


288. Id.
interpretations." The lower federal courts have regularly cited *The Paquete Habana* for this same proposition.

The reliance on the *Paquete* holding by the Supreme Court and lower courts has not been a product of a careless quote, ignoring the pre-*Erie* context in which the case was decided. The *Filártiga* decision, for example, strongly criticized by Bradley and Goldsmith for inappropriate reliance on *The Paquete Habana*, actually relies on a broad range of sources for its conclusion that international law is a part of federal common law. *Filártiga* begins with a review of the status of international law at the time of the ratification of the Constitution, citing to evidence that the framers intended to assign control over foreign affairs to the federal government and to afford federal courts jurisdiction over cases raising issues of international law. Nineteenth century cases and *The Paquete Habana* are cited properly to demonstrate the continuing commitment to and incorporation of international law into the law of the United States.

Nor does the *Filártiga* approach conflict with that of the Restatement of Foreign Relations Law. Both cite *The Paquete Habana* for the proposition that international law is federal law.

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289. Id. at 622 n.11; see also First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 763 (1972) (plurality opinion) (citing *The Paquete Habana* for the proposition that international law is one of several applicable sources of law in federal court); Skiriotes v. Florida, 313 U.S. 69, 72-73 (1941) (ambiguously citing *The Paquete Habana* for the proposition that "[i]nternational law is a part of our law and as such is the law of all States of the Union"). Pre-*Erie*, the Court cited the same language in *Kansas v. Colorado*, 206 U.S. 46 (1907), to support its development of a federal common law of interstate relations. Id. at 97.

290. See, e.g., cases cited supra note 1.


292. Id. at 885-87.

293. *Id.* Bradley and Goldsmith also criticize *Filártiga* for failing to cite Bergman v. De Siyees, 170 F.2d 360 (2d Cir. 1948), a case applying international law as the law of New York State. Bradley & Goldsmith, supra note 6, at 834; see supra note 243. Bergman, however, did not involve a federal statute instructing the federal courts to adjudicate violations of the law of nations. Moreover, any implication that international law is governed by state law, not federal law, was overruled by *Sabbatino*. See supra notes 278-82 & accompanying text.

294. Restatement (Third), supra note 7. Bradley and Goldsmith oversimplify both the *Filártiga* decision and the Restatement. After reducing both arguments to one-dimensional caricatures, they conclude that they are contradictory. Bradley & Goldsmith, supra note 6, at 836-57. They claim that the *Filártiga* court "relayed uncritically on pre-*Erie* precedents" and "appeared not to understand that these precedents applied [customary international law] as general common law, not federal law." *Id.* at 834. Their criticism completely misses the long history of federal common law developed before the *Erie* decision.

295. *Filártiga*, 630 F.2d at 887; Restatement (Third), supra note 7, § 111 reporters' notes 2, 4. The Restatement (Third) analysis properly notes that *The Paquete Habana* did not address the issue of the supremacy of customary international law over state law, but that later cases did find it to be supreme. *Id.* § 111 reporters' note 2. The holding in *The Paquete Habana* is also cited in support of the conclusion that "[m]atters arising under customary international law also arise under 'the laws of the United States'. . . ." *Id.* § 111 reporters' note 4. Bradley and Goldsmith thus err in
statements by John Jay to demonstrate the framers' intent to assign issues of international law to the jurisdiction of the federal courts.\footnote{296} The Restatement discusses the equivocal status of customary international law during the period before \textit{Erie}, an issue \textit{Filartiga} had no need to address, but does not thereby undercut the precedential value of \textit{The Paquete Habana} or any of the pre-\textit{Erie} cases cited by \textit{Filartiga}.\footnote{297} Most important, both conclude at the same modern point, citing \textit{Sabbatino} for the holding that post-\textit{Erie}, customary international law is federal law.\footnote{298}

The question of the post-\textit{Erie} significance of cases decided pre-\textit{Erie} has arisen in other areas as well. As discussed earlier, the Supreme Court reviewed pre-\textit{Erie} cases deciding disputes between states over borders and water rights and characterized the law applied in those cases as federal common law. Similarly, the modern citations to \textit{The Paquete Habana}, coupled with the extensive analysis of \textit{Sabbatino}, make clear that the pre-\textit{Erie} cases stand for the proposition that international law is part of federal common law—even if, in the era in

\footnote{296} Even before the Constitution, as the “United States were responsible to foreign nations for the conduct of each State, relative to the laws of nations, and the performance of treaties . . . the inexpediency of referring all such questions to State Courts, and particularly to the Courts of delinquent States became apparent.”

