

# CUSTOMARY INTERNATIONAL LAW IN UNITED STATES COURTS

Gary Born\*

*Abstract:* Over the past two decades, the status of customary international law in U.S. courts has been the subject of vigorous debate. On the one hand, proponents of the “modernist” position contend that rules of customary international law are presumptively rules of federal law, which apply directly in U.S. courts and preempt inconsistent state law even in the absence of federal legislative or executive authorization. On the other hand, the “revisionists” argue that, in the absence of congressional legislation or a U.S. treaty, rules of customary international law are generally not matters of federal law, and will therefore generally be governed by state law. This Article argues for an approach that rejects central elements of both the modernist and revisionist positions, while also adopting other aspects of both positions. The Article contends that the text, structure, and objectives of the Constitution, and the weight of judicial authority, require treating all rules of customary international law as rules of federal law, but that such rules will be directly applicable in U.S. courts only when the federal political branches have expressly or impliedly provided for judicial application of a particular rule.

This approach would mirror the way in which courts apply U.S. treaties and other international agreements—treating them as matters of federal law but applying their provisions in U.S. courts only to the extent authorized by the political branches. The intentions of the political branches regarding application of particular rules of customary international law by U.S. courts can be deduced from a number of indicia, analogous to those applied to determine whether particular treaty provisions are self-executing; these include the content and character of the relevant rule of international law, statements by the Executive or Legislative branch, and the content, character, and historical treatment of related rules of international law.

The position proposed in this Article produces materially different results from either the modernist or the revisionist approaches. In many cases, the analysis proposed in this Article will lead to the conclusion that particular customary international law rules—such as head of state or consular immunity and attribution of state responsibility—are directly applicable in U.S. courts, notwithstanding the absence of express authorization by the political branches. In other cases, including many emerging human rights protections, this analysis will lead to a conclusion that particular rules of customary international law are not applicable in U.S. courts.

INTRODUCTION .....	1642
I. THE CURRENT STATUS OF CUSTOMARY INTERNATIONAL LAW IN U.S. COURTS .....	1645

---

\* Mr. Born is the author of *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* (6th ed. 2017), *INTERNATIONAL COMMERCIAL ARBITRATION* (2nd ed. 2014), and *INTERNATIONAL ARBITRATION: CASES AND MATERIALS* (2010). He benefited from thoughtful comments by Curtis Bradley, Jack Goldsmith, Harold Koh, Gerald Neuman, Catherine Rogers, Bo Rutledge, Linda Silberman and Paul Stephan. All mistakes are his alone.

A.	The Modernists: “The Modern View Is that Customary International Law Is Federal Law and Its Determination by the Federal Courts Is Binding on the State Courts”....	1648
B.	The Revisionists: Customary International Law “Does Not Have the Status of Federal Common Law” .....	1650
C.	The Others: “Customary International Law Can Have an Intermediate Status Between State and Federal Law”.....	1653
II.	THE PROPER STATUS OF CUSTOMARY INTERNATIONAL LAW IN U.S. COURTS .....	1655
A.	Constitutional Text, Structure, and Purposes .....	1657
1.	Federal Foreign Relations Power.....	1657
2.	Separation of Powers .....	1673
B.	Judicial Authority .....	1689
1.	Separation of Powers .....	1689
2.	Federalism .....	1703
III.	CUSTOMARY INTERNATIONAL LAW: NON-SELF-EXECUTING FEDERAL COMMON LAW .....	1707
A.	No Clear Statement or Legislative Act Requirement .....	1708
B.	Self-Executing Versus Non-Self-Executing Federal Common Law .....	1711
	CONCLUSION .....	1719

## INTRODUCTION

Few issues of international law have attracted more attention, or inspired greater fervor, in the United States than the status of customary international law in U.S. courts. Contemporary commentators and courts have written prolifically on whether rules of customary international law are governed by U.S. federal law or U.S. state law and when these rules may be applied by U.S. courts. These various authorities have arrived at widely differing, and largely irreconcilable, answers to these questions.

Citing constitutional text and judicial precedent, an extensive body of authority has concluded that rules of customary international law are presumptively rules of federal law, which apply directly in U.S. courts and preempt inconsistent state law even in the absence of federal legislative or executive authorization. Citing other constitutional provisions and judicial precedent, another body of authority has concluded that, in the absence of congressional legislation or a U.S. treaty, rules of customary international law will generally be matters of state law. A third body of commentary proposes other approaches, suggesting that customary international law be treated either as a form of general common law (subject to independent development in state and federal courts) or a *sui generis* category of “non-preemptive federal law.”

None of these approaches is consistent with the text, structure, and objectives of the Constitution, judicial authority, or sound policy. The modern position, which presumptively regards all customary international law as federal common law, directly applicable in U.S. courts, ignores critical limitations on federal courts' lawmaking authority, particularly in a field implicating the Nation's foreign relations. Conversely, the so-called revisionist view, which generally results in customary international law being treated as state law, accords insufficient importance to federal authority over U.S. foreign relations and the manner in which those relations are conducted. For similar reasons, the alternatives proposed by other commentators would produce results that are inconsistent with both the Constitution and judicial authority.

This Article argues for an approach that rejects central elements of both the modernist and revisionist positions, while also adopting other aspects of those positions. The Article contends that the text, structure, and objectives of the Constitution, and the weight of judicial authority, require treating all rules of customary international law as rules of federal law, but that such rules will be directly applicable in U.S. courts only when the federal political branches have expressly or impliedly provided for judicial application of a particular rule. This ensures that all customary international law rules, binding on the United States internationally, are rules of federal law, subject to uniform application and interpretation by federal courts. At the same time, this approach ensures that particular rules of customary international law, like provisions of treaties and other international agreements, will be directly applicable in U.S. courts when, but only when, the U.S. political branches have so provided.

This approach is mandated by the text, structure, and objectives of the Constitution, which provide the federal government, as distinguished from the several states, with broad authority over U.S. foreign relations. This expansive federal authority reflects a compelling need for the United States to speak internationally with "one voice," particularly regarding the content of international law and the Nation's international obligations. Given this, the revisionists' conclusion that rules of international law are generally matters of state law would violate the Constitution's allocation of foreign affairs power and work serious damage to the political branches' ability to conduct U.S. foreign relations. Conversely, the Constitution limits the federal courts' authority independently to make and apply federal law, proscribing any judicially-created "general common law." Given these limits, and the risks of judicial interference in U.S. foreign relations, the modernist position that virtually all rules of customary international law are directly applicable in U.S. courts,

regardless of the intentions of the U.S. political branches, is also untenable.

Although judicial authority is diverse, it is most consistent with treating all rules of customary international law as rules of federal law, but also with particular rules of international law applying directly in U.S. courts only when the federal political branches have expressly or impliedly provided for such judicial application. Thus, U.S. courts have applied rules of customary international law in countless cases since the founding of the Republic, but have consistently refused to do so without sufficient indication of political branch intent—effectively treating customary international law rules in the same manner as U.S. treaties and other international agreements. Likewise, particularly since *Erie Railroad v. Tompkins*<sup>1</sup> gave the issue importance, U.S. courts have treated rules of customary international law as rules of federal law. In practice, this approach has ensured federal supremacy over issues of international law while preventing unauthorized judicial law-making or interference in U.S. foreign relations.

This Article argues that, consistent with the text, structure, and objectives of the Constitution and judicial authority, all rules of customary international law have the status of federal law. It also argues, however, that the question whether a particular rule of customary international law is directly applicable in U.S. courts depends, as with U.S. treaties and other international agreements, on a separate inquiry into whether the federal political branches have expressly or impliedly provided for judicial application of that rule. The Article contends, again as with treaties, that the intentions of the political branches are deducible from a number of indicia, analogous to those applied to determine whether particular treaty provisions are self-executing; these indicia include the content and character of the relevant rule of international law, statements by the Executive or Legislative branch, and the content, character, and historical treatment of related rules of international law.

The position proposed in this Article produces materially different results from either the modern or the revisionist approaches. All rules of customary international law would be treated as federal law, thus providing for a more expansive body of federal law than the modernist (or revisionist) position; at the same time, the Article's approach results in more frequent application of customary international law in U.S. courts than urged by revisionists, but less frequent application than under the modernist position. In many cases, the analysis proposed in this Article will lead to the conclusion that particular customary international law

---

1. 304 U.S. 64 (1938).

rules—such as head of state or consular immunity and attribution of state responsibility—are directly applicable in U.S. courts, notwithstanding the absence of express authorization by the political branches. In other cases, including many emerging human rights protections, this analysis will lead to a conclusion that particular rules of international law are not applicable in U.S. courts.

Part I of this Article describes the current status of customary international law in U.S. courts, outlining the modernist position, the revisionist view, and the alternative positions. Part II critiques the treatment of international law under existing analyses, arguing that the modern and revisionist positions are both flawed in critical respects. Part III proposes an alternative approach to the subject, adopting aspects of both the modern and revisionist positions.

## I. THE CURRENT STATUS OF CUSTOMARY INTERNATIONAL LAW IN U.S. COURTS

Until the turn of this century, the status of customary international law in U.S. courts was of only occasional, and usually passing, interest. Although courts frequently applied rules of customary international law, the question whether these rules were state, or federal, law seldom arose. Rather, the so-called “modernist position” was that customary international law is federal law, directly applicable in U.S. courts and prevailing over inconsistent state law. This position was codified in 1987 by the *Restatement (Third) of the Foreign Relations Law of the United States*,<sup>2</sup> reflecting what was regarded at the time as “an ‘unquestioned’ principle of the law of foreign relations.”<sup>3</sup>

The modernist position was not only questioned, but vigorously challenged, by Professors Bradley, Goldsmith, and other “revisionists” in the late 1990s.<sup>4</sup> Their work challenged the constitutionality of the

---

2. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (AM. LAW INST. 1987) [hereinafter RESTATEMENT (THIRD)].

3. Lea Brilmayer, *Federalism, State Authority and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295, 295.

4. See Curtis A. Bradley, Beard, *Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529, 543–44 (1999) [hereinafter Bradley, *Beard*]; Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479 (1998) [hereinafter Bradley, *Charming Betsy Canon*]; Curtis A. Bradley, *The Status of Customary International Law in U.S. Courts—Before and After Erie*, 26 DENV. J. INT’L L. & POL’Y 807, 809 (1998); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 849 (1997) [hereinafter Bradley & Goldsmith, *International Law*]; Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260 (1998) [hereinafter Bradley &

modernist position, arguing that rules of customary international law lack the status of federal law unless expressly adopted by congressional legislation or a U.S. treaty. The revisionists disputed assertions that customary international law had historically been regarded as federal law, as well as claims that international law could legitimately take the form of judge-made federal common law. In their words, customary international law “does not have the status of federal common law.”<sup>5</sup>

The revisionist critique was met by a vigorous defense of the modernist position.<sup>6</sup> The modernists argued that the revisionist position ignored the historical role of U.S. courts in applying international law<sup>7</sup> and would produce incongruous results, with different state courts adopting conflicting positions on the content of international law rules.<sup>8</sup> In the words of one modernist, “[t]reating international law as some species of state law does not foster original intent, states’ rights, judicial restraint, executive discretion, or democratic decisionmaking.”<sup>9</sup>

Judicial decisions mirrored the modernist and revisionist positions, with different lower courts adopting different positions on the status of customary international law.<sup>10</sup> The Supreme Court eventually addressed

---

Goldsmith, *Federal Courts*]; Curtis A. Bradley & Jack L. Goldsmith, *Pinochet and International Human Rights Litigation*, 97 MICH. L. REV. 2129 (1999) [hereinafter Bradley & Goldsmith, *Pinochet*]; Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319, 332 (1997) [hereinafter Bradley & Goldsmith, *Human Rights*]; Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, Sosa, *Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869 (2007) [hereinafter Bradley, Goldsmith & Moore, *Continuing Relevance*]. There had been earlier indications of dissent from the modern position, but these attracted limited attention. A.M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT’L L. 1 (1995) [hereinafter Weisburd, *State Courts*]; Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665 (1986) [hereinafter Trimble, *A Revisionist View*].

5. Bradley & Goldsmith, *International Law*, *supra* note 4, at 821.

6. Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1825 (1998) [hereinafter Koh, *State Law?*]; Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371, 383 (1997); Beth Stephens, *The Law of our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393, 395–96 (1997) [hereinafter Stephens, *Law of our Land*]; Carlos M. Vasquez, *Customary International Law as U.S. Law: A Critique of the Revisionist and Intermediate Positions and A Defense of the Modern Position*, 86 NOTRE DAME L. REV. 1495, 1498–1500 (2011).

7. Koh, *State Law?*, *supra* note 6, at 1827 (“[E]ven casual reflection compels the conclusion that Bradley and Goldsmith are utterly mistaken.”).

8. *Id.* at 1827–29.

9. *Id.* at 1861.

10. *Compare* *Kadic v. Karadzic*, 70 F.3d 232, 246 (2d Cir. 1995) (“settled proposition that federal common law incorporates international law”), *Trajano v. Marcos (In re Estate of Marcos Human Rights Litig.)*, 978 F.2d 493, 502 (9th Cir. 1992) (“It is . . . well settled that the law of nations is part of federal common law.”), and *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 n.20 (2d Cir. 1980) (“[I]nternational law has an existence in the federal courts independent of acts of Congress.”), *with*

the issue,<sup>11</sup> but did so inconclusively,<sup>12</sup> with both the modernists and revisionists seizing on the Court's decision as vindication of their positions.<sup>13</sup> Lower courts have responded similarly, continuing to reach inconsistent decisions about the status of customary international law.<sup>14</sup> At the same time, the modernists and revisionists have both moderated their positions in some respects, edging modestly toward common ground, but ultimately producing neither meaningful consensus nor analytical clarity.<sup>15</sup>

As discussed below, this treatment of customary international law in U.S. courts is dysfunctional. It has produced, and continues to produce, uncertainty about the character and sources of international law in the United States and the circumstances in which international law will be applied by U.S. courts. This uncertainty about basic issues of domestic constitutional authority and the relationship between U.S. and international law risks interference with U.S. foreign relations, undercuts the role of U.S. courts in the development of international law, and imposes serious costs on litigants and lower courts. More fundamentally, as both revisionists and modernists have recognized, resolving this

---

*Al-Bihani v. Obama*, 619 F.3d 1, 13 (D.C. Cir. 2010) (Kavanaugh, J., concurring) (“Only when international-law principles are incorporated into a statute or a self-executing treaty do they become domestic U.S. law enforceable in U.S. courts.”), *Al Odah v. United States*, 321 F.3d 1134, 1146–47 (D.C. Cir. 2003), *Princz v. Germany*, 26 F.3d 1166, 1176 (D.C. Cir. 1994), and *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 810–23 (D.C. Cir. 1984) (Bork, J., concurring).

11. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728–31, 734–35 (2004).

12. Ernest A. Young, *Sosa and the Retail Incorporation of International Law*, 120 HARV. L. REV. F. 28, 28 (2007) (“Justice Souter’s majority opinion in *Sosa v. Alvarez-Machain* has become something of a Rorschach blot . . .”).

13. Compare Beth Stephens, *Sosa v. Alvarez-Machain “The Door Is Still Ajar” for Human Rights Litigation in U.S. Courts*, 70 BROOK. L. REV. 533, 533–38 (2004), and Ralph G. Steinhardt, *Laying One Bankrupt Critique to Rest: Sosa v. Alvarez-Machain and the Future of International Human Rights Litigation in U.S. Courts*, 57 VAND. L. REV. 2241, 2255 (2004), with Bradley, Goldsmith & Moore, *Continuing Relevance*, *supra* note 4, at 892–93.

14. *Al-Bihani*, 619 F.3d at 13 (Kavanaugh, J., concurring) (“[S]tatutes and self-executing treaties are domestic U.S. law and thus enforceable in U.S. courts. By contrast, non-self-executing treaties and customary international law are not domestic U.S. law.”); *Jovic v. L-3 Servs., Inc.*, 69 F. Supp. 3d 750, 760 (N.D. Ill. 2014) (“‘Laws’ in the context of Section 1331 includes federal common law, which includes the laws of nations or customary international law.”); *Tarros S.p.A. v. United States*, 982 F. Supp. 2d 325, 338 n.12 (S.D.N.Y. 2013) (“courts may no longer create ‘general’ federal common law, and are restricted to ‘limited enclaves’ where Congress has authorized its creation[,]” such as the Alien Tort Statute).

15. See *infra* section II.A.1 (some revisionists appear to accept expanded concept of political branch authorization of judicial application of customary international law); *infra* section II.A.1; *infra* note 135; *infra* section III.A (some modernists appear to limit types of customary international law rules that are judicially applicable).

uncertainty, and the debate giving rise to it, is essential in “a democratic society increasingly governed by international law.”<sup>16</sup>

A. *The Modernists: “The Modern View Is that Customary International Law Is Federal Law and Its Determination by the Federal Courts Is Binding on the State Courts”*

The modernists’ position is superficially straightforward: all rules of customary international law are rules of federal law, directly applicable in U.S. courts. In the words of the *Third Restatement*, “the modern view is that customary international law in the United States is federal law and its determination by the federal courts is binding on the State courts.”<sup>17</sup> As a consequence, although there is no “canonical account” of the modern position,<sup>18</sup> it generally holds that all customary international law rules are judicially applicable and prevail over state law: “[a]ny rule of customary international law, is federal law (§ 111), [and] it supersedes inconsistent State law or policy whether adopted earlier or later.”<sup>19</sup> For the same reason, claims based on customary international law “aris[e] under” federal law for purposes of Article III and statutory federal question jurisdiction.<sup>20</sup>

The modern position is unequivocal in asserting that all rules of customary international law are presumptively applicable in U.S. courts, without the need for implementing legislation or further acts of the political branches.<sup>21</sup> Thus, “[i]nternational law . . . is ‘self-executing’ and is applied by courts in the United States without any need for it to be enacted or implemented by Congress.”<sup>22</sup> This position assertedly applies to *all* customary international law rules, which, as discussed below,<sup>23</sup>

16. Bradley & Goldsmith, *International Law*, *supra* note 4, at 821; *see also* Koh, *State Law?*, *supra* note 6, at 1855; Neuman, *supra* note 6, at 389.

17. RESTATEMENT (THIRD) § 111 reporters’ note 3.

18. Bradley & Goldsmith, *International Law*, *supra* note 4, at 849.

19. RESTATEMENT (THIRD) § 115 cmt. e; *see also* Ernest A. Young, *Sorting Out the Debate Over Customary International Law*, 42 VA. J. INT’L L. 365, 377 (2002) [hereinafter Young, *Sorting Out*] (“[C]ustomary international law is ‘supreme’ in its relation to state law.”); Koh, *State Law?*, *supra* note 6, at 1825 (“[I]nternational law, as applied in the United States, must be federal law.”).

20. Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1559–60 (1984) [hereinafter Henkin, *International Law as Law*]; Young, *Sorting Out*, *supra* note 19, at 378.

21. Some modernists envisage some (limited) constraints on the types of customary international law rules that are directly applicable in U.S. courts. *See* Koh, *State Law?*, *supra* note 6, at 1835 (“Once customary norms *have sufficiently crystallized*, courts should presumptively incorporate them into federal common law . . . .”) (emphasis added).

22. Henkin, *International Law as Law*, *supra* note 20, at 1561.

23. *See infra* section II.A.1.

extend to a wide range of subjects. Thus, regardless of their character “customary international law is *always* federal law and *always* displaces [state] law, without consideration of the nature of the particular rule at issue.”<sup>24</sup>

The modernist position recognizes, of course, that customary international law may be overridden by subsequent federal legislation.<sup>25</sup> Where Congress does not legislate to the contrary, however, the modern position provides that customary international law, as interpreted by the federal courts, is the supreme law of the land and preempts state law.<sup>26</sup> As Professor Neuman summarizes the modern position: “[t]he existence and content of rules of customary international law that are binding on the United States is to be determined as a matter of federal law. Such rules are presumptively incorporated into the U.S. domestic legal system and given effect as rules of federal law.”<sup>27</sup>

Although the consequences of the modern position are straightforward, the basis for that position is less clear. The explanation most widely endorsed by modernists is that customary international law is federal common law,<sup>28</sup> analogous to the rule adopted in *Banco Nacional de Cuba v. Sabbatino*.<sup>29</sup> On this theory, the federal courts possess authority to incorporate international law into U.S. federal law by virtue of the uniquely federal interests in the Nation’s foreign relations<sup>30</sup> and the historic practice of federal courts applying customary international law as

24. Young, *Sorting Out*, *supra* note 19, at 437.

25. See Neuman, *supra* note 6, at 384 (“Our system follows a practice of presumptive enforceability of customary international law, subject to congressional override.”); Koh, *State Law?*, *supra* note 6, at 1835 (“Once customary norms have sufficiently crystallized, courts should presumptively incorporate them into federal common law, unless the norms have been ousted as law for the United States by contrary federal directives.”).

26. Neuman, *supra* note 6, at 383 (“[T]he modern position entails the conclusion that, in the face of congressional silence, customary international law will be supreme over the laws of the States.”).

27. *Id.* at 376.

28. Koh, *State Law?*, *supra* note 6, at 1835 (“[F]ederal courts retain legitimate authority to incorporate bona fide rules of customary international law into federal common law.”); Neuman, *supra* note 6, at 376 n.31.

Other modernists conclude that customary international law rules “resemble,” but are not identical to, federal common law rules. See Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 876, 878 (1987) (customary international law “resembles” or “is like” federal common law); cf. Koh, *State Law?*, *supra* note 6, at 1835 n.61 (“[C]ustomary international law *is* federal common law (not simply ‘like federal common law’).”).

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

30. Koh, *State Law?*, *supra* note 6, at 1838 (“[T]he capacity of federal courts to incorporate customary international law into federal law—unless ousted by contrary federal directive—is absolutely critical to maintaining the coherence of federal law in areas of international concern.”).

“part of our Law.”<sup>31</sup> Thus, as one court put it, “the law of nations . . . has always been part of the federal common law . . . . International law has an existence in the federal courts independent of acts of Congress.”<sup>32</sup> And, as detailed above, the modernists would apply this analysis to all rules of customary international law: simply by virtue of a rule’s status as customary international law, it also acquires the status of federal common law, directly applicable in U.S. courts.

*B. The Revisionists: Customary International Law “Does Not Have the Status of Federal Common Law”*

There is also no canonical account of the revisionist position. Stated most simply, the revisionists’ claim is that the modernists are wrong and that customary international law “does not have the status of federal common law.”<sup>33</sup> More specifically, the revisionists reason that customary international law was not included in Article VI’s catalogue of sources of federal law,<sup>34</sup> and that, absent authorization by treaty or statute, under Article VI, federal judges lack the authority to make (or find) rules of international law or to incorporate these rules into U.S. law.<sup>35</sup> Thus, “the judicial federalization of *all* [customary international law] requires some authorization from the Constitution or a federal statute.”<sup>36</sup>

The revisionists contend that, for much of the Nation’s history, customary international law was not regarded as federal law. Instead, international law was part of the “general common law,” which, during the era of *Swift v. Tyson*,<sup>37</sup> was neither state nor federal law, and which federal and state courts were, in principle, free to interpret in independent, potentially conflicting ways. As Professors Bradley and Goldsmith conclude, “[customary international law] was not viewed as federal law during most of our nation’s history.”<sup>38</sup>

The centerpiece of the revisionists’ position is *Erie Railroad v. Tompkins* and its declaration that, “[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any

---

31. Koh, *State Law?*, *supra* note 6, at 1838 n.23.

32. *Filartiga v. Pena-Irala*, 630 F.2d 876, 885, 887 n.20 (2d Cir. 1980).

33. Bradley & Goldsmith, *International Law*, *supra* note 4, at 821.

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

35. Bradley & Goldsmith, *International Law*, *supra* note 4, at 850.

36. Bradley & Goldsmith, *Human Rights*, *supra* note 4, at 354.

37. 41 U.S. 1 (1938).

38. Bradley & Goldsmith, *Human Rights*, *supra* note 4, at 332.

case is the law of the state.”<sup>39</sup> According to the revisionists, absent an applicable federal statute (or U.S. treaty), *Erie* forbids federal courts from independently making or applying rules of “general” common law: “[federal] courts should not apply [customary international law] as federal law unless authorized to do so by the federal political branches.”<sup>40</sup> Applying this standard, the revisionists required an express statement, in either a treaty or federal legislation, that a rule of customary international law had been incorporated into federal law.<sup>41</sup> They reasoned that this was necessitated by “well-accepted notions of American representative democracy, federal common law, separation of powers, and federalism.”<sup>42</sup> More recently, some revisionists have suggested less demanding standards of political branch incorporation of international law, although even these still require “at least to some degree, [a showing of] political branch authorization.”<sup>43</sup>

The revisionists acknowledge that the political branches may, and frequently have, incorporated particular rules of international law into federal law, citing the Torture Victim Protection Act, the Alien Tort Statute, and the Foreign Sovereign Immunities Act.<sup>44</sup> But the revisionist position denies that Congress has incorporated all (or very many) customary international law rules into federal law. In their words, “Congress has never purported to incorporate all of [customary

---

39. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938). Justice Brandeis would of course have meant to include treaties concluded pursuant to Article I, but his focus was on domestic, rather than international, matters.

40. Bradley & Goldsmith, *Human Rights*, *supra* note 4, at 319.

41. Bradley, *Breard*, *supra* note 4, at 543 (“treaty or statute”); Bradley & Goldsmith, *Human Rights*, *supra* note 4, at 355 (“federal treaty or statute”); Bradley & Goldsmith, *International Law*, *supra* note 4, at 819–20 (contemplating political branch authorization only by legislation or treaty); *id.* at 868–69 (endorsing “plain statement” requirement); Trimble, *A Revisionist View*, *supra* note 4, at 716.

42. Bradley & Goldsmith, *International Law*, *supra* note 4, at 821.

43. Bradley, Goldsmith & Moore, *Continuing Relevance*, *supra* note 4, at 924; *see also id.* at 921–22 (referring to federal common law rules of customary international law based on “executive branch” authorization); Bradley & Goldsmith, *Federal Courts*, *supra* note 4, at 2260, 2269 (denying a requirement for “explicit and unambiguous directive”).

44. Bradley & Goldsmith, *Human Rights*, *supra* note 4, at 356; *see also* *Yousuf v. Samantar*, 699 F.3d 763, 777 (4th Cir. 2012) (“[W]e find Congress’s enactment of the TVPA, and the policies it reflects, to be both instructive and consistent with our view of the common law regarding these aspects of *ius cogens*.”); *Al-Bihani v. Obama*, 619 F.3d 1, 13–14 (D.C. Cir. 2010) (“Consistent with that constitutionally assigned role, Congress sometimes enacts statutes to codify international-law norms derived from non-self-executing treaties or customary international law, or to fulfill international-law obligations. The Foreign Sovereign Immunities Act of 1976 is a good example of that kind of legislation.”).

international law] into federal law,”<sup>45</sup> and “Congress’s selective incorporation would be largely superfluous if [customary international law] were already incorporated wholesale into federal common law . . . .”<sup>46</sup>

The revisionist position rejects arguments that customary international law can generally be regarded as federal common law. The revisionists cite the exceptional character of federal common law and limited circumstances in which the Supreme Court has recognized federal common law rules.<sup>47</sup> They also question the extent to which the Nation’s foreign relations involve matters of uniquely federal interest, noting the existence of concurrent authority (both federal and state) over many aspects of “foreign relations.”<sup>48</sup> More fundamentally, the revisionists emphasize that federal authority over foreign relations is vested in the political branches,<sup>49</sup> not in the federal courts, concluding that *Erie* denies federal judges the power to make rules of federal law without authorization by the political branches.<sup>50</sup>

The revisionists also emphasize the differences between “traditional” international law (which principally concerns matters of inter-state relations, such as sovereign immunity and prize law) and “new” international law (which, in their view, principally concerns human rights protections, including states’ treatment of their own nationals).<sup>51</sup> As a consequence, revisionists observe, “[customary international law] is now viewed as regulating many matters that were traditionally regulated by domestic law,”<sup>52</sup> posing even more serious concerns about federal intrusion into areas of historical state regulatory authority.

Moreover, the revisionists argue that application of customary international law by federal courts will interfere with the political branches’ conduct of the Nation’s foreign relations. Citing the breadth of “new” rules of customary international law, the revisionists conclude that

---

45. Note, *An Objection to Sosa—And to the New Federal Common Law*, 119 HARV. L. REV. 2077, 2086 (2006).

46. Bradley & Goldsmith, *International Law*, *supra* note 4, at 857.

47. Bradley & Goldsmith, *Federal Courts*, *supra* note 4, at 2272.

48. Bradley & Goldsmith, *International Law*, *supra* note 4, at 866.

49. The revisionists also contend that, historically, it was the federal political branches, not the judiciary, that addressed asserted breaches of international law. Bradley & Goldsmith, *Human Rights*, *supra* note 4, at 332 (“During at least the first 150 years of our nation, our constitutional system permitted states to violate CIL unless and until the federal political branches said otherwise through enacted federal law.”).

50. Bradley & Goldsmith, *International Law*, *supra* note 4, at 856–57.

51. Bradley & Goldsmith, *Human Rights*, *supra* note 4, at 325–28.

52. Bradley & Goldsmith, *International Law*, *supra* note 4, at 840–41.

application of these rules by U.S. courts would have serious foreign relations consequences.<sup>53</sup> They also contend that federal judges lack the institutional capacity to make judgments about the Nation's foreign relations, arguing again against the incorporation of customary international law by federal courts without clear authorization by the federal political branches.<sup>54</sup>

For these reasons, the revisionists conclude that there is generally no basis for treating customary international law as federal common law. Instead, as outlined above, *Erie* requires federal courts to apply state law (or no law) in the absence of any federal rule of decision: “[u]nder *Erie*, if [customary international law] is not federal law, federal courts are not to apply it unless they determine that it is part of state law.”<sup>55</sup> It is therefore clear, under the revisionists’ analysis, that where state courts have adopted a rule of customary international law as state law, federal courts will be obligated to apply that rule, notwithstanding the refusal of federal courts to recognize a rule of federal law. The revisionists acknowledge this possibility, but predict that “in most cases, states would rarely incorporate [customary international law] into state law,” with the result that “[customary international law] simply would not be a rule of decision in federal court.”<sup>56</sup>

C. *The Others: “Customary International Law Can Have an Intermediate Status Between State and Federal Law”*

Other views of customary international law in U.S. courts have also emerged, provoked by skepticism about both the modernist and revisionist positions. These alternatives have taken a variety of forms, all of which are irreconcilable both with one another and with the modernist and revisionist positions.

Some commentators have suggested resurrecting *Swift v. Tyson*’s “general common law,” but limited to international law. This approach would “treat[] customary international law as ‘general’ law—a third category of law, neither state nor federal in nature . . . available for both state and federal courts to apply in appropriate cases . . . .”<sup>57</sup> This position

---

53. Bradley & Goldsmith, *Human Rights*, *supra* note 4, at 330, 368–69.

54. *Id.* at 345–47.

55. *Id.* at 349.

56. *Id.* at 349–50.

57. Young, *Sorting Out*, *supra* note 19, at 370; *see also* Weisburd, *State Courts*, *supra* note 4, at 3 (“[A] new analysis . . . that analogizes customary international law to the law of a foreign sovereign and applies it accordingly.”).

assertedly preserves the historic status of customary international law in U.S. courts while limiting the extent of federal intervention in traditional areas of state sovereign authority.<sup>58</sup>

A related approach would treat customary international law as so-called “*non-preemptive federal law*,”<sup>59</sup> which federal courts could apply, but only in the absence of contrary state law. These rules of international law would apply in federal courts (with state courts being free, but not obliged, to apply them). The rationale for this approach parallels that of the revisionists, reasoning that Article VI does not include customary international law among the forms of preemptive federal law and that Article I, section 8 requires that customary international law be incorporated by Congress in order to apply in U.S. courts.<sup>60</sup>

Other commentary has proposed treating customary international law as so-called “*non-preemptive non-federal law*,”<sup>61</sup> applicable in federal courts (regardless of conflicting state law), but not in state courts. Under this analysis, which assertedly involves minimal interference with state sovereignty, customary international law would only “announce the rule for the federal branches,” and not the several states.<sup>62</sup>

Finally, another body of commentary has agreed with the revisionists that customary international law is not ordinarily federal law, but contends that some rules of international law do constitute federal law, which prevails over inconsistent state law and which both state and federal courts are obligated to apply, even absent political branch authorization. Specifically, “history and structure demonstrate that courts have applied certain principles derived from the law of nations as a means of upholding the Constitution’s allocation of foreign affairs powers to Congress and the President.”<sup>63</sup> Under this analysis, federal courts are constitutionally authorized to apply customary international law rules (and related doctrines, such as the act of state doctrine)<sup>64</sup> that implicate the political

---

58. Young, *Sorting Out*, *supra* note 19, at 502–03.

59. Michael D. Ramsey, *International Law as Non-Preemptive Federal Law*, 42 VA. J. INT’L L. 555, 558 (2002) [hereinafter Ramsey, *International Law*]; see also MICHAEL D. RAMSEY, *THE CONSTITUTION’S TEXT IN FOREIGN AFFAIRS* 346–55 (2007).