\footnote{297} See supra note 192 (discussing the Restatement’s treatment of international law pre-\textit{Erie}).

\footnote{298} The Restatement observes that international law is “like” federal common law, but not that it “is” federal common law. Restatement (Third), supra note 7, § 111, cmt. d. The distinction accurately reflects both the deference paid to the views of the executive branch in determining the content of international law and the fact that international law is developed by the international community as a joint endeavor. See Henkin, supra note 18, at 137 n.* (noting that, in “finding” international law, judges are bound to consider the authority of the executive branch and “attend to the practices and opinions of many nation-states over many years”). Nevertheless, this distinction is immaterial to the characterization of customary international law as federal law, both supreme over state law and jurisdiction-granting. Restatement (Third), supra note 7, § 111 reporters’ note 4.

For these purposes, there is no reason to treat claims arising under international law any differently from those arising under other federal law. In determining international law, judges are less free in their “sources” and are subject to international constraints . . . but the law they find is “part of our law” like other nonstatutory law and is properly treated like federal common law.

\textit{Id.}
which they were written, such language and concepts could not have been employed.

IV. In Defense of the Modern Position

The modern position holds that customary international law is federal common law, both jurisdiction-granting and supreme over state law. This position has been adhered to consistently by the federal courts without causing demonstrable strains in the fabric of our constitutional federalism or democracy.\textsuperscript{299} The exaggerated fear of interna-

\textsuperscript{299} Many of the modern cases applying customary international law as federal law involve the Alien Tort Claims Act, 28 U.S.C. § 1350 (1994) [hereinafter "ATCA"], which states, "The district courts shall have original jurisdiction of 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." Originally enacted as part of the First Judiciary Act, Judiciary Act of 1789, ch. 20 § 9(b), 1 Stat. 73, 77 (1789), the statute was rarely cited before 1980. Randall, \textsuperscript{supra} note 7, at 4-5 n.15-17 (counting twenty-one cases asserting jurisdiction under the statute, but only two sustaining the claim).


Congress recently enacted a similar statute, signed by President Bush, the Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 (1994), enacted as Pub. L. No. 102-256, 106 Stat. 73 (1992) [hereinafter "TVPA"], which codified a cause of action for citizens as well as aliens based on international law prohibitions against torture and summary execution. The legislative reports accompanying the TVPA stress Congress' approval of the \textit{Fildrtiga} interpretation of the ATCA and clarify that the TVPA is meant to strengthen and expand its reach. H.R. Rep. No. 102-367 (1992), \textit{reprinted in 1992 U.S.C.C.A.N.} 84, 86 (describing the ATCA as "permit[ting] Federal district courts to hear claims by aliens for torts committed 'in violation of the law of nations,'" stating that the ATCA "has other important uses and should not be replaced" by the TVPA, and noting that "[t]he \textit{Fildrtiga} case has met with general approval."); S. Rep. No. 102-249, at 4 (1992) (same). Congress explicitly based its constitutional power to enact the TVPA on the premise that international law is part of the "law of the United States" for the purposes of Article III jurisdiction and on Congress' authority to "define and punish . . . Offenses against the Law of Nations," S. Rep. No. 102-249, at 5.

The ATCA properly triggers the federal common law powers of the federal courts as an express congressional instruction to resolve claims by aliens alleging torts in
tional law expressed by authors such as Bradley and Goldsmith reflects an inaccurate view of both the method by which customary international law develops and the content of such law. This view leads to the misplaced concern that foreign legal norms will be imposed by the courts without a democratic process.  

Customary international law is the product of a deliberative interaction among the nations of the world. The process is far faster now than two centuries ago, given the phenomenal growth of multinational organizations and communication advances that permit information to be exchanged virtually instantaneously, rather than arriving by boat after weeks or months, if at all. Nevertheless, the involvement of almost 200 nations in the process guarantees that regardless of the communication advances of the information superhighway, consensus will rarely be quick or easy.