60. Ramsey, *International Law*, *supra* note 59, at 559–61.

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

62. *Id.*

63. Anthony J. Bellia Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 7 (2009).

64. See *infra* section III.B.1; GARY B. BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 888–963 (6th ed. 2017) (discussing the act of state doctrine).

branches' authority over war and recognition of foreign states.<sup>65</sup> Apart from these constitutionally mandated rules, however, customary international law is a matter of state (or foreign) law unless the federal political branches have authorized federal courts to apply it.<sup>66</sup>

## II. THE PROPER STATUS OF CUSTOMARY INTERNATIONAL LAW IN U.S. COURTS

One of the first U.S. Supreme Court decisions to consider the application of customary international law by American courts observed that “[o]ur situation being new, unavoidably creates new and intricate questions. We have sovereignties moving within a sovereignty.”<sup>67</sup> The existence of multiple sovereignties—federal and state—as well as multiple branches of the governments of those sovereignties—Legislative, Executive and Judicial—continue to give rise to intricate questions when U.S. courts consider issues of customary international law. The intricacy of these questions is heightened by the absence of unequivocal constitutional text or judicial authority resolving them.

None of the existing approaches to the status of customary international law satisfactorily resolve the questions that the subject raises. As discussed below, the modernist position ignores critical limitations on the scope of federal judicial authority, as well as the character of other rules of international law in the United States. As a result, this position produces an overbroad approach that is impossible to reconcile with either the treatment of treaties or the federal courts' limited authority to make federal common law. This position is also impossible to reconcile with existing precedent, which has generally rejected the modernists' expansive approach to judicial law-making authority, instead requiring a more nuanced inquiry into the intentions of the political branches and the content and character of particular rules of international law.

Conversely, the revisionist position ignores federal authority over U.S. foreign relations and the importance of national uniformity in interpreting and espousing rules of customary international law. As a result, that approach also produces an overbroad rule that is impossible to reconcile with the Constitution's allocation of authority over the Nation's foreign relations. Moreover, the revisionist position is contradicted by judicial authority: in the post-*Erie* era, when the issue matters, U.S. courts consistently treat customary international law as federal law, subject to

---

65. Bellia & Clark, *supra* note 63, at 28, 37. The rationale for this approach is that the Framers and early federal judiciary adopted rules to safeguard the “perfect rights” of foreign states. *Id.* at 5–6.

66. *Id.* at 62.

67. *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133, 154 (1795).

uniform interpretation by the federal courts. Similarly, the revisionists' insistence on express, or comparably specific, political branch authorization for judicial application of international law is inconsistent with both the constitutional authority of those branches and existing precedent, in which courts have applied international law in a substantially broader set of circumstances.

Other proposed approaches to the status of customary international law are also inconsistent with both constitutional text and structure and with judicial authority. They produce unprecedented forms of U.S. law, such as non-preemptive federal law, that are consistent with neither broad federal foreign relations authority nor with limited federal judicial authority. Not surprisingly, none of these approaches has been adopted by U.S. courts.

Instead, the better approach adopts elements of both the modernist and revisionist positions, while rejecting other aspects of those positions. Under this approach, all rules of customary international law have the status of federal law, but only those rules of international law which the federal political branches have empowered U.S. courts to apply will be judicially applicable. This approach overcomes the deficiencies in both the modernist and revisionist positions, preserving federal authority over the Nation's foreign relations while also respecting limits on unauthorized law-making by federal courts.

Contrary to the modernist position, this approach ensures that rules of customary international law, like U.S. treaties, will be directly applicable in U.S. courts only if the U.S. political branches have so provided. Contrary to the revisionist position, however, this approach ensures that *all* rules of customary international law are rules of federal law, subject to uniform application and interpretation by federal courts. Moreover, also contrary to the revisionist position, this approach does not require express, or comparably specific, congressional authorization to apply customary international law. Instead, this approach looks to the character and content of the relevant international law rule, and other circumstances surrounding the U.S. political branches' acceptance of that rule, applying factors paralleling those relevant to determining whether U.S. treaties are self-executing.

The approach proposed in this Article is the most sensible interpretation of the text, structure, and purposes of the Constitution and the most coherent explanation of existing judicial authority. Although the views of U.S. courts have varied over time, there is a relatively consistent theme to judicial applications of international law: U.S. courts have generally applied customary international law rules only after careful consideration of the extent to which the federal political branches have, in

some fashion, provided for such judicial application, exercising particular care to avoid judicial interference in the Nation's foreign relations. In doing so, U.S. courts have in practice eschewed requirements for express political branch authorization and instead looked to a variety of considerations, paralleling the considerations that are relevant to determining whether a U.S. treaty is self-executing. As proposed in this Article, the same approach should be applicable to rules of customary international law.

#### A. *Constitutional Text, Structure, and Purposes*

The language, structure, and purposes of the Constitution do not support, and are instead inconsistent with, both the modern and revisionist positions. As detailed below, constitutional structure and objectives, as well as the Constitution's text, provide decisive support for the view that all customary international law is federal law, but that particular rules of customary international law are directly applicable in U.S. courts only where the federal political branches have provided for such judicial application.

##### 1. *Federal Foreign Relations Power*

The starting point for consideration of the status of customary international law in U.S. courts is the Constitution's allocation of authority over U.S. foreign relations. Those provisions are familiar, and include the expansive grants of foreign relations authority to the Legislative and Executive branches in Articles I and II, including the power to raise armies and declare war;<sup>68</sup> to regulate foreign commerce and immigration;<sup>69</sup> to "define and punish . . . Offenses against the Law of Nations;"<sup>70</sup> to appoint and receive ambassadors and make Treaties;<sup>71</sup> and to exercise executive authority as Commander-in-Chief.<sup>72</sup> Conversely, the Constitution also (exceptionally) limits the authority of the states to undertake international legal obligations, providing in Article I that the states may not conclude treaties, alliances, compacts, or agreements with foreign states, grant letters of marque and reprisal, or wage war.<sup>73</sup>

---

68. U.S. CONST. art. I, § 8, cls. 11, 14.

69. *Id.* cls. 1, 3, 4.

70. *Id.* cl. 10.

71. U.S. CONST. art. II, § 2, cl. 2; U.S. CONST. art. II § 3, cl. 1.

72. U.S. CONST. art. II, § 2, cl. 1.

73. U.S. CONST. art. I, § 10, cls. 1, 3 ("No State shall enter into any Treaty, Alliance, or Confederation[, or] grant Letters of Marque and Reprisal . . . . No State shall, without the Consent of

It is non-controversial that these grants of authority provide the federal government with broad power over the Nation's foreign relations, to ensure that national organs, representing national interests, will have authority over the Nation's international affairs. In Madison's words, "[i]f we are to be one nation in any respect, it clearly ought to be in respect to other nations."<sup>74</sup> At a minimum, these provisions "reflect[] a concern for uniformity in this country's dealings with foreign nations and indicat[e] a desire to give matters of international significance to the jurisdiction of federal institutions."<sup>75</sup> More expansively, "in respect of our foreign relations generally, state lines disappear,"<sup>76</sup> and "[p]ower over external affairs is not shared by the States; it is vested in the national government exclusively."<sup>77</sup> Narrower formulations are also plausible, and periodically invoked,<sup>78</sup> but on any view, the Constitution vests the federal government with uniquely broad and plenary authority over U.S. foreign affairs, particularly with respect to actions implicating the Nation's international legal obligations (whether through "treaties," "agreements and compacts," or the "law of nations").<sup>79</sup>

It is against this background of constitutional text and structure that the revisionists' claim that customary international law can be, and presumptively is, non-federal law must be assessed. The Constitution's expansive grants of federal authority over the Nation's foreign relations make that claim an exceedingly difficult one: the notion that each of the 50 states is presumptively free to adopt and apply its own view as to the content of rules of customary international law is, at a minimum, in significant tension with the federal government's broad affirmative authority over the Nation's foreign relations and international legal obligations, as well as with the Constitution's limitations on state authority in these fields.

---

Congress, lay any Duty of Tonnage, . . . enter into any Agreement or Compact with another State, or with a foreign Power . . .").

74. THE FEDERALIST NO. 42, at 264 (James Madison) (Clinton Rossiter ed., 1961).

75. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964).

76. *United States v. Belmont*, 301 U.S. 324, 331 (1937); *see also id.* at 330 ("Governmental power over external affairs is not distributed, but is vested exclusively in the national government.").

77. *United States v. Pink*, 315 U.S. 203, 233 (1942).

78. *Medellín v. Texas*, 552 U.S. 491, 523–24 (2008); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 419–20, 420 n.11 (2003).

79. The importance of federal authority over the Nation's international legal rights and obligations is evident from the Constitution's focus on such issues, particularly in provisions addressing the power to make treaties and other international agreements, defining rules of customary international law (the Law of Nations), the power to declare war, and the power to recognize foreign states. *See* U.S. CONST. art. II, § 2, cl. 2; U.S. CONST. art I, § 8, cl. 10, 11; U.S. CONST. art II, § 3.

The revisionist position also produces a host of deeply unsatisfactory results. It means, for example, that individual states would presumptively be free to adopt divergent views of foreign head-of-state immunity. To use familiar examples, under the logic of the revisionist position, the Queen of England or President of China would be subject to different rules of immunity in Massachusetts, Maine, and Maryland,<sup>80</sup> as would U.K. and Chinese state officials and a number of foreign consuls and diplomats.<sup>81</sup> The same result would apply to a wide range of other issues not regulated by treaties or federal legislation, but subject to universally recognized rules of customary international law—including attribution of state responsibility,<sup>82</sup> state succession,<sup>83</sup> treatment of aliens,<sup>84</sup> limits on

---

80. The United States is not party to any treaty regulating head of state immunity, and no statute addresses the subject. *See Samantar v. Yousef*, 560 U.S. 305, 325 (2010) (holding that the Foreign Sovereign Immunities Act does not address head-of-state immunity). Accordingly, the treatment of foreign heads of state in the United States is subject, on an international plane, to customary international law. As others have observed, it is implausible to suggest that foreign heads of state would be entitled to different immunities in different states or to different immunity from that recognized by the federal Executive branch. Koh, *State Law?*, *supra* note 6, at 1838; Neuman, *supra* note 6, at 382–83.

Some revisionists suggest that there may be grounds for concluding that the federal political branches have authorized judicial application of customary international law rules of head-of-state immunity. Bradley, Goldsmith & Moore, *Continuing Relevance*, *supra* note 4, at 922–23; Bradley & Goldsmith, *Pinochet*, *supra* note 4, at 2160–67. As noted above, however, neither the FSIA nor other federal legislation, or international agreements, addresses the subject of head-of-state immunity. It is very difficult to conclude, therefore, that there has been federal political branch authorization of the character required by revisionist analysis (which, as discussed above, emphasizes the importance of congressional legislation, or a treaty, under *Erie*). *See supra* section I.B; *infra* section II.A.1; *infra* section III.A.

81. The United States is party to treaties regarding diplomatic and consular immunity. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95; Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. However, a number of states are not party to one (or both) of these treaties, and issues of diplomatic and consular immunity between these states and the United States are governed by customary international law. RESTATEMENT (THIRD) §§ 464–66.

82. The United States is not party to any treaty generally prescribing rules for state responsibility. *See* RESTATEMENT (THIRD) § 207. Issues of state responsibility affecting the United States (and other states) are subject, on an international plane, to customary international law, generally as reflected in the International Law Commission’s Articles on State Responsibility. G.A. Res. 56/83, Responsibility of States for Internationally Wrongful Acts (Jan. 28, 2002).

83. The United States is not party to any treaty addressing state succession (including the Vienna Convention on Succession of States in Respect of Treaties and Vienna Convention on the Law of Treaties). *See* RESTATEMENT (THIRD) §§ 208–09. Accordingly, issues of state succession affecting the United States are subject, on an international plane, to customary international law.

84. The United States is party to a number of treaties regarding the treatment of aliens (including foreign investors) RESTATEMENT (THIRD) § 701, cmt. e. However, these treaties address only aspects of treatment of aliens and involve only some foreign states, leaving most aspects of the subject governed by customary international law. *Id.* at §§ 701–02.

extraterritorial jurisdiction,<sup>85</sup> validity of U.S. (and non-U.S.) treaties,<sup>86</sup> law of the sea,<sup>87</sup> and international environmental issues.<sup>88</sup> Other examples can be readily identified.<sup>89</sup>

In all of these cases, the logic of the revisionist position necessarily permits each of the fifty states to adopt different views as to the existence, contents, and judicial applicability of customary international law rules. A foreign head of state or other senior foreign official could be immune from suit (or arrest) in New York, but not New Jersey. A foreign state could be liable for actions of its agents in California, but not Arizona. A foreign (or U.S.) investor could be entitled to compensation under one state's view of international law, but not another state's. A treaty could be effective or applicable in one state, and not in another state.<sup>90</sup> In each case,

---

85. The United States is not party to any treaty generally regulating extraterritorial exercises of legislative, judicial, or enforcement jurisdiction. *See* RESTATEMENT (THIRD) §§ 401–16, 421–23, 431–33. Accordingly, the extraterritorial assertion of jurisdiction by the United States (and other states) is subject, on an international plane, to customary international law. *See id.*

86. The United States is not party to any treaty addressing issues regarding the status and legal effect of treaties, including issues of capacity, consent, reservations, entry into force, provisional application, *pacta sunt servanda*, retroactivity, and third-party rights. *See generally*, RESTATEMENT (THIRD) pt. III.

87. The United States is not party to any treaty generally regulating the law of the sea (as a consequence of the United States's non-ratification of the United Nations Convention on the Law of the Sea). RESTATEMENT (THIRD) pt. V, Intro. Note. However, the Executive branch has declared that the Convention generally codifies customary international law. U.S. DEP'T OF STATE, BUREAU OF OCEANS AND INTERNATIONAL ENVIRONMENTAL AND SCIENTIFIC AFFAIRS, LIMITS IN THE SEAS NO. 143 CHINA: MARITIME CLAIMS IN THE SOUTH CHINA SEA 8 n.14 (2014).

88. Most international environmental law is customary international law. *See* RESTATEMENT (THIRD) §§ 601–04.

89. Koh, *State Law?*, *supra* note 6, at 1850 (“[B]efore the U.S. ratification of the Genocide Convention, a federal judge, faced with the question whether to apply the rules against genocide in a civil tort suit, would have to predict whether the Supreme Court of Tennessee, for example, would incorporate the universal norm against genocide into Tennessee law.”). The revisionists’ observation that there are generally parallel U.S. constitutional or statutory protections is beside the point. The relevant inquiry is whether state positions on the international legal status of the rules prescribed by the Genocide Convention—or the International Covenant on Civil and Political Rights or other comparable treaties—are binding on the federal courts and override the positions of the federal political branches (absent legislation or a treaty). The answer to those queries are plainly in the negative.

90. The validity and applicability of a treaty is not governed by the terms of that treaty itself, but by general principles of customary international law, which determine when particular treaties will be valid and what they mean. *See* RESTATEMENT (THIRD) pt. III, Intro. Note; THE OXFORD GUIDE TO TREATIES 552, 557 (Duncan B. Hollis ed., 2012) (“Legal systems typically need rules to establish whether the norms prevailing in them are valid or invalid. . . . The only explicit validity rules circulating in the international legal order are the rules on . . . the invalidity of treaties, as laid down in Articles 46 to 53 of the [Vienna Convention on the Law of Treaties].”). It would therefore be incorrect to suggest that the federal courts’ authority to interpret U.S. treaties as federal law (under Article VI) would provide federal courts the authority to resolve issues of treaty validity and applicability as matters of federal law. Those issues are determined, not by the terms of a U.S. treaty, but by external rules of law (specifically, customary international law). *See supra* note 86. Moreover,

individual state courts would be free to announce and apply divergent, and contradictory, views regarding the content of customary international law and, therefore, regarding the Nation's international legal obligations.<sup>91</sup>

Moreover, in each case, applying the revisionist view that customary international law is generally a matter of state law, binding on federal courts absent contrary federal legislation, *Erie* would also require federal courts to apply divergent state rules. That is because, as discussed above, under the revisionist position, both as generally stated and logically compelled, rules of customary international law are not federal law and, if adopted by a state, are state law, binding on federal courts under *Erie*.<sup>92</sup> The revisionist position would compel all of the foregoing results, not just in state courts, but in federal courts as well.

The logic of the revisionist position would generally produce the foregoing results without regard to contrary Executive branch views, whether expressed in diplomatic correspondence, statements of policy, or before international organizations or tribunals. As long as Congress had not legislated (or the Senate has not ratified a treaty), federal courts would be forbidden from applying rules of customary international law as federal law, and would instead be bound to apply state court interpretations of international law. In the revisionists' words, "[i]f a state chooses to

---

there is neither express nor implied statutory (or treaty) authorization for judicial application of these rules of customary international law. Indeed, with respect to some of these rules, not even the (unratified) Vienna Convention on the Law of Treaties applies the relevant customary international law rules. Under the logic of the revisionists' position, state courts would therefore be free to reach independent conclusions regarding the customary international law rules of treaty validity, which would also be binding on federal courts under *Erie*. Indeed, the same conclusion would appear to apply to the interpretation of treaties to which the United States is not party (e.g., the Vienna Convention of the Law of Treaties) and, at least arguably, the interpretation of U.S. Treaties. Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 VA. J. INT'L L. 431, 434 (2004).

91. Indeed, it is difficult to see why the revisionist position would not, in the numerous areas where there has been no federal political branch authorization for judicial application of customary international law, permit state legislative enactments from adopting or incorporating asserted rules of international law, or state officials from participating in forums engaged in the formation of international law (such as UNCITRAL, UNIDROIT, or the International Law Commission).

92. See Bradley & Goldsmith, *International Law*, *supra* note 4, at 870; *supra* section I.C; *infra* notes 97–102 and accompanying text. Professors Bradley and Goldsmith deny that the revisionist position treats customary international law as state law, instead contending that their position is only "that [customary international law] should not be a source of law for courts in the United States unless the appropriate sovereign—the federal political branches or the appropriate state entity—makes it so." Bradley & Goldsmith, *Federal Courts*, *supra* note 4, at 2260. That formulation does not alter the fundamental premise of the revisionist position, which is that, except in limited cases of federal political branch authorization for courts to apply customary international law, state courts and legislatures are free independently to interpret customary international law and to apply divergent and contradictory rules of international law.

incorporate [customary international law] into state law, then the federal courts would be bound to apply the state interpretation of [customary international law] on issues not otherwise governed by federal law.”<sup>93</sup>

These results are impossible to reconcile with federal authority over the Nation’s foreign relations and or with the process by which the United States (like other countries) conducts its international relations.<sup>94</sup> The revisionist position would prevent the federal political branches’ statements and actions regarding matters of customary international law, declaring the United States’s formal legal position and engaging the United States’s international legal responsibility, from being given effect in U.S. courts. Indeed, as discussed above, the revisionist position would require federal courts to apply rules of customary international law, adopted by individual states, that conflicted with the positions of the federal political branches. This result would place both state and federal courts, applying state law, in direct conflict with the political branches on a centrally important aspect of the Nation’s foreign relations—the interpretation and application of customary international law, governing the Nation’s conduct and international legal obligations vis-à-vis other states. That conflict is impossible to reconcile with the broad foreign affairs powers of the federal political branches.

It is no answer to argue, as the revisionists do, that the federal political branches could conclude treaties or enact legislation to address particular issues of customary international law.<sup>95</sup> That argument ignores the fact that, by design and necessity, many aspects of the Nation’s foreign relations are conducted in other, less formalized ways.<sup>96</sup> Requiring the political branches to conclude treaties or enact legislation to deal with issues of customary international law would impede those branches’ ability to conduct foreign relations, limiting their flexibility and ignoring the fluidity inherent in international relations and in making international law.

The reality is, and inevitably must be, that many of the United States’s positions regarding customary international law are expressed by informal communications or other actions of the political branches (such as

---

93. Bradley & Goldsmith, *International Law*, *supra* note 4, at 870; *see supra* section I.C; *infra* notes 97–102 and accompanying text.

94. Koh, *State Law?*, *supra* note 6, at 1832 (“specter that multiple variants of the same international law rule could proliferate among the several states”); Neuman, *supra* note 6, at 376–77.

95. Bradley & Goldsmith, *International Law*, *supra* note 4, at 819–20.

96. *See* Paul F. Diehl, Charlotte Ku & Daniel Zamora, *The Dynamics of International Law: The Interaction of Normative and Operating Systems*, 57 INT’L ORG. 43 (2003); Charles Lipson, *Why Are Some International Agreements Informal*, 45 INT’L ORG. 495 (1991).

diplomatic notes or protests, submissions in international legal proceedings, and statements in international forums),<sup>97</sup> which over time come to express the United States's legal position and, in many cases, the content of customary international law.<sup>98</sup> The revisionists' rule would permit state courts (or legislation) to contradict the positions of the political branches, expressed in these ways—a result again impossible to reconcile with the broad foreign affairs powers of the federal political branches.

The revisionist position is therefore in direct conflict with the need for the United States to speak with “one voice” on matters of international law. Although broader applications of the principle may be unjustified, a critical element of the political branches' foreign relations power is the federal government's ability to “speak for the Nation with one voice in dealing with other governments,”<sup>99</sup> particularly regarding the content of international law and the United States's international legal obligations.<sup>100</sup> This ensures that the interests of the Nation as a whole, in its international relations, will not be undermined or compromised by divergent or parochial positions of individual states.<sup>101</sup>

Divergent state court (or legislative) interpretations of international law would compromise the federal political branches' ability to speak with one voice on behalf of the Nation. In particular, state pronouncements on the content of rules of customary international law would undermine the credibility and weight of contrary federal positions on those same issues.

---

97. See JAMES CRAWFORD, *BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 24 (8th ed. 2012); MARK E. VILLIGER, *CUSTOMARY INTERNATIONAL LAW AND TREATIES: A MANUAL ON THE THEORY AND PRACTICE OF THE INTERRELATION OF SOURCES* 17 (2d rev. ed. 2012).

98. The process of the formation of rules of customary international law has been addressed extensively elsewhere. See K. WOLFKE, *CUSTOM IN PRESENT INTERNATIONAL LAW* 59–62 (2d ed. 1993); Michael Akehurst, *Custom as a Source of International Law*, 47 *BRIT. Y.B. INT'L L.* 1 (1975); Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 *AUSTL. Y.B. INT'L L.* 82 (1988–1989).

99. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 381 (2000); see also *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413 (2003) (“At some point an exercise of state power that touches on foreign relations must yield to the National Government's policy, given the ‘concern for uniformity in this country's dealings with foreign nations’ that animated the Constitution's allocation of the foreign relations power to the National Government in the first place.” (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964))); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 449 (1979); *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976) (“[T]he Federal Government must speak with one voice when regulating commercial relations with foreign governments.”).

100. See *supra* section II.A.1.

101. See *Zivotofsky v. Kerry*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 2076, 2090 (2015); *Sabbatino*, 376 U.S. at 424 (“[I]t is plain that the problems involved [in the area of foreign relations] are uniquely federal in nature.”).

For example, declarations by the U.S. political branches that a particular rule had (or had not) achieved the status of customary international law would be undermined by state court decisions reaching the opposite conclusion, while political branch declarations denying (or asserting) the existence of *opinio juris* could be denied international effect by state court decisions reaching the opposite conclusion.<sup>102</sup> As an amicus curiae brief for the United States in a state court proceeding reasoned, arguing that customary international law was federal law:

It is especially in areas not governed by precise treaty stipulations that “divergent and perhaps parochial state interpretations” can most markedly affect the conduct of international relations. *Were individual states free to formulate their own rules in such areas, the capacity of the United States to contribute with authority to the development of the international legal order would be greatly diminished . . .* The federal government cannot effectively invoke standards of international law to ensure continued favorable treatment by foreign governments for American governmental property abroad if these standards are not given effect by the political subdivisions of the United States.<sup>103</sup>

The foregoing conclusions have particular force given the process by which customary international law is (and must be) formed, an issue that the revisionists largely ignore. As noted above, that process entails the evaluation of state practice with the objective of identifying “a general and consistent practice of states followed by them from a sense of legal obligation.”<sup>104</sup>

Importantly, one means of establishing the existence (or non-existence) of a rule of customary international law is “judgments and opinions of national judicial tribunals.”<sup>105</sup> The actions of individual states and the decisions of state courts are attributable to and binding on the United States as a matter of international law.<sup>106</sup>

---

102. *Sabbatino*, 376 U.S. at 424 (“If . . . state courts are left free to formulate their own rules, the purposes behind the doctrine could be as effectively undermined as if there had been no federal pronouncement on the subject.”).

103. Brief for the United States of America as Amicus Curiae at 39–40, *Republic of Argentina v. City of New York*, 25 N.Y.2d 252 (1969).

104. RESTATEMENT (THIRD) § 102(2).

105. *Id.* § 103(2)(b); *id.* cmt. b.

106. *See Chy Lung v. Freeman*, 92 U.S. 275, 279 (1876) (“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.”); RESTATEMENT (THIRD) § 207 reporters’ note 3 (“The United States has consistently accepted international responsibility for actions or omissions of its constituent States and has insisted upon similar

As a consequence, state court decisions adopting particular views of customary international law do not merely involve the risk of committing violations of international law or undermining U.S. government positions, but also entail the individual states' direct participation in the formation of rules of international law, binding the entire Nation.<sup>107</sup> This participation would include contributing to formation of a rule of international law<sup>108</sup> on which the federal government has not yet taken a position or may oppose. Once that rule is established, the United States might well be bound as a matter of international law, regardless of subsequent contrary views of the federal government.<sup>109</sup> Alternatively, state court decisions could undercut the formation of a rule of international law that the federal government supported, by denying the rule's existence. In all of these cases, categorizing customary international law as state law produces unacceptable results with the potential seriously to undermine the federal political branches' role in creating and applying international law.

To take another familiar example,<sup>110</sup> Oregon or California courts could hold that customary international law forbids capital punishment, or provides a claim in tort to recover damages for certain types of environmental pollution, or guarantees asylum to certain aliens; at the same time, South Carolina courts would be free to hold the opposite, rejecting arguments that international law forbids capital punishment or allows claims for environmental pollution or asylum. Both sets of holdings would, under the logic of the revisionist position, be matters of state law, with no possibility of U.S. Supreme Court review. In these circumstances, both sets of state court holdings could materially affect the

---

responsibility on the part of the national governments of other federal states.”).

107. See PITT COBBETT, *WAR AND NEUTRALITY* 103–05 (Hugh Bellot ed., 4th ed. 1921) (citing Massachusetts decision to establish content of customary international law); Michael Wood (Special Rapporteur), *Second Report on Identification of Customary International Law*, ¶ 50, U.N. Doc. A/CN.4/672 (May 22, 2014) (“[A]ccount has to be taken of all available practice of a particular State. . . . This may be particularly likely with the practice of sub-State organs (for example, in a federal State.)”); *id.* ¶¶ 34, 37; Difference Relating to Immunity From Legal Process of a Special Rapporteur, Advisory Opinion, 1999 I.C.J. Rep. 62, ¶ 62 (April 29) (“According to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State.”).

108. See K. WOLFKE, *supra* note 98, at 73 (“[I]t is a truism to say that a judicial organ ascertaining customs to some extent creates them.”).

109. See RESTATEMENT (THIRD) §§ 102(4), 207 reporters’ note 3; ANTHONY A. D’AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 4 (1971) (custom “is generally regarded as having universal application, whether or not any given state participated in its formation or later ‘consented’ to it”).

110. See Bradley & Goldsmith, *Human Rights*, *supra* note 4, at 349–51; Brilmayer, *supra* note 3, at 322–29; Young, *Sorting Out*, *supra* note 19, at 382–84, 474–79.

international legal position of the United States, potentially binding the Nation to whichever state court first expressed its position, while also having more general effects on the weight and credibility of contrary federal positions.<sup>111</sup> All of this would seriously undermine the conduct of U.S. foreign relations and the United States's participation in the development of international law.

The revisionist position is also very difficult to reconcile with Article I's express (and exceptional) denial of state authority to conclude treaties, compacts, or agreements with foreign states.<sup>112</sup> Although Article I, section 8 does not refer expressly to customary international law, all of the state actions that it does refer to are closely analogous to direct state participation in the making of customary international law through state judicial decisions on issues of international law. Each type of state action referred to in Article I involves the formation of international legal obligations, on the basis of state consent,<sup>113</sup> and result in the responsibility of the entire United States.<sup>114</sup> Given this, and the lack of clear textual direction or evidence of intent in Article I, section 8,<sup>115</sup> it is very difficult to see why constitutional prohibitions against the making of international agreements by states do not apply with equal force to state interpretations and applications of customary international law.<sup>116</sup>

---

111. See Wood, *supra* note 107, ¶ 50 (“[I]t may be necessary to look cautiously at that practice . . . [w]here a State speaks in several voices, its practice is ambivalent, and such conflict may well weaken the weight to be given to the practice concerned.”); *id.* ¶ 79.

112. See U.S. CONST. art. I, § 8, cl. 10.

113. See *supra* section II.A.1.

114. See *supra* section II.A.1.

115. It is unclear what precise meaning the Framers attributed to the terms “treaty,” “agreement,” and “compact.” See *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 463 (1978) (“Whatever distinct meanings the Framers attributed to the terms in Art. I, § 10, those meanings were soon lost.”); *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893); Abraham C. Weinfeld, Comment, *What Did the Framers of the Federal Constitution Mean by “Agreements or Compacts”?*, 3 U. CHI. L. REV. 453, 457 (1936). As a consequence, the Supreme Court has looked to the purposes and consequences of particular arrangements in applying Article I. See *U.S. Steel Corp.*, 434 U.S. at 463. From that perspective, the same concerns that underlie the conclusion of international “agreements” by states also apply to the states’ participation in the formation of customary international law. See also JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 668 (Ronald D. Rotunda and John E. Nowak, eds., Carolina Academic Press 1987) (1833) (by virtue of Article I’s prohibitions against actions by states, “[u]niformity is thus secured in all operations which relate to foreign powers; and an immediate responsibility to the nation on the part of those for whose conduct the nation is itself responsible”).

116. See, e.g., *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 380 (2000) (state law restricting purchases of goods from companies conducting business in Burma intrudes on federal foreign affairs authority); *Zschernig v. Miller*, 389 U.S. 429, 432–36 (1968) (state inheritance statute intrudes on federal foreign affairs authority); *United States v. Rauscher*, 119 U.S. 407, 414–15 (1886) (state’s extradition to foreign nation intrudes on federal foreign affairs authority). The revisionists

It was for these reasons that, in *Banco Nacional de Cuba v. Sabbatino*, the Supreme Court endorsed Judge Jessup's "caution[] that rules of international law should not be left to divergent and perhaps parochial state interpretations," and declared that this "basic rationale is *equally* applicable to the act of state doctrine."<sup>117</sup> The Court's language could not have been more clear in characterizing customary international law as federal law. It is, of course, true that the Court went on to refuse to directly apply customary international law rules against uncompensated expropriations in *Sabbatino*.<sup>118</sup> But that refusal has nothing to do with the Court's prior observation that rules of international law could not be governed by "divergent and perhaps parochial state interpretations,"<sup>119</sup> or the Court's explicit approval of Judge Jessup's categorization of customary international law as federal law. Rather, that refusal concerns only the separate issue, discussed below, of the existence of political branch authorization for direct judicial application of particular rules of customary international law by U.S. courts.<sup>120</sup>

As discussed above, the foregoing conclusions have particular force because the actions of individual states are, as a matter of international law, attributable to and binding upon the United States.<sup>121</sup> Where the United States as a whole is responsible for, and bound by, the actions of individual states applying customary international law, it is implausible to conclude that the states are free to adopt divergent, conflicting interpretations of international law (with those views being binding on the federal courts). Rather, as *Sabbatino* concluded, the United States's ultimate responsibility for interpretations of customary international law necessarily requires federal judicial authority over such interpretations.<sup>122</sup>

---

observe, correctly, that Article I, section 8, omits reference to customary international law (or the law of nations), although other provisions of the Constitution contain such references, and conclude that state participation in the making of customary international law is therefore not prohibited. See Bradley & Goldsmith, *International Law*, *supra* note 4, at 862–63. That analysis fails to account for Article I, section 8's notorious lack of clarity or the purposes of section 8's prohibition against independent state action. See *supra* note 115.

117. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964) (emphasis added). Justice White's dissenting opinion agreed that rules of customary international law were federal law. *Id.* at 451 (White, J., dissenting).

118. See *infra* section II.B.1.

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

120. See *infra* section II.A.1; *infra* section II.A.2.

121. See *supra* section II.A.1.

122. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 316 (M. Farrand ed., rev. ed. 1937) ("[N]o part of a nation shall have it in its power to bring [international complaints] on the whole."); THE FEDERALIST NO. 80, at 535–36 (Alexander Hamilton) (Jacob Cooke ed., 1961) ("[T]he peace of the WHOLE ought not to be left at the disposal of a PART. The union will undoubtedly be

Importantly, federal law governs both the content of rules of customary international law and the question whether such rules of international law are directly applicable in U.S. courts. It is essential to the federal foreign affairs power that federal courts, applying uniform federal law, determine whether a particular rule of customary international law exists, what its content is, and whether U.S. courts have been authorized by the federal political branches to apply that rule. With respect to this final question, the Supreme Court's analysis in *Sabbatino*, articulating a rule governing whether international law rules regarding expropriation were applicable in U.S. courts, is directly relevant: "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."<sup>123</sup>

The foregoing conclusions are confirmed by U.S. courts' treatment of international law in other contexts. For example, it is clear that, under the *Charming Betsy* presumption (requiring interpretation of federal legislation consistently with international law),<sup>124</sup> the relevant rules of international law are ascertained as a matter of federal law: the effects of the *Charming Betsy* presumption on the meaning of federal legislation do not vary from state to state, as they necessarily would if international law were generally a matter of state law.<sup>125</sup> The same is true of the presumption against extraterritoriality, based in substantial part on rules

---

answerable to foreign powers for the conduct of its members. . . ."); THE FEDERALIST NO. 44, at 281 (James Madison) (Clinton Rossiter ed., 1961) (emphasizing "the advantage of uniformity in all points which relate to foreign powers").