In their article in this volume of the Fordham Law Review, Bradley and Goldsmith sketch new questions about the Fildariga interpretation of the Alien Tort Claims Act and its relation to the Torture Victim Protection Act. Bradley & Goldsmith, supra note 201, at 356-57 (1997). Although a full response to their novel argument is beyond the scope of this article, it suffices to say that their extreme positivist view of federal court jurisdiction and common lawmaking powers leads them to an implausibly narrow interpretation of the actions of both the eighteenth century Congress that enacted the Alien Tort Claims Act and the twentieth century Congress that chose to reaffirm it, with ringing language about this country's obligation to protect and enforce human rights.

See, e.g., Bradley & Goldsmith, supra note 6, at 868 ("The modern position . . . posits that unelected federal judges apply customary law made by the world community at the expense of state prerogatives."); Phillip R. Trimble, A Revisionist View of Customary International Law, 33 UCLA L. Rev. 665, 721 (1986) ("[I]f customary international law can be made by practice wholly outside the United States it has no basis in popular sovereignty at all. Many foreign governments are not responsive to their own people, let alone to the American people.").

A rule does not attain the status of customary international law unless it is observed by a significant number of states out of a sense of legal obligation. Restatement (Third), supra note 7, § 102(2); Ian Brownlie, Principles of Public International Law 4-11 (4th ed. 1990); Janis, supra note 26, at 35-46.

See, e.g., Restatement (Third), supra note 7, § 102 reporters' note 2 (noting that passage of an extended period of time is no longer deemed necessary for the establishment of a customary international law norm, "perhaps because improved communications made the practice of states widely and quickly known"); Blum & Steinhardt, supra note 7, at 72 ("The essence of the new modes of lawmaking is that they accelerate the process of customary law formation by relying upon the unique form of state practice which occurs in multilateral organizations like the United Nations.").


Bradley and Goldsmith and I all agree that "[c]ustomary international law is a developing concept." Beth Stephens, Litigating Customary International Human Rights Norms, 25 Ga. J. Int'l Comp. L. 191, 198 (1995-96). Part of such development,
This slow and cumbersome process has produced an extremely short list of customary international law norms. The Restatement (Third) lists seven human rights prohibitions, including genocide, slavery, murder, and torture. Not surprisingly, none are controversial in the United States. The difficulty involved in reaching worldwide consensus ensures that binding norms of customary international law will reflect only the most basic, noncontroversial international rules of conduct. Advocates of stronger human rights protections urge expansion of the short list. Arguments in support of the inclusion of dozens of course, entails recognition of new norms, id. at 199, although such a process is not nearly as fast as victims of human rights abuses would prefer. Neither is it the uncontrollable evil portrayed by Bradley and Goldsmith.

305. Restatement (Third), supra note 7, § 702. The full list includes genocide; slavery or the slave trade; murder or causing disappearance; torture or other cruel, inhuman, or degrading treatment; prolonged arbitrary detention; systematic racial discrimination; and "a consistent pattern of gross violations of internationally recognized human rights." Id.


The great majority of rights considered important under U.S. law, as well as virtually every right which recent U.S. governments have been prepared to criticize other governments for violating, are held to be part of customary international law. By contrast, none of the rights which the U.S. fails to recognize in its domestic law, is included.

Id. The criticism is somewhat off target, given that the Restatement purports only to be a "restatement" of the foreign relations law of the United States. The observation that the Restatement closely mirrors U.S. domestic law, however, does indicate that the United States has generally accepted only those international rules that mesh neatly with our own law—an observation that troubles strong advocates of the rule of international law, but that should provide comfort to those worried about the impact of such law on our domestic legal system.

307. That the list of customary international human rights norms is subject to modification and expansion is self-evident. As the nations of the world come to a consensus on basic human rights, more and more of those rights will reach the level of customary international law. The Restatement (Third) states that the list "is not necessarily complete, and is not closed: human rights not listed in this section may have achieved the status of customary law, and some rights might achieve that status in the future." Restatement (Third), supra note 7, § 702 cmt. a.

A sampling of the rights proposed for inclusion over the past decade includes education, see Connie de la Vega, The Right to Equal Education: Merely a Guiding Principle or Customary International Legal Right?, 11 Harv. Blackletter J. 37 (1994); environmental harm, see Michelle Leighton Schwartz, International Legal Protections for Victims of Environmental Abuse, 18 Yale J. Int'l L. 355 (1993); gender discrimination and gender violence, see Charlotte Bunch, Women's Rights as Human Rights: Toward a Re-Vision of Human Rights, 12 Hum. Rts. Q. 486 (1990); housing, see Marc-Olivier Herman, Fighting Homelessness: Can International Human Rights Law Make a Difference?, 2 Geo. J. on Fighting Poverty 59 (1994); indigenous rights, see S. James Anaya, Indigenous Rights Norms in Contemporary International Law, 8 No. 2 Ariz. J. Int'l & Comp. L. 1 (1991); the juvenile death penalty, see Julian S. Nicholls, Too Young to Die: International Law and the Imposition of the Juvenile Death Penalty in the United States, 5 Emory Int'l L. Rev. 617 (1991); labor rights, see Leslie Deak, Customary International Labor Laws and Their Application in Hungary, Poland, and the Czech Republic, 2 Tulsa J. Comp. & Int'l L. 1 (1994); right to defense counsel, see
ens of new norms have been advanced over the past decade. For better or worse, however, such debates are still mired at the theoretical level. Despite human rights advocates' best efforts, the built-in barriers to rapid development of a consensus on human rights protections ensure slow, incremental movement toward recognition of new norms.

The United States has played an increasingly important role in the development of customary international law over the past fifty years, first as one of the two superpowers, now as the only one. As the law of the sea evolved over the course of this century, for example, the United States played an active role, blocking disfavored rules and obtaining acceptance of others.\footnote{See Restatement (Third), supra note 7, pt. V, introductory note (summarizing U.S. recognition of customary law rules governing aspects of the law of the sea); 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, 915-16 (1986); Henkin, supra note 7, at 1564 n.34; Henry M. Arruda, Comment, The Extension of the United States Territorial Sea: Reasons and Effects, 4 Conn. J. Int'l L. 697 (1989) (detailing the history of international and U.S. positions as to sovereignty over coastal waters and control over undersea resources). The United States' concept of coastal state economic rights over the continental shelf, announced in 1945, was so quickly accepted as customary international law binding on all states that it has been cited as an example of "instant customary law." Restatement (Third), supra note 7, § 102 reporters' note 2.}

In another field, the executive branch has recognized that many provisions of the laws of war are binding on the United States as customary international law, even where the United States has not ratified the relevant treaties. For example, although the United States has not ratified the Protocols to the Geneva Conventions,\footnote{Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) adopted by the Conference on 8 June 1977, 16 I.L.M. 1442 (1977).} the government considers some of the Protocols' provisions to be binding as customary international law norms.\footnote{See Michael J. Matheson, The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions, 2 Am. U. J. Int'l L. & Pol'y 419 (1987) (discussing the Reagan administration's analysis determining which of the Protocols' many provisions constitute norms of customary international law, binding on the United States).} The Reagan administration's approach to the Protocols is illustrative. Having decided not to sign Protocol I due to disagreement over certain key provisions, the executive branch undertook a careful review of which of its provisions were nonetheless binding on this country as customary international law. A Department of State attorney observed at the time, "This question is not an academic one, but has considerable practical importance," because the United States would consider itself legally bound by those...
rules that reflected customary international law. 311 Clarity as to which rules were binding was necessary to guide U.S. military commanders, as well as U.S. allies.

In practice, customary international law thus fits comfortably within the U.S. legal system. As illustrated by these examples, the executive branch participates in the formation of customary norms, sifts through emerging norms, and offers guidance as to which norms have reached binding status. 312 Federal courts asked to enforce international norms draw upon the expertise of the executive branch, as well as international sources and the opinions of scholars. The suggestion that the United States could suddenly find federal courts imposing a new norm upon the states is inconsistent with the reality of both the international law process and that of the United States.