123. *Sabbatino*, 376 U.S. at 425. As discussed below, this is precisely how U.S. treaties are treated: the question whether a treaty's provisions are self-executing is a question of federal (not state) law. See *infra* section II.A.2.

124. *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . ."); RESTATEMENT (THIRD) § 114; see also Bradley, *Charming Betsy Canon*, *supra* note 4, at 482.

125. Some revisionists argue that the *Charming Betsy* presumption is a rule of federal common law and that this implies incorporation of uniform federal rules of customary international law. See Bradley, *Charming Betsy Canon*, *supra* note 4, at 534; Bradley, Goldsmith & Moore, *Continuing Relevance*, *supra* note 4, at 921. That explanation is unpersuasive: the fact that the *Charming Betsy* presumption is a rule of federal law does not mean that the rules of international law incorporated by the *Charming Betsy* canon are also federal law. Federal law looks routinely to state law in similar circumstances. See, e.g., *Wallace v. Kato*, 549 U.S. 384, 387 (2007) (under section 1983, "in several respects . . . federal law looks to the law of the State in which the cause of action arose"); *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 95 (1991) ("[C]ourts should incorporate state law when fashioning federal common law rules."). If, as the revisionists contend, customary international law does not have the status of federal common law, then it is very difficult to see how the *Charming Betsy* presumption would incorporate such (non-existent) rules of federal law.

of customary international law;<sup>126</sup> again, the presumption is applicable uniformly in all American courts to determine the scope of federal legislation, regardless of state court views about the precise scope of jurisdictional limitations imposed by international law. In each case, it is both settled and obvious that the rules of international law applicable in U.S. courts are uniform rules of federal, not state, law.

Some revisionist analyses suggest that judicial application of a few rules of customary international law may be regarded as having been authorized by independent Executive branch action, including rules regarding treaty interpretation<sup>127</sup> and foreign sovereign immunity.<sup>128</sup> These suggestions have generally been guarded,<sup>129</sup> and are contrary to prior revisionist positions (which required legislation or treaty provisions expressly incorporating international law).<sup>130</sup> These suggestions are also difficult to reconcile with the centerpiece of revisionist analysis — that, after *Erie*, customary international law cannot be “a source of law for courts in the United States unless the appropriate sovereign — the federal political branches or the appropriate state entity — makes it so.”<sup>131</sup>

---

126. See, e.g., *F. Hoffmann-La Roche, Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004) (“This rule of construction reflects principles of customary international law . . . .”); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 818 (1993) (Scalia, J., dissenting) (“[T]he practice of using international law to limit the extraterritorial reach of statutes is firmly established in our jurisprudence.”); Gary Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 LAW & POL’Y INT’L BUS. 1, 8–9 (1992).

127. See Bradley, Goldsmith & Moore, *Continuing Relevance*, *supra* note 4, at 921–22. These analyses have suggested that the (unratified) Vienna Convention on the Law of Treaties could provide “gap-filling” rules for interpretation of treaties, which might be applied as federal common law, apparently relying on Executive branch authorization. *Id.* As discussed below, this position is very difficult to reconcile with earlier revisionist positions or with the revisionists’ emphasis on legislative law-making authority under *Erie*. See *supra* section I.A.; *infra* section II.A.2; *infra* section III.A.

128. See Bradley, Goldsmith & Moore, *Continuing Relevance*, *supra* note 4, at 922–23. These analyses have suggested that Executive branch suggestions of immunity prior to enactment of the Foreign Sovereign Immunities Act provided a basis for judicial development of rules of federal common law. Again, these suggestions are difficult to reconcile with the logic of the revisionist position.

129. See *id.* at 922 (“*Sometimes, courts* look to principles of CIL as embodied in the Vienna Convention . . . .”) (emphasis added); *id.* at 924 (“*[C]ourts are looking*, at least to some degree, for political branch authorization.”) (emphasis added); Bradley & Goldsmith, *Federal Courts*, *supra* note 4, at 2269–70 (“The head-of-state immunity example illustrates that *in some cases* there will be *plausible arguments* for and against the requisite political branch authorization . . . .”) (emphasis added).

130. See *supra* section I.B.; *supra* note 41.

131. Bradley & Goldsmith, *Federal Courts*, *supra* note 4, at 2260; see also Bradley & Goldsmith, *Human Rights*, *supra* note 4, at 345 (“[J]udicial federalization of CIL without political branch authorization is inconsistent with American constitutional democracy,” in part, because it applies a “law against states by federal courts without the filter of constitutional or legislative authorization.”); Bradley & Goldsmith, *International Law*, *supra* note 4, at 857 (treating customary international law

Moreover, the logic of these suggestions would open the door to much broader incorporation of customary international law as federal law, based entirely on Executive branch action, than that promised by revisionist analysis more generally.<sup>132</sup>

Most fundamentally, however, even accepting these suggestions, the revisionist position would continue to treat very substantial portions of the corpus of customary international law as non-federal law. That is obvious from the Constitution's limits on Executive branch authority,<sup>133</sup> and is explicit in revisionist analysis: "[t]he term 'customary international law' subsumes a variety of different norms, only some of which the political branches want to federalize."<sup>134</sup> Thus, under the revisionist analysis, states remain free to adopt divergent positions with respect to both the content of the customary international law rules in these fields, whatever they may be, and the applicability of such rules in U.S. courts. As discussed above, and assuming no political branch authorization, Oregon and South Carolina courts would remain free to reach different conclusions regarding the content and applicability of customary international law in U.S. courts, including on issues such as capital punishment, environmental torts, and asylum. These results are impossible to reconcile with federal authority over U.S. foreign affairs and the necessity that the Nation speak with one voice about the content of customary international law and U.S. international legal obligations.<sup>135</sup>

---

as federal common law is "in tension with basic notions of American representative democracy" because "it is not applying law generated by the U.S. lawmaking processes," but rather "law derived from the views and practices of the international community").

132. Relatedly, the specific examples of Executive branch authorization suggested by some revisionist analysis are difficult to characterize as involving any meaningful acts of political branch authorization for U.S. courts to apply such rules. Thus, there is no indication of any such actions with regard to the Vienna Convention on the Law of Treaties (which, instead, the Senate has refused to ratify). See Koh, *State Law?*, *supra* note 6, at 1839–40. Similarly, judicial application of rules of foreign sovereign, consular, diplomatic, head-of-state and official immunity routinely occurred in the absence of Executive branch suggestions of immunity (much less legislative authorization); although Executive suggestions of immunity were sometimes treated as conclusive by U.S. courts, the decisive point is that, even in the absence of such Executive branch suggestions, courts directly applied customary international law. See *Republic of Mexico v. Hoffman*, 324 U.S. 30, 34–35 (1945) ("[C]ourts may decide for themselves whether all the requisites of [foreign sovereign] immunity exist."); *Yousuf v. Samantar*, 699 F.3d 763, 770–77 (4th Cir. 2012) (head-of-state and official act immunity). Thus, in neither of these categories is there meaningful evidence of actions by the federal political branches to authorize judicial application of customary international law rules.

133. See *infra* section II.A.2.

134. See Bradley & Goldsmith, *Federal Courts*, *supra* note 4, at 2270.

135. Ironically, many statements of the modern position produce the same (unacceptable) results. Most modernists would not treat all customary international law rules as federal common law, instead requiring some sort of heightened showing of specificity. See Koh, *State Law?*, *supra* note 6, at 1835 ("Once customary norms *have sufficiently crystallized*, courts should presumptively incorporate them

It is no answer to object to “*unelected federal judges apply[ing] customary [international] law made by the world community at the expense of state prerogatives . . . [where] the interests of the states are neither formally nor effectively represented in the lawmaking process.*”<sup>136</sup> The relevant question is *whose* interests and lawmaking processes must prevail in the formation and judicial application of customary international law—those of individual states and their citizens or the United States and its citizens. The answer is straightforward: federal judges, selected by the federal government,<sup>137</sup> applying uniform federal law, ultimately reviewable by the U.S. Supreme Court, plainly must prevail on issues of customary international law, binding the Nation and directly impacting its foreign relations.<sup>138</sup> And when the President and Congress participate in the selection of federal judges and in the formation of customary international law, then the interests of the states—all of the states—have been both “formally [and] effectively represented in the lawmaking process” of customary international law.<sup>139</sup>

It is also no answer to object that “[customary international law] was not viewed as federal law during most of our nation’s history.”<sup>140</sup> It is non-controversial<sup>141</sup> that, prior to the “avulsive” changes produced by *Erie Railroad v. Tompkins*, customary international law was “general common law”—which was neither state nor federal in character.<sup>142</sup> As the revisionists usually acknowledge,<sup>143</sup> pre-*Erie* authority is therefore of limited value in determining the status of customary international law in

---

into federal common law.”) (emphasis added); Neuman, *supra* note 6, at 387–88 (requiring a “genuine norm of customary international law,” not “emerging norms”). As a consequence, “insufficiently crystallized” rules or “emerging norms” of international law would be state law under the modernist analysis—leading to the same ills as those produced by the revisionist position. *See supra* section II.A.1.

136. Bradley & Goldsmith, *International Law*, *supra* note 4, at 868.

137. There is little question that with regard to their selection, experience, and institutional structure, federal courts are better situated to decide issues of international law than state courts. Koh, *State Law?*, *supra* note 6, at 1849 (“[F]ederal judges have *structural* attributes that make them more appropriate adjudicators to rule on international matters.”).

138. *See Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793) (quoted *infra*, note 212); Koh, *State Law?*, *supra* note 6, at 1853 n.163 (“Bradley and Goldsmith’s proposal would also allow unelected federal and state judges to construe customary international law, but as some species of state law.”).

139. Bradley & Goldsmith, *International Law*, *supra* note 4, at 868.

140. Bradley & Goldsmith, *Human Rights*, *supra* note 4, at 332.

141. Contrary suggestions are plainly untenable. Jordan J. Paust, *Customary International Law and Human Rights Treaties are Law of the United States*, 20 MICH. J. INT’L L. 301, 308–09 (1999).

142. Bradley & Goldsmith, *International Law*, *supra* note 4, at 824; Young, *Sorting Out*, *supra* note 19, at 374–75.

143. Bradley & Goldsmith, *International Law*, *supra* note 4, at 849.

a post-*Erie* legal system. The more relevant inquiry is what the text, structure, and purposes of the Constitution require, and as discussed above, those sources require treating customary international law as federal law.

In any event, prior to *Erie*, customary international law was regarded as general common law, not as state law. Simply re-characterizing customary international law as state law because it was not previously federal law is a *non sequitur*. *Erie* raises, but does not resolve, the question of how rules of general common law should be categorized—as state law or federal law—in a system which requires a choice. The answer to that question is, again, provided by the federal foreign relations powers, requiring that international law be treated as federal, not state, law.<sup>144</sup> That answer is confirmed by post-*Erie* judicial authority, discussed below, holding consistently that rules of international law, and their status in the U.S. courts, are matters of federal law.<sup>145</sup>

Finally, suggestions that customary international law should be regarded as “non-preemptive federal law,” “non-preemptive non-federal law,” or “general common law”<sup>146</sup> are also untenable. All of these alternatives are even less consistent with expansive federal foreign relations authority than the revisionist position. Indeed, these alternatives make it even more difficult for the United States to speak with one voice,<sup>147</sup> while simultaneously creating novel categories of law that resurrect the risks of different results in state and federal courts that *Erie* sought to prevent. These results are incompatible with both the federal foreign affairs power and the Article VI Supremacy Clause, and are even less plausible than the revisionist position.<sup>148</sup>

---

144. That answer is supported by the fact that, in pre-*Erie* America, the general common law had an important unifying function: “[t]he ‘general common law’ had provided a coordinating concept that linked [the federal and state judicial] systems in a joint interpretive enterprise.” Neuman, *supra* note 6, at 378; see *infra* section II.B.2; *infra* note 333.

145. See *infra* section II.B.1; *infra* section II.B.2.

146. See Aleinikoff, *supra* note 61, at 97; Ramsey, *International Law*, *supra* note 59, at 558; Young, *Sorting Out*, *supra* note 19, at 502–03.

147. They do so by adding an additional voice (federal courts) to the fifty (state court) voices under the revisionist position.

148. Other commentators have argued that the Constitution itself authorizes federal courts to make federal common law in order to safeguard the federal political branches’ foreign relations authority. Bellia & Clark, *supra* note 63, at 7. In order to cabin this position, however, its proponents postulate that the Framers and U.S. courts sought only to safeguard the “perfect rights” of foreign states, as a means of avoiding interference with the powers to declare war and recognize foreign states. The absence of any evidence of attention by nineteenth century U.S. courts to the concept of “perfect rights,” coupled with the breadth and uncertainty of the concept, present insurmountable obstacles for this thesis. It does, however, usefully emphasize the breadth of the political branches’ foreign relations authority.

## 2. *Separation of Powers*

The characterization of all rules of customary international law as federal law does not conclude inquiry into the status of these rules in U.S. courts. Rather, it is also necessary separately to consider whether, on the one hand, the federal political branches have provided for U.S. courts to apply particular rules of customary international law or, whether, on the other hand, the U.S. political branches intended, in accepting such a rule, that it operate only internationally, requiring subsequent domestic implementation in the United States by Congress (or otherwise) before it could be judicially applicable by U.S. courts. This analysis gives effect to *Erie*'s prohibition against unauthorized judicial law-making and parallels the approach applicable to other international legal obligations to which the U.S. political branches subject the United States by way of treaties or other international agreements; as discussed below, the approach applicable to U.S. treaties applies with equal force to customary international law.

Article VI of the Constitution provides that U.S. treaties are federal law, the “supreme Law of the Land,” which prevails over inconsistent state law.<sup>149</sup> Nonetheless, despite that text and the status of treaties as federal law, it has been clear from the early days of the Republic that particular provisions of U.S. treaties will only be directly applicable in U.S. courts if they are “self-executing.”<sup>150</sup> More specifically, a treaty provision will be given effect in U.S. courts if the political branches—in particular, the President and Senate—intended that the provision “operates of itself without the aid of any legislative provision.”<sup>151</sup> On the other hand, if the political branches intend the treaty provision to “import a contract,” then the provision “addresses itself to the political, not the judicial department; and the legislature must execute the contract, before it can become a rule for the Court.”<sup>152</sup>

The distinction between self-executing and non-self-executing treaties was articulated in the first U.S. Supreme Court decisions concerning U.S.

---

149. U.S. CONST. art. VI, cl. 2 (“The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any [t]hing in the Constitution or Laws of any state to the Contrary notwithstanding.”).

150. The distinction between self-executing and non-self-executing treaties was recognized from the earliest days of the Republic. *Camp v. Lockwood*, 1 U.S. (1 Dall.) 393, 403–04 (Pa. Ct. Com. Pl. 1788).

151. *Foster v. Nielson*, 27 U.S. (2 Pet.) 253, 254 (1829).

152. *Id.* at 314.

treaties. In *Ware v. Hylton*,<sup>153</sup> the Court considered whether a provision of the Treaty of Paris applied directly in a U.S. judicial proceeding to invalidate a state law that nullified debts to British subjects. Justice Chase reasoned that, notwithstanding the text of Article VI, “[n]o one can doubt that a treaty may stipulate, that certain acts shall be done by the Legislature; that other acts shall be done by the Executive; and others by the Judiciary.”<sup>154</sup> The Court continued:

When . . . a treaty stipulates for any thing of a legislative nature, the manner of giving effect to this stipulation is by that power which possesses the Legislative authority, and which consequently is authorized to prescribe laws to the people for their obedience, passing such laws as the public obligation requires.<sup>155</sup>

Nevertheless, the Court concluded that the relevant treaty provision was addressed to the courts, not to Congress, and that the provision therefore applied directly to preempt otherwise applicable state law.<sup>156</sup>

The Court adopted the same distinction between self-executing and non-self-executing treaties in *Foster v. Neilson*.<sup>157</sup> Citing Article VI, the Court observed that the “constitution declares a treaty to be the law of the land,”<sup>158</sup> and therefore federal law, directly applicable in U.S. courts. But Chief Justice Marshall also qualified that observation, holding that a treaty is “to be regarded in courts of justice as equivalent to an act of the legislature, *whenever it operates of itself without the aid of any legislative provision*.”<sup>159</sup> And the Court went on, following the analysis in *Ware v. Hylton*, to hold that, “when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, *the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court*.”<sup>160</sup>

This distinction between self-executing treaties, addressed to the judiciary, and non-self-executing treaties, addressed to the political

---

153. 3 U.S. (3 Dall.) 199 (1796).

154. *Id.* at 244.

155. *Id.* at 272.

156. *Id.* at 244–45.

157. 27 U.S. (2 Pet.) 253 (1829).

158. *Id.* at 254.

159. *Id.* at 314 (emphasis added).

160. *Id.* (emphasis added). The Court noted that the treaty “seems to be the language of contract; and if it is, *the ratification and confirmation which are promised must be the act of the legislature. Until such act shall be passed*, the Court is not at liberty to disregard the existing laws on the subject.” *Id.* (emphasis added).

branches, was applied throughout the nineteenth and twentieth centuries,<sup>161</sup> and adopted without controversy in the Restatements of Foreign Relations Law.<sup>162</sup> According to the *Third Restatement*, “a ‘non-self-executing’ agreement will not be given effect as law in the absence of necessary implementation.”<sup>163</sup> Or, as the Supreme Court recently summarized, “[t]his Court has long recognized the distinction between treaties that automatically have effect as domestic law, and those that—while they constitute international law commitments—do not by themselves function as binding federal law.”<sup>164</sup>

As the text of the *Third Restatement* suggests, the distinction between self-executing and non-self-executing provisions applies equally to treaties and other international agreements concluded by the United

---

161. *See, e.g.*, *The Five Percent Discount Cases*, 243 U.S. 97, 105 (1917) (applying the distinction); *De Geofroy v. Riggs*, 133 U.S. 258, 267–68, 273 (1890) (applying the distinction); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (“If the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative . . . they [will] have the force and effect of a legislative enactment.”); *United States v. Rauscher*, 119 U.S. 407, 410–11, 429–30 (1886) (applying the distinction); *The Head Money Cases*, 112 U.S. 580, 598–99 (1884) (“A treaty, then, is a law of the land as an act of [C]ongress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, [courts must] resor[t] to the treaty for a rule of decision for the case before it as it would to a statute.”); *Am. Ins. Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 542 (1828) (applying the distinction).

162. *See* RESTATEMENT (THIRD) §§ 111(3), (4); RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 141 (AM. LAW INST. 1965) [hereinafter RESTATEMENT (SECOND)]; RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 106 cmt. a (AM. LAW INST., Discussion Draft, 2015) [hereinafter RESTATEMENT (FOURTH)].

163. RESTATEMENT (THIRD) § 111(3).

164. *Medellín v. Texas*, 552 U.S. 491, 504 (2008). Even if a treaty is non-self-executing, it nonetheless constitutes federal law under the Supremacy Clause. *See* LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 203–04 (2d ed. 1996); Curtis A. Bradley, *Self-Execution and Treaty Duality*, 2008 SUP. CT. REV. 131, 174 [hereinafter Bradley, *Treaty Duality*]. Some recent commentary argues that the Framers did not intend to allow non-self-executing treaties. *See* Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT’L L. 760, 764 (1988); Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1113–14 (1992). That view is inconsistent with long-established judicial authority and practice, fundamental to the contemporary conduct of U.S. foreign relations, *see supra* section II.A.2, and is logically untenable: consider a treaty provision obligating each contracting state to “enact legislation providing for the protection of intellectual property rights” or to “adopt regulations for the free movement of persons between the contracting states.” Provisions of this character are inevitably non-self-executing. *See* *Camp v. Lockwood*, 1 U.S. (1 Dall.) 393, 403 (Pa. Ct. Com. Pl. 1788) (interpreting Treaty of Peace with Britain providing “Congress shall recommend it to the Several Legislatures to provide for such a restitution; and, as to those of another description, they have liberty given them by the treaty . . . and Congress is to recommend to the States, that they be restored on refunding the money paid for [the estates]”).

States.<sup>165</sup> It is, of course, well-settled that the federal political branches possess the constitutional authority to conclude international agreements in forms other than treaties.<sup>166</sup> Thus, provisions of both congressional-executive agreements<sup>167</sup> and sole executive agreements<sup>168</sup> have repeatedly been held directly applicable in U.S. courts, and given effect notwithstanding contrary provisions of state law. Most recently, in *American Insurance Association v. Garamendi*,<sup>169</sup> the Supreme Court commented that sole executive agreements are generally “fit to pre-empt state law, just as treaties are,” and held that a specific sole executive agreement was directly applicable in U.S. courts, superseding rights that would otherwise exist under U.S. state law.<sup>170</sup>

---

165. RESTATEMENT (THIRD) § 111(3).

166. *See id.* § 303. Again, some recent commentary argues that the Framers did not intend to permit sole executive or congressional-executive agreements. *See* RAMSEY, *THE CONSTITUTION’S TEXT*, *supra* note 59, at 174–75, 186–93 (2007) (describing various kinds of “non-treaty agreements”); Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573, 1581–90 (2007) [hereinafter Clark, *Sole Executive Agreements*]; Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995). That view is again inconsistent with 200 years of practice and nearly a century of judicial authority. *See* *United States v. Belmont*, 301 U.S. 324, 331 (1937) (“While th[e] rule in respect of treaties is established by the express language of clause 2, article 6, of the Constitution, the same rule would result in the case of all international compacts and agreements from the very fact that complete power over international affairs is in the national government.”); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION*, *supra* note 164, at 496 n.163 (“Presidents from Washington to Clinton have made many thousands of agreements . . . on matters running the gamut of U.S. foreign relations.”); Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995).

167. *B. Altman & Co. v. United States*, 224 U.S. 583 (1912) (approving congressional-executive agreement). *Cf.* *Santovincenzo v. Egan*, 284 U.S. 30 (1931) (upholding validity of international agreement approved by Senate super-majority, not denominated as a treaty); *Gross v. German Found. Indus. Initiative*, 549 F.3d 605, 611–13 (3d Cir. 2008) (considering whether Joint Statement of Berlin Accords, which “is not a formal treaty,” is self-executing).

168. *See* *United States v. Pink*, 315 U.S. 203, 223, 230 (1942) (“[A]ll international compacts and agreements’ are to be treated with similar dignity [to treaties under Article VI’s Supremacy Clause] for the reason that ‘complete power over international affairs is in the national government. . . . A treaty is a ‘Law of the Land’ under the supremacy clause . . . . Such international compacts and agreements as the Litvinov Assignment have a similar dignity.”); *Belmont*, 301 U.S. at 331 (“[W]hile this rule [i.e., supremacy over prior law] in respect of treaties is established by the express language of cl. 2, Art. VI, of the Constitution, the same rule would result in the case of all international compacts and agreements.”); *Watts v. United States*, 1 Wash. Terr. 288, 294 (1870) (“Such conventions are not treaties within the meaning of the constitution, and, as treaties, supreme law of the land, conclusive on the courts, but they are provisional arrangements . . . [which are] for the occasion an expression of the will of the people through their political organ, touching the matters affected; and to avoid unhappy collision between the political and judicial branches . . . such an expression to a reasonable limit should be followed by the courts and not opposed, though extending to the temporary restraint or modification of the operation of an existing statute.”).

169. 539 U.S. 396 (2003).

170. *Id.* at 416, 419–20, 419 n.11; *see also* *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *United*

U.S. courts have looked to a variety of factors to determine whether particular treaties or other international agreements<sup>171</sup> were intended by the U.S. political branches to be self-executing.<sup>172</sup> These factors include statements in the agreement indicating its status,<sup>173</sup> the character of the agreement and content of the rights it conferred,<sup>174</sup> statements in the U.S. negotiating or ratification process,<sup>175</sup> the character and content of related international agreements,<sup>176</sup> and the post-ratification views and conduct of the United States.<sup>177</sup> These factors have produced a variety of results, with some agreements and some provisions of agreements treated as self-executing, and others as non-self-executing.<sup>178</sup>

The approach that applies to treaties (and congressional-executive and sole executive agreements) under Article VI should also apply to customary international law. There is, of course, no express textual basis for such a result (because Article VI refers only to “*Laws* of the United States which shall be made in Pursuance [of the Constitution]” and “*Treaties* made, or which shall be made, under the Authority of the United States,” and not to customary international law).<sup>179</sup> But that has not prevented congressional-executive and sole executive agreements, which are also absent from Article VI’s text, from being treated in the same

States v. Kelly, 676 F.3d 912, 916 (9th Cir. 2012) (“[T]he purposes of the treaty and the objectives of its creators . . . is the factor that is critical to determine whether an *executive agreement is self executing . . .*” (emphasis added, omissions in original)); Al-Bihani v. Obama, 619 F.3d 1, 35 n.17 (D.C. Cir. 2010) (Kavanaugh, J., concurring) (“a congressional-executive agreement, the language of which made the agreement self-executing” is “domestic U.S. law”).

171. Some provisions of a treaty may be self-executing even if others are not. See RESTATEMENT (THIRD) § 111 cmt. h.

172. See *Medellín v. Texas*, 552 U.S. 491, 504–18 (2008); *Frolova v. U.S.S.R.*, 761 F.2d 370, 373 (7th Cir. 1985) (“[C]ourts consider several factors in discerning the intent of the parties to the agreement: (1) the language and purposes of the agreement as a whole; (2) the circumstances surrounding its execution; (3) the nature of the obligations imposed by the agreement; (4) the availability and feasibility of alternative enforcement mechanisms; (5) the implications of permitting a private right of action; and (6) the capability of the judiciary to resolve the dispute.”); RESTATEMENT (THIRD) § 111 reporters’ note 5; Bradley, *Treaty Duality*, *supra* note 164, at 149.

173. RESTATEMENT (THIRD) § 111(4)(a); see *Medellín*, 552 U.S. at 504–05.

174. RESTATEMENT (THIRD) § 111 reporters’ note 5 (“[p]rovisions in treaties of friendship, commerce, and navigation . . . conferring rights on foreign nationals”); see also RESTATEMENT (FOURTH) § 106 reporters’ note 2 (“Courts also have been more likely to find self-execution when treaty provisions address matters of individual or private rights as opposed to the rights of the state.”).

175. RESTATEMENT (THIRD) § 111(4)(b); see also RESTATEMENT (FOURTH) § 106 reporters’ note 2.

176. See *Medellín*, 552 U.S. at 517–18 (2008).

177. See *id.* at 506–07.

178. See Tim Wu, *Treaties’ Domains*, 93 VA. L. REV. 571, 600–30 (2007) (categorizing Supreme Court decisions regarding self-executing status of treaties).

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

manner as treaties for purposes of Article VI.<sup>180</sup> The same conclusions apply to rules of customary international law to which the U.S. political branches have subjected the United States; that is true notwithstanding the status of all customary international law rules as federal law.<sup>181</sup> The basis for the distinction between self-executing and non-self-executing treaties—that the political branches may not intend to make international obligations that they have undertaken applicable directly in U.S. courts, notwithstanding their status as federal law—is at least equally applicable to customary international law rules. Like some treaty obligations, many rules of customary international law are plainly not intended for direct application in national courts. International law rules regarding the use of force and protection of the environment are obvious examples.<sup>182</sup> It would make no sense to conclude that the U.S. political branches intended these rules to be automatically applicable in U.S. courts.

Indeed, if a formal written treaty, negotiated by the President and approved by the Senate, must be examined in order to determine whether the political branches intended it to be self-executing, it is impossible to see why customary international law, not involving any equivalent written instrument, individualized negotiations, or Senate approval, should not be subject to the same inquiry. Moreover, in practice, customary international law rules are also characterized by substantially less clarity and precision than treaty provisions,<sup>183</sup> again, arguing for care in treating

---

180. See RESTATEMENT (THIRD) § 303; *supra* section II.A.2.

181. The *Third Restatement* devotes no attention to the question whether customary international law is directly applicable in U.S. courts. It provides, in section 111(3), that U.S. courts “are bound to give effect to international law and to international agreements of the United States,” except for “non-self-executing” agreements. RESTATEMENT (THIRD) § 111(3). No similar exception is included in section 111 for “non-self-executing” rules of customary international law. Comment d recites that rules of customary international law “while not mentioned explicitly in the Supremacy Clause, are also federal law and as such are supreme over State law.” *Id.* cmt. d. Comment h then addresses “self-executing and non-self-executing international agreements” without reference to customary international law. *Id.* cmt. h. The Restatement makes no effort to explain the differential treatment of customary and conventional international law.

182. See CRAWFORD, *supra* note 97, at 69 (“A rule . . . of a strictly interstate character . . . may be difficult to restructure as a norm within a domestic legal system, aside from cases where the common law has transposed the various state immunities directly from international law.”).

183. As Justice Cardozo put it, “[i]nternational law . . . has at times, like the common law within states, a twilight existence during which it is hardly distinguishable from morality or justice.” *New Jersey v. Delaware*, 291 U.S. 361, 383 (1934). See D’AMATO, *supra* note 109, at 4 (“The questions of how custom comes into being and how it can be change or modified are wrapped in mystery and illogic.”); G.J.H. VAN HOOFF, *RETHINKING THE SOURCES OF INTERNATIONAL LAW* 85 (1983) (“The views represented in doctrine provide a kaleidoscopic picture ranging from one extreme to the other.”); WOLFKE, *supra* note 98, at 4–5.

Some customary international law principles are particularly ill-suited for judicial application. See *Delimitation of Maritime Boundary in the Gulf of Maine Area (Can./U.S.)*, 1984 I.C.J. Rep. 246, ¶

such rules as directly applicable in U.S. courts. Given these considerations, an inquiry into the self-executing status of customary international law rules is more, not less, appropriate than it is for treaties and other international agreements.

Despite this, the modern position is that *all* rules of customary international law are presumptively self-executing and applicable in U.S. courts. That is the rule prescribed by the *Third Restatement*,<sup>184</sup> as well as by proponents of the modern position: “[i]nternational law . . . is ‘self-executing’ and is applied by courts in the United States without any need for it to be enacted or implemented by Congress.”<sup>185</sup> As already discussed, however, this position is impossible to reconcile with the treatment of other forms of international law in the United States or with the character of customary international law; rather, like treaties, particular rules of customary international law must be examined to determine whether they are self-executing and directly applicable in U.S. courts.

Federal judicial application of customary international law rules, without political branch direction, is also inconsistent with constitutional text and structure. Article I contains the Constitution’s most relevant reference to customary international law, granting Congress the power to “define and punish . . . [o]ffenses against the Law of Nations.”<sup>186</sup> Likewise, Article III grants federal courts jurisdiction over cases arising under “Laws” and “Treaties” of the United States, but not customary international law,<sup>187</sup> and Article VI provides that “Laws” and “Treaties” of the United States, but not customary international law, are the supreme Law of the Land.<sup>188</sup>

These provisions do not support, and are instead in tension with, the modernist claim that federal courts are presumptively empowered to apply

---

111 (Oct. 12) (“A body of detailed rules is not to be looked for in customary international law which in fact comprises a limited set of norms for ensuring the co-existence and vital co-operation of the members of the international community, together with a set of customary rules whose presence in the opinio juris of States can be tested by induction based on the analysis of a sufficiently extensive and convincing practice . . .”). The need for inquiry into political branch authorization of judicial application is particularly appropriate in these circumstances.

184. RESTATEMENT (THIRD) §§ 111(1), (3).

185. Henkin, *International Law as Law*, *supra* note 20, at 1561; *see also* Bradley & Goldsmith, *International Law*, *supra* note 4, at 858 (“[P]roponents of the modern position contend that all of CIL, unlike treaties, is ‘self-executing’ federal law.”).

186. U.S. CONST. art. I, § 8, cl. 10.

187. On the contrary, although early drafts of Article III included reference to the Law of Nations as federal law, the Framers eventually omitted the reference. *See* William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 VA. J. INT’L L. 687, 705–11 (2002).

188. U.S. CONST. art. VI.

all rules of customary international law as preemptive federal law, without the need for any federal political branch direction. Instead, these provisions suggest decisively that it was the federal political branches that were granted authority to define rules of customary international law and incorporate them into U.S. federal law. Neither Article I, section 8 nor Articles III and VI provide for an independent federal judicial role in making rules of customary international law, as envisaged by the modernists.

On the contrary, the modernist position is difficult to reconcile with constitutional limits on the law-making powers of the federal courts. The central lesson of *Erie* is that federal courts have limited independent authority to make rules of law. When Justice Brandeis declared that, “[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state,”<sup>189</sup> he made clear that the federal courts lacked independent authority to make rules of general common law, even in fields where federal legislative and executive authority was unquestioned. Thus, “[*Erie*] recognizes that federal judicial power to displace state law is not coextensive with the scope of dormant congressional power. Rather, the Court must point to some source, such as a statute, treaty, or constitutional provision, as authority for the creation of substantive federal law.”<sup>190</sup>

Application of customary international law rules by federal courts often entails many of the aspects of independent judicial law-making that are present in the application of rules of general common law.<sup>191</sup> As the revisionists have demonstrated, customary international law rules are frequently ill-defined and controversial, providing only limited direction to courts and involving only limited participation by U.S. political branches.<sup>192</sup> In these circumstances, judicial application of customary international law involves much the same type of expansive judicial law-making as does the application of general common law rules—and raises the same concerns as those identified in *Erie*.

---

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

190. Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 11–12 (1975); see also Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1414–15 (2001).