Given the tremendous clout of the United States in the international arena, complaints that international law is imposed on this country ring false. Consider for a moment the small, impoverished nations around the world who are unable to send representatives to many of the international meetings at which international law principles are debated and developed, much less to engage in the behind-the-scenes negotiations at which deals and tradeoffs are struck. Compare the position of the United States, a nation with a government working overtime to influence and direct international law discussions. Now imagine the reaction of a citizen of one of those less powerful nations when presented with a complaint from U.S. citizens that international law does not represent their views. Such whining from the dominant force in world affairs lacks credibility and fails to reflect the process by which customary international law norms develop. 313

It is true that the United States occasionally loses on such issues, despite its clout. But U.S. citizens can be confident that their views have been fully aired and that their government is deeply involved in developments of importance to this country. That the result might on rare occasions be disappointing does not make the process less democratic, because minority views usually lose in a democratic process. In

311. Id. at 419.

312. "[I]t is the executive branch, far more than the courts, that acts for the United States to help legislate customary international law." Henkin, supra note 7, at 1562. Bradley and Goldsmith repeatedly characterize customary international law as judge-made law. Bradley & Goldsmith, supra note 201, at 329-31 (arguing that federal courts "impose" customary international law). They ignore the role of the executive branch, the representative of the United States government in the international arena, in the formation of such law and in the decision whether it is binding on the United States. Id. at 345 (alleging the "judicial federalization of [customary international law] without political branch authorization").

313. Brilmayer points out that when U.S. courts assert jurisdiction over citizens of other countries, a concern for democracy would point toward application of international law rather than U.S. law, because those outside the United States have an opportunity to participate in the creation of international norms, but not U.S. law. Brilmayer, supra note 5, at 311.
the area of customary international law, however, each country has a powerful individual veto in that customary international law norms do not bind states that have objected to the rule during its formation.\textsuperscript{314} Thus, if dissatisfied with an emerging norm of international law, the United States can register an objection and block the rule from applying to this country. Moreover, given the relatively weak placement of common law in the hierarchy of federal law sources, federal courts have declined to enforce international law in the face of conflicting congressional or executive instructions, whether articulated through statute, executive order, or treaty.\textsuperscript{315} Thus, even if a norm were to attain customary international law status, binding on the United States, the federal courts would not enforce it if either the executive or legislative branches disagreed.\textsuperscript{316} Enforcement of norms that the United States, a full participant in the international law community, has willingly become bound by, poses no threat to democracy.\textsuperscript{317}

International law does address topics at one time considered domestic, most importantly, a State's treatment of its own citizens. But it is important to understand the full international implications of this, before challenging the enforcement of such norms within the United States. The fifty years since World War II have seen a dramatic expansion of international human rights norms.\textsuperscript{318} Fundamental to this

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\item[314.] See Restatement (Third), supra note 7, pt. I, ch. 1, introductory note, at 18, §§ 102 cmt. d, 111 cmt. b (stating that a State is not bound by a customary international law norm if it objects to the norm during its formation).
\item[315.] See cases cited supra note 24. Thus, as Professor Neuman has explained, the modern position calls for the enforcement of customary international law by federal courts as a kind of default rule, following "a practice of presumptive enforceability of customary international law," where international and U.S. sources—including statements of the executive and legislative branches—indicate that a norm has become binding on the United States, and the political branches have not said otherwise. See Gerald L. Neuman, Sense and Nonsense about Customary International Law: A Response to Professors Bradley and Goldsmith, 66 Fordham L. Rev. 371, 384, 386-87 (1997).
\item[316.] One suspects that a major unstated concern of those worried about the imposition of international law norms is that one U.S. administration might intentionally or unwittingly allow a customary norm to attain binding status without objecting; the United States would then be bound by the rule despite later objections. Federal courts, however, would not follow such a norm if either of the political branches objected to its imposition. Had the Carter Administration, for example, consented to the binding status of a rule barring the death penalty, later administrations or Congress could have stated their opposition to the norm, instructing the courts to disobey it. Although such a retroactive withdrawal would have had no effect on the United States' international obligations, the executive or congressional action would have effectively barred domestic application of the otherwise valid customary rule in the United States.
development was the resounding assertion that individuals could be held accountable by the international community for acts that were tolerated or even mandated by their government. As expressed at the Nuremberg proceedings, "The very essence of the [Nuremberg] Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state."\(^{319}\) The United States championed this notion of international accountability after World War II and has strongly reaffirmed this position over the past several years through the International Tribunals for Yugoslavia and Rwanda.\(^{320}\)