191. Modernists and revisionists spar over the question whether courts “make” or “find” rules of customary international law. Nothing should turn on the characterization. There is no disagreement that courts must look to objective external sources (such as state practice, treaties, decisions, and commentary) in “finding” international law, nor that this process inevitably entails a fair measure of law-“making.”

192. See Bradley & Goldsmith, *Human Rights*, *supra* note 4, at 327–31; Bradley & Goldsmith, *Federal Courts*, *supra* note 4, at 2268–72.

On the other hand, other rules of customary international law are well-defined and specific, and enjoy extensive support from U.S. political branches.<sup>193</sup> In these circumstances, *Erie*'s concerns about unfettered judicial law-making are only tenuously implicated: exercising their constitutional authority over the Nation's foreign relations, the federal political branches have made rules of law, which U.S. courts are able to apply with no more judicial law-making than their application of statutory or treaty provisions. The modernist position provides no principled means of distinguishing between these different categories of customary international law, and the different types of judicial action required by different international law rules, and instead broadly approves of both.

It is no answer for modernists to cite judicial authority holding that "international law is part of our law."<sup>194</sup> As the revisionists have shown, that authority stands only for the proposition that rules of customary international law are part of U.S. law, without addressing whether those rules are also directly applicable in U.S. courts—just as U.S. treaties are denominated the law of the land, without resolving whether their provisions are self-executing.<sup>195</sup> Moreover, pronouncements that "international law is part of our law"<sup>196</sup> were made in pre-*Erie* settings, when limits on independent judicial law-making absent a sovereign mandate to do so had not yet been articulated. In any event, as discussed below, in applying customary international law during this period, U.S. courts consistently inquired whether particular rules were intended by the political branches to be judicially-applicable;<sup>197</sup> the adage that international law was part of our law did not resolve the question whether that law was also self-executing and directly applicable in U.S. courts.

The modernist position also gives rise to serious risks of judicial interference with the federal political branches' conduct of foreign relations. Judicial application of all customary international law rules, without inquiry into political branch authorization, risks undermining the President and Congress in their dealings with foreign states.<sup>198</sup> As the revisionists have demonstrated, judicial application of some rules of customary international law—particularly "new" rules, including

---

193. Examples include foreign sovereign immunity, consular immunity, and treatment of aliens. See *supra* section II.A.1.

194. Koh, *State Law?*, *supra* note 6, at 1831 (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)).

195. See Bradley & Goldsmith, *International Law*, *supra* note 4, at 822–23; *supra* section II.A.2.

196. *Paquete Habana*, 175 U.S. at 700 (1900).

197. See *infra* section II.B.1.

198. See *supra* section II.A.1; *infra* section II.B.1.

emergent human rights protections—have significant foreign policy implications.<sup>199</sup> Application of those types of rules is often likely to require U.S. courts to make inquiries into, and judgments about, foreign sovereign actions, potentially provoking foreign protests and potential retaliation. That is particularly true of many contemporary rules of international human rights law, including rules regarding arbitrary detention, capital punishment, race and gender discrimination, asylum, and labor rights.<sup>200</sup>

The likelihood of foreign offense or retaliation is heightened by the character of contemporary customary international law. As the revisionists have pointed out, contemporary customary international law rules are formed more quickly, with less evidence of state practice, than “traditional” international law rules.<sup>201</sup> Contemporary customary international law rules are often based upon declarations or aspirational statements in international forums instead of being crystallized through state practice.<sup>202</sup> As a consequence, contemporary rules of customary international law are often more general, ill-defined, and aspirational than traditional international law rules—heightening concerns about the foreign policy consequences of judicial application of such rules.<sup>203</sup>

Reflecting these concerns, the federal courts have consistently been reluctant to adopt rules of international law that risk judicial interference in the political branches’ conduct of the Nation’s foreign relations. They have instead underscored the authority of the President and Congress, rather than the Judicial branch, over foreign relations: “[t]he conduct of the foreign relations of our government is committed by the constitution to the executive and legislative . . . departments.”<sup>204</sup> As a consequence, foreign policy decisions have “long been held to belong in the domain of political power not subject to judicial intrusion or inquiry,”<sup>205</sup> and courts

---

199. See Bradley & Goldsmith, *International Law*, *supra* note 4, at 840–41.

200. See RESTATEMENT (THIRD) § 702 (providing examples of emerging rules); Beth Stephens, *Litigating Customary International Human Rights Norms*, 25 GA. J. INT’L & COMP. L. 191 (1995/96).

201. See Bradley & Goldsmith, *International Law*, *supra* note 4, at 838–40.

202. RESTATEMENT (THIRD) § 102 cmt. f & reporters’ note 2; *id.* § 103 cmt. c & reporters’ note 3; D’AMATO, *supra* note 109, at 44–46, 49–51; J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT’L L. 449, 485–86 (2000).

203. This does not, however, lead to a conclusion that all customary international law rules are inapplicable in U.S. courts, as revisionists suggest. See *supra* section I.B. Rather, it is necessary to distinguish between different rules of customary international law, examining which rules the U.S. political branches intended to have judicial application and which rules they did not.

204. *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918); see also *Medellin v. Texas*, 552 U.S. 491, 511 (2008).

205. *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948); see also *Bank Markazi v. Peterson*, \_\_\_ U.S. \_\_\_, 136 S. Ct. 1310, 1328 (2016); *Christopher v. Harbury*, 536 U.S. 403,

have eschewed applications of customary international law rules, including in *Sabbatino*, that could “interfere with negotiations being carried on by the Executive Branch.”<sup>206</sup>

These considerations provide further confirmation that the modernist position, which presumptively requires judicial application of all rules of customary international law, is untenable. Direct application of all customary international law rules by U.S. courts entails not only unauthorized judicial law-making, but judicial law-making in a context that involves especially significant risks of interference with the political branches’ exercise of their foreign relations authority. Because of those risks, inquiry into the existence of political branch authorization for the application of customary international law rules, like that required for the provisions of treaties and other international agreements, is particularly important.

There is also no basis for concluding that the federal political branches have broadly authorized direct judicial application of all rules of customary international law. On the contrary, in many instances, the political branches have made clear that they do not want particular rules of international law to be directly applied in U.S. courts. The United States has ratified most human rights treaties only after attaching reservations, declarations, or understandings confirming the treaties’ non-self-executing status.<sup>207</sup> As the revisionists observe,<sup>208</sup> it is implausible to argue that the non-self-executing provisions of these treaties do *not* apply in U.S. courts, but that parallel rules of customary international law (derived in large part from the treaties themselves), *do* apply, without any inquiry as to whether essentially the same rules of international law were intended to be self-executing.

It is no answer to say that “international human rights [law] did not just happen to the United States; the political branches deliberately participated in its creation.”<sup>209</sup> Although it is true that the federal political branches participate in the formation of many (but not all<sup>210</sup>) rules of customary international law, that elides the critical question: whether the

---

417 (2002).

206. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 432 (1964).

207. Bradley & Goldsmith, *Human Rights*, *supra* note 4, at 328–29; *see generally* David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT’L L. 129 (1999).

208. Bradley & Goldsmith, *International Law*, *supra* note 4, at 858; Bradley & Goldsmith, *Human Rights*, *supra* note 4, at 330–31.

209. Neuman, *supra* note 6, at 385.

210. Bart M.J. Szewczyk, *Customary International Law and Statutory Interpretation: An Empirical Analysis of Federal Court Decisions*, 82 GEO. WASH. L. REV. 1118, 1163 (2014); Young, *Sorting Out*, *supra* note 19, at 396–97.

political branches have, when participating in making particular rules of international law, authorized U.S. courts to apply those rules. Unless the political branches have authorized judicial application of a rule of law, whether customary international law or otherwise, the federal courts have no authority to apply that rule. That is the lesson of *Erie* and its limits on independent judicial law-making.

Conversely, where the political branches *have* bound the United States to a rule of customary international law, and provided for application of that rule in U.S. courts, then federal courts not only may, but must, apply that rule. As discussed above, the Constitution provides the federal political branches with broad, and exclusive, authority to act for the United States in making customary international law and undertaking international legal obligations on behalf of the Nation.<sup>211</sup> Those grants of constitutional authority complement the inherent, and inevitable, power of the federal political branches to exercise the sovereign rights and obligations of the United States to participate in the formation of customary international law.<sup>212</sup> In practice, the political branches exercise this authority on an ongoing, continuous basis, necessarily committing the United States to new or revised obligations under customary international law (or declining to undertake such commitments) in the course of its international relations.

When the political branches exercise this authority to make rules of customary international law that are intended to have direct application in national courts, those rules can and must be applied by U.S. courts. These international law rules are no different in international effect than self-executing treaties, congressional executive agreements, or sole executive agreements. In each case, exercising authority granted by the Constitution,<sup>213</sup> the Executive and Legislative branches make rules of international law, with the status of federal law.<sup>214</sup> And, in each case, the structure and objectives of the Constitution provide for the possibility of

---

211. See *supra* section II.A.1.

212. See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318 (1936) (“The power to acquire territory by discovery and occupation, the power to expel undesirable aliens, the power to make such international agreements as do not constitute treaties in the constitutional sense, none of which is expressly affirmed by the Constitution, nevertheless exist as inherently inseparable from the conception of nationality.”); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (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; in their national character and capacity.”).

213. See *supra* section II.A.2; *supra* note 168.

214. See *supra* section II.A.2.

direct application of these international law rules in U.S. courts, depending on the intentions of the political branches.

It is no answer to say that customary international law (unlike treaties) is not included expressly among the categories of law referred to in Article VI's Supremacy Clause as the "supreme Law of the Land."<sup>215</sup> The same observation applies to congressional-executive agreements<sup>216</sup> and sole executive agreements<sup>217</sup>—both of which may also be self-executing and directly applicable in U.S. courts, but which are also omitted from Article VI's express text.<sup>218</sup> The same observation also applies to rules of federal common law, and to regulations and similar forms of law made by federal administrative agencies,<sup>219</sup> all of which are unquestionably applicable in U.S. courts notwithstanding their omission from Article VI's text.<sup>220</sup> The absence of customary international law—like the absence of these other types of federal law—from the text of Article VI is therefore not decisive. The Constitution grants the federal political branches the authority to make customary international law, which includes the power to make rules of customary international law with the status of federal law that are directly applicable in U.S. courts, just as other types of federal law, not expressly included in Article VI, are directly applicable in U.S. courts.

Moreover, Article VI supplies an entirely satisfactory textual basis for these conclusions. The Supremacy Clause's provision that the Constitution, U.S. treaties, and "the Laws of the United States which shall

---

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

216. See *supra* section II.A.2; *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

217. See *supra* section II.A.2; *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937).

218. It is also no answer to argue, as revisionists do, that customary international law is made by the international community, while other forms of law under Article VI are made by the U.S. political branches. See Bradley & Goldsmith, *International Law*, *supra* note 4, at 857–58. Treaties and other international agreements are, of course, made by foreign states (sometimes many foreign states), as well as the United States; conversely, customary international law binding on the United States also almost always requires assent by the U.S. political branches, albeit less formally and explicitly. More fundamentally, the revisionist response fails to focus on the critical question, which is whether, in assenting to a rule of customary international law, the U.S. political branches intended that rule to be directly applicable in U.S. courts. It is these actions and intentions of U.S. political bodies, not the world community, that are decisive in determining whether rules of international law are directly applicable in U.S. courts (just as it is the intentions of the U.S. political branches that are decisive in determining the self-executing status of treaties). See *infra* section II.B.2; *infra* Part III; *infra* Part IV.

219. Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 756–65 (2010).

220. See *id.* at 758–65; *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972) (noting federal common law is "law" for purposes of statutory arising under jurisdiction; "laws" include "claims founded upon federal common law as well as those of a statutory origin"). The same rationale applies under Article VI, and to customary international law.

be made in Pursuance [of the Constitution]” are the “Law of the Land” has given rise to substantial controversy.<sup>221</sup> Nonetheless, the Clause provides ample grounds for categorizing rules of customary international law as federal law.<sup>222</sup> Article VI’s reference to “Laws of the United States” is not limited to “Acts” of Congress,<sup>223</sup> and instead was drafted expansively to extend to other forms of U.S. “Law” made pursuant to the Constitution, including congressional-executive and sole-executive agreements, as well as federal common law.<sup>224</sup> As a textual matter, this formulation encompasses rules of customary international law, made by the federal political branches “in pursuance of” their constitutional foreign affairs powers, and then interpreted and applied by the federal courts “in pursuance of” their constitutional judicial authority.<sup>225</sup> Alternatively, grants of jurisdiction to the federal courts over international matters (including, as discussed below, admiralty, maritime, and alienage jurisdiction and the Alien Tort Statute) are readily interpreted as providing

---

221. See Bellia & Clark, *supra* note 63; Craig Green, *Erie and Problems of Constitutional Structure*, 96 CALIF. L. REV. 661 (2008); Monaghan, *supra* note 219.

222. Alternatively, contemporary authorities appear to have regarded customary international law as “constitutional” in character (and therefore falling within Article VI’s reference to the Constitution). See William R. Castro, *The Federal Courts’ Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 528 (1986) (reprinting draft opinion by William Paterson, treating law of nations as arising under Constitution: “[t]his is an offence—How? By the law of nations, or, in other words, by the common law, which comprehends the law of nations. It is too an offence arising under the constn, as distinct from an offence arising under the law of the U. States; because we have no stat. on the subject”).

223. William S. Dodge, *After Sosa: The Future of Customary International Law in the United States*, 17 WILLAMETTE J. INT’L L. & DISP. RES. 21, 40 (2009) [hereinafter Dodge, *After Sosa*]; Peter L. Strauss, *The Perils of Theory*, 83 NOTRE DAME L. REV. 1567, 1568–71 (2008) (noting that initial drafts of Article VI applied to “Acts,” but were revised to refer to “Laws”); cf. Clark, *Sole Executive Agreements*, *supra* note 166, at 1575.

224. See *supra* section II.A.2. That reading is supported by the reference in Article VI to the “Laws of any State,” which plainly referred to all forms of state law (not merely state statutes). Monaghan, *supra* note 219, at 767; Strauss, *supra* note 223, at 1568–69.

225. This conclusion is not inconsistent with nineteenth century decisions suggesting that the reference to “Laws” in Articles III and VI did not include common law rules. See, e.g., *Am. Ins. Co. v. 365 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 543–45 (1828) (maritime law is not “Law” of United States under Article III); *Osborn v. President, Dirs. & Co. of Bank*, 22 U.S. (9 Wheat.) 738, 738 (1824) (“[T]he 3d article of the Constitution . . . declares[] that ‘the judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority.’”). The critical distinction is that rules of customary international law, which the political branches authorize U.S. courts to apply, are not judge-made common law. Rules of customary international law are “Law” made by the political branches, pursuant to their constitutional foreign relations powers, which the federal courts are then authorized by specialized statutory grants of jurisdiction to apply. That provides a textual explanation for the inclusion of both international agreements other than treaties and rules of customary international law in Article VI’s reference to “Laws.” Cf. Monaghan, *supra* note 219, at 755–65 (arguing that legislation, not common law, is “made” for purposes of Article VI).

authority for the federal courts to apply, as rules of federal “Law” under Article VI, rules of customary international law made pursuant to those jurisdictional grants.<sup>226</sup>

The conclusion that rules of customary international law are the “Law of the Land” for purposes of Article VI is supported by the historic rule that customary international law is “part of the law of the land” or “part of our law.”<sup>227</sup> As the revisionists have shown, this phrase did not imply that customary international law was federal law or that it had preemptive effects.<sup>228</sup> Importantly, however, the phrases “part of our law” and “law of the land” *did* imply that customary international law was “law” and therefore the possibility of direct application in judicial proceedings. This is an inherent aspect of the concept of “law,” as contemporary commentary and judicial authority concluded, both generally<sup>229</sup> and with specific application to the law of nations.<sup>230</sup> Thus, when the Framers granted the President and Congress the constitutional authority to make customary international law as part of their foreign affairs authority, they did so in the context of this understanding of the concept of law. As a consequence, rules of customary international law, made by the political branches, were “part of our law” and applicable in U.S. courts, in the same manner as other forms of international law.

Judicial application of rules of customary international law, when the political branches have provided for such application, does not violate separation of powers principles.<sup>231</sup> On the contrary, where the political branches have made a rule of customary international law, which they intend to be self-executing, it would offend separation of powers

226. See *infra* section II.B.1; Dodge, *Alien Tort Statute*, *supra* note 187, at 689–90; Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983).

227. See *supra* section I.A.; *supra* section II.A.2.

228. Bellia & Clark, *supra* note 63, at 11; see David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, The Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 1001–02 (2010).

229. Peterson v. Davis (1848) 136 Eng. Rep. 1241, 1243 (C.B.) (“[C]onstant immemorial usage, sanctified and recognised by the Courts of Westminster Hall, and in many instances by the legislature [make it now] as much a part of the law of the land as any other course of practice which custom has introduced and established.”); Fogue v. Gale (1747) 95 Eng. Rep. 551 (K.B.) (“[W]e cannot depart from the practice, which is the law of the Court, and, as such, is the law of the land . . .”); 3 WILLIAM BLACKSTONE, COMMENTARIES \*422; see also STORY, *supra* note 115, § 966.