International accountability signifies that a U.S. citizen who violates a fundamental international norm—by committing genocide, for example, or a war crime—could be prosecuted as a criminal by an international tribunal even if the U.S. government had sanctioned or ordered the criminal acts. The government as well could be held liable for such crimes under the current version of a draft Convention on state responsibility under negotiation at the United Nations.\(^{321}\) Thus, the shifting of power feared by Bradley and Goldsmith has long since occurred; the federal government has the authority to consent to both

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\(^{319}\) 1 International Military Tribunal, The Trial of German Major War Criminals 223 (1946). See generally Lobel, supra note 22, at 1135 (discussing the effect of the Nuremburg Trials on human rights doctrine).


\(^{321}\) According to the draft under discussion by the International Law Commission, a state could be held responsible for an "international crime" if it breaches "an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole." Draft Articles on State Responsibility, in Report of the International Law Commission, U.N. GAOR, 51st Sess., Supp. No. 10, art. 19, § 2, U.N. Doc. A/51/10 (1996). International crimes include aggression; interference with the right to self-determination; widespread human rights violations such as slavery, genocide, and apartheid; and "massive pollution of the atmosphere or of the seas." Id. at art. 19, § 3.
conventional and customary norms that fundamentally impact on the
behavior of U.S. citizens by subjecting them to the possibility of pun-
ishment by an international tribunal.\textsuperscript{322} The federal govern-ment has exercis-ed this power over the past fifty years, working in collaboration
with the international community to define abuses that are beyond the
pale, that trigger criminal penalties even if mandated by a legitimate
government—even our own.

This expansion of areas addressed by international law reflects an
international consensus, joined in and championed by the United
States, that issues once considered of purely domestic concern are in
fact of great importance to the international community.\textsuperscript{323} Genocide,
war crimes, and torture are but some of the human rights violations
now prohibited by international law. Given their international im-
port, their prohibition and regulation falls within the authority of the
federal government, not the states.

V. Conclusion

Recent attacks on the status of international law as federal common
law are based on an incomplete review of history, a mistaken interpre-
tation of recent Supreme Court decisions, and a skewed view of inter-
national law and the enormously positive role international norms
play in our country and the world. The conclusion that customary in-
ternational law constitutes federal law is supported by early constitut-
ional history and has been firmly upheld by modern Supreme Court
rulings. It fits comfortably within the framework defining the proper
role of the common law in the federal courts.

322. The change in the content of the norms does not presuppose a less active role
for the U.S. government in their development and in the decision whether to allow
such norms to become binding on this country. This view of the changing nature of
customary international law as eliminating the “implied consent” of the United States
and other governments leads commentators such as Lessig to give undue credence to
Bradley and Goldsmith’s claim that judges impose a “political” judgment when they
enforce such law. See Lessig, supra note 280, at 1797.

323. See Louis Henkin, Foreign Affairs and the U.S. Constitution 150 (2d ed. 1996)
(“International concern for human rights has made a state’s respect for the rights of
its inhabitants a subject of international law and international politics, therefore a
concern of U.S. foreign policy.”); M. Cherif Bassiouni, Human Rights in the Context
of Criminal Justice: Identifying International Procedural Protections and Equivalent
Protections in National Constitutions, 3 Duke J. Comp. & Int’l L. 235, 238 (1993) (re-
ferring to the “vast array” of international treaties and customary norms that “pene-
trate into areas that in the past have been deemed to be wholly within the realm of
domestic law” (footnotes omitted)).

The U.S. State Department has long acknowledged the foreign policy implications
of human rights, issuing yearly human rights reports on countries around the world.
See U.S. Department of State, Country Reports on Human Rights Practices, issued
yearly since 1961, pursuant to 22 U.S.C. § 2304 (1993), which instructs the Secretary
of State to transmit to Congress “a full and complete report . . . with respect to prac-
tices regarding the observance of and respect for internationally recognized human
rights in each country” slated to receive military security assistance. 22 U.S.C.
§ 2304(b).
Far from a naked emperor, the modern position is a modestly clothed, well-traveled yeoman of our federal-state division of authority, and the fabric used to make his clothes is woven from some of the most ancient and venerated threads of our constitutional history.