230. 4 WILLIAM BLACKSTONE, COMMENTARIES \*67.

231. Revisionists sometimes suggest that, “if customary international law can be made by practice wholly outside the United States it has no basis in popular sovereignty at all.” See Trimble, *A Revisionist View*, *supra* note 4, at 721. That is unconvincing. It ignores the decisive role of the U.S. political branches in making customary international law, see *supra* section II.A.1, and the requirement for political branch authorization to U.S. courts to apply those rules of international law, see *supra* section II.A.2.

principles if federal courts did not apply that rule.<sup>232</sup> The position of the U.S. Executive branch regarding judicial application of customary international law rules of foreign sovereign immunity is again instructive: “The federal government cannot effectively invoke standards of international law to ensure continued favorable treatment by foreign governments for American governmental property abroad *if these standards are not given effect by the political subdivisions of the United States.*”<sup>233</sup>

Nor is judicial application of customary international law in these circumstances likely to interfere with the conduct of U.S. foreign relations. In accepting a particular customary international law rule, the political branches are in a position to assess the risks of interference with U.S. foreign policy from judicial application of the rule, and to conclude that those risks either do not exist or are outweighed by other considerations. Indeed, the refusal of federal courts to apply rules of international law when the political branches have provided for judicial application of a rule would itself presumptively undermine the political branches’ conduct of the Nation’s foreign relations. A failure of U.S. courts to apply rules of foreign sovereign immunity, or rules of head-of-state or consular immunity, would again provide obvious examples of this point.

Judicial application of customary international law also offends neither federalism interests nor democratic values when it has been provided for by the political branches. As discussed above, the Constitution empowers the federal political branches, and not the states, to participate in making customary international law;<sup>234</sup> when the political branches do so, they do not intrude upon state sovereignty, but exercise exclusive federal authority. Likewise, when federal courts give direct effect to customary international law rules, as provided for by the political branches, they apply rules of law made by organs of government elected by the entire United States. Giving effect to those rules advances, rather than detracts from, constitutional values.

\* \* \*

In sum, the Constitution provides the federal government—as distinguished from the several states—with broad, largely exclusive, authority over U.S. foreign relations in Articles I and II. Given this expansive federal authority, and the compelling need for the Nation to

---

232. See Koh, *State Law?*, *supra* note 6, at 1845 (“Bradley and Goldsmith’s approach creates, rather than alleviates, separation of powers concerns.”).

233. Brief for the United States of America as Amicus Curiae at 40, *Republic of Argentina v. City of New York*, 25 N.Y.2d 252 (N.Y. 1969).

234. See *supra* section II.A.1.

speak with “one voice” about the existence and content of customary international law and U.S. international legal obligations, the proposition that customary international law is generally a matter of state law is untenable. Rather, all rules of customary international law, and their applicability in U.S. courts, are matters of federal law, subject to uniform interpretation by the federal courts.

At the same time, notwithstanding the status of customary international law as federal law, the Constitution also limits the authority of U.S. courts to apply particular rules of customary international law. That is true for the same reasons that only “self-executing” provisions of U.S. treaties and other international agreements apply directly in U.S. courts, even though such agreements have the status of federal law. Thus, the proposition that all rules of customary international law are presumptively applicable in U.S. courts is also untenable. Rather, as with U.S. treaties and other international agreements, further inquiry is required to determine whether, in accepting a customary international law rule, the U.S. political branches intended that rule to be self-executing and directly applicable in U.S. courts, without the need for further legislative action.

### *B. Judicial Authority*

The foregoing analysis provides the most satisfactory explanation of U.S. judicial authority applying customary international law. That authority is extensive, with multiple strands of precedent, much of which was decided in historical settings that differ materially from contemporary America. Nonetheless, this authority adopts analysis and reaches results generally paralleling those set forth above. Under this approach, U.S. courts have routinely applied rules of customary international law, effectively treating them as national law, but only after concluding that the federal political branches had provided for judicial application of these rules. Conversely, this authority is inconsistent with central elements of both the modernist and revisionist positions, as well as the various other alternatives that have been proposed for the treatment of customary international law.

#### *1. Separation of Powers*

U.S. courts have applied customary international law since the beginning of the Republic, in decisions too numerous to cite.<sup>235</sup> Contrary

---

235. See Edwin Dickinson, *Changing Concepts and the Doctrine of Incorporation*, 26 AM. J. INT'L L. 239, 259 (1932) (in its first thirty years of existence, the Supreme Court decided eighty-two cases raising issues of international law); Ariel N. Lavinbuk, *Rethinking Early Judicial Involvement in*

to both the modernist and revisionist positions, however, U.S. courts have generally applied particular customary international law rules only after inquiring whether the political branches had, either expressly or impliedly, provided for judicial application of those rules, undertaking an analysis analogous to that used in determining whether a treaty provision is self-executing.<sup>236</sup> In doing so, U.S. courts have examined a variety of factors, including the content and character of the relevant rule of customary international law and the actions and statements of the political branches regarding that rule.

The Supreme Court's decision in *Rose v. Himely*<sup>237</sup> illustrates the early approach of U.S. courts to international law. Chief Justice Marshall's opinion addressed three questions of what was regarded as contemporary customary international law.<sup>238</sup> First, the Court held that international law entitled the courts of one nation to consider whether a court of another nation had properly exercised jurisdiction in rendering a judgment.<sup>239</sup> Second, Chief Justice Marshall held that international law entitled a nation's courts to deny recognition of a judgment regarding property that was never within the rendering court's territorial jurisdiction,<sup>240</sup> and that U.S. courts could not recognize a St. Domingo court's judgment rendered in these circumstances.<sup>241</sup> Third, the Court also held that the question whether St. Domingo was an independent sovereign state, or a French colony, was an issue of international law that was for the political branches, not the courts, to decide.<sup>242</sup>

Importantly, the Court's decision in *Rose* distinguished between rules of international law that were addressed to courts (the first two issues noted above)<sup>243</sup> and rules that were addressed to the political branches of

---

*Foreign Affairs: An Empirical Study of the Supreme Court's Docket*, 114 YALE L. J. 855, 872 (2005) (in its first forty-five years of existence, 25% of the Supreme Court's decisions involved foreign affairs).

236. See *infra* section II.B.1.

237. 8 U.S. (4 Cranch) 241 (1808).

238. The law of nations was broadly defined in the eighteenth and early nineteenth centuries to include what came to be regarded as private international law and public international law. Edwin D. Dickinson, *Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26, 26–29 (1952); Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. PA. L. REV. 1231, 1263–64 (1985).

239. *Rose*, 8 U.S. (4 Cranch) at 271.

240. *Id.* at 276–77.

241. *Id.* at 278–79.

242. *Id.* at 272.

243. *Id.* at 271 (“[I]t is apparent that the courts of that country [England] hold themselves warranted in examining the jurisdiction of a foreign court, by which a sentence of condemnation has passed, not only in relation to the constitutional powers of the court, but also in relation to the situation of the

government (the third issue).<sup>244</sup> The Court was prepared to apply the first two rules of international law directly (and to hold, as a consequence, that the St. Domingo judgment had not conferred valid title), but it was unwilling to apply the third rule (holding that this rule was “obviously addressed to sovereigns, not to *courts*”).<sup>245</sup> The Court’s decision treated the relevant rules of customary international law differently, in each instance based almost entirely on the content and character of those rules and, in particular, whether the rule was “addressed to” courts, as opposed to political branches.<sup>246</sup>

A similar approach to international law was adopted in *Schooner Exchange v. McFaddon*,<sup>247</sup> which considered “the very delicate and important inquiry, whether an American citizen can assert, in an American court, a title to an armed national vessel [of another nation] found within the waters of the United States.”<sup>248</sup> In answering this question in the negative, applying a rule that would become the doctrine of foreign sovereign immunity, the Court again relied upon three rules of customary international law.

First, Chief Justice Marshall held that a nation possesses absolute jurisdiction over its own territory: “[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute.”<sup>249</sup> The Court declared that this rule of international law applied to courts as well as other organs of the Nation, reasoning that a court’s jurisdiction was “a branch of that which is possessed by the nation as an independent sovereign

---

thing on which those powers are exercised; at least so far as the right of the foreign court to take jurisdiction of the thing is regulated by the law of nations and by treaties. There is no reason to suppose that *the tribunals of any other country* whatever deny themselves the same power. It is, therefore, at present, considered as the uniform practice of civilized nations, and is *adopted by this court as the true principle which ought to govern in this case.*” (emphasis added); *id.* at 276–77 (“[I]f [a court] exercises a jurisdiction which, according to the law of nations, its sovereign could not confer, however available its sentences may be within the dominions of the prince from whom the authority is derived, they are not regarded by *foreign courts*. This distinction is taken upon this principle, that the law of nations is the *law of all tribunals* in the society of nations, and is supposed to be equally understood by all.”) (emphasis added).

244. *Id.* at 272 (“[T]he doctrines of Vattel have been particularly referred to. But the language of that writer is obviously addressed to sovereigns, not to *courts*. It is for governments to decide whether they will consider St. Domingo as an independent nation, and until such decision shall be made, . . . courts of justice must consider the ancient state of things as remaining unaltered . . .”).

245. *Id.* at 272.

246. In reaching this conclusion, the Court cited only international law authority (Vattel), referring to neither the Constitution nor constitutional separation of powers principles. *Id.* at 271–72.

247. 11 U.S. (7 Cranch) 116 (1812).

248. *Id.* at 135.

249. *Id.* at 136.

power,”<sup>250</sup> and therefore subject to the general principle of territoriality. Second, the Court held that nations could either expressly or impliedly consent to limitations on their territorial jurisdiction,<sup>251</sup> and that “by common usage, and by common opinion, growing out of that usage,”<sup>252</sup> nations had expressed such consent by not exercising territorial “jurisdiction over the public armed ships of a foreign sovereign entering a port open for their reception.”<sup>253</sup> Finally, the Court also held that:

[The] sovereign of the place is capable of destroying this implication [of consent], but that until such power be exerted in a manner not to be misunderstood, *the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction*, which it would be a breach of faith to exercise.<sup>254</sup>

As with *Rose*, the Court’s opinion directly applied customary international law in order to deny an otherwise valid claim to title under U.S. law. In doing so, Chief Justice Marshall emphasized that the rules of international law were addressed to, and applicable in, national courts—namely, territorial jurisdictional limits and immunity of foreign warships from local judicial jurisdiction.<sup>255</sup> Likewise, the Court acknowledged that international law permitted states to revoke this immunity, but held that the decision to do so involved “rather questions of policy than of law,” and was “for diplomatic, rather than legal discussion.”<sup>256</sup> Again like *Rose*, focusing on the content and character of particular international law rules,<sup>257</sup> the Court treated some rules of international law as being addressed to national courts (which the Court applied) and others as being addressed to, and capable of being invoked or applied by, the political branches (which the Court did not apply).<sup>258</sup>

---

250. *Id.*

251. *Id.* at 136–37.

252. *Id.* at 136.

253. *Id.* at 144 (recognizing the “principle of public law, that national ships of war, entering the port of a friendly power open for their reception are to be considered as exempted by the consent of that power from its jurisdiction”).

254. *Id.* at 146 (emphasis added).

255. *See id.* at 136, 144 (territorial jurisdiction of courts; immunity of foreign warship from judicial jurisdiction); *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 299 (1822) (for foreign nations, “all the departments of the government make but one sovereignty”).

256. *Schooner Exchange*, 11 U.S. (7 Cranch) at 146.

257. As in *Rose*, the Court relied only on international authority (Vattel and Bynkershoek), and did not refer to the U.S. Constitution or constitutional separation of powers principles.

258. The Court’s treatment of foreign sovereign immunity was subsequently applied generally, outside the context of prize cases, to all categories of jurisdiction in U.S. courts. *See Berizzi Bros. Co. v. Steamship Pesaro*, 271 U.S. 562 (1926); *United States v. Lee*, 106 U.S. 196, 209 (1882); *United States v. Diekelman*, 92 U.S. 520, 525 (1875). It was also applied in state courts. *See Kline v. Kaneko*,

U.S. courts adopted the same approach to customary international law in prize cases. Both modernists and revisionists have devoted only limited attention to prize decisions.<sup>259</sup> That lack of attention is surprising, because prize disputes formed a highly important part of the U.S. courts' international caseload during the early nineteenth century,<sup>260</sup> with courts routinely applying customary international law rules,<sup>261</sup> and because the treatment of international law in these decisions parallels its treatment in other fields. Prize decisions were rendered pursuant to legislation giving federal courts jurisdiction over "all civil causes of admiralty and maritime jurisdiction,"<sup>262</sup> and, in prize cases, exclusive jurisdiction.<sup>263</sup> This jurisdictional grant was understood as both authorizing and requiring U.S. courts to apply customary international law rules governing issues of neutrality, prize, and capture, which they routinely did.<sup>264</sup> Again, however, U.S. courts did so only after inquiring whether particular rules of international law were directly applicable in U.S. courts, focusing principally on the content and character of such rules.

---

535 N.Y.S.2d 303, 304 (N.Y. Sup. Ct. 1988) ("[L]ogic mandates that courts be bound by the State Department's recommendation."); *United States of Mexico v. Schmuck*, 56 N.E.2d 577, 580 (N.Y. 1944).

259. See, Bradley & Goldsmith, *Human Rights*, *supra* note 4, at 827 n.74 (addressing the decisions in passing); Koh, *State Law?*, *supra* note 6, at 1830 & n.33 (addressing the decisions in passing).

260. See *supra* note 235; David Bederman, *The Feigned Demise of Prize*, 9 EMORY INT'L L. REV. 31, 33 (1995) (in the early nineteenth century, "the law of prize was the law of nations"); Lavinbuk, *supra* note 235, at 872.

261. See William R. Castro, *The Origins of Federal Admiralty Jurisdiction in An Age of Privateers, Smugglers, and Pirates*, 37 AM. J. LEGAL HIST. 117 (1993). There was extensive contemporary commentary on the application of international law by U.S. prize courts. See H. WHEATON, A DIGEST OF THE LAW OF MARITIME CAPTURE AND PRIZE (1815).

262. Judiciary Act of 1789, ch. 20, 1 Stat. 73, 77. It was undisputed that "[i]n cases of prize . . . the courts of admiralty have an undisturbed and exclusive jurisdiction to determine the same according to the law of nations." 3 WILLIAM BLACKSTONE, COMMENTARIES \*108; see also STORY, *supra* note 115, § 865 ("[C]ourts of common law [were] bound to abstain from any decision on questions of this sort.").

263. Castro, *supra* note 261, at 121–22, 129–35, 139–49; Harrington Putnam, *How the Federal Courts Were Given Admiralty Jurisdiction*, 10 CORNELL L.Q. 460, 467–70 (1925).

264. See *The Schooner Adeline*, 13 U.S. (9 Cranch) 244, 284 (1815) ("The Court of prize is emphatically a Court of the law of nations; and it takes neither its character nor its rules from the mere municipal regulations of any country."); *Thirty Hogsheads of Sugar v. Boyle*, 13 U.S. (9 Cranch) 191, 198 (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."); *Glass v. The Sloop Betsey*, 3 U.S. (3 Dall.) 6, 16 (1794) (federal court has jurisdiction to determine "whether such restitution can be made consistently with the laws of nations and the treaties and laws of the United States"); Bederman, *supra* note 260, at 51 ("[F]rom time immemorial, when a national court adjudicated a case of a maritime capture it was obliged to follow international law.").

In *The Nereide*,<sup>265</sup> for example, the Supreme Court affirmed its authority, and obligation, to apply international law in prize cases. Chief Justice Marshall held that the law of nations treated the property of neutrals as neutral, and therefore exempt from capture, even if that property was shipped on the vessels of belligerents.<sup>266</sup> His opinion explained that “congress has not left it to this department to say whether the rule of foreign nations shall be applied to them, but has by law applied that rule.”<sup>267</sup> Although the captors argued that the Court should apply an exception to the applicable rule of neutrality, because the putative neutral cargo owner’s home state (Spain) applied such an exception, the Court refused, on the basis that this was an exception for the political branches to invoke. It reasoned:

If it be the will of the government to apply to Spain any rule respecting captures which Spain is supposed to apply to us, the government will manifest that will by passing an act for the purpose. Till such an act be passed, the Court is bound by the law of nations which is a part of the law of the land.<sup>268</sup>

As in *Rose and Schooner Exchange*, the Court both confirmed its authority to apply customary international law as the “law of the land” when so intended by the political branches, and denied its authority to apply such rules of international law without such political direction. Likewise, in determining when the judiciary was authorized to apply a particular customary international law rule, the Court again looked to the content and character of the rule, evaluating to which branch of government the rule was addressed.

Similarly, in *Brown v. United States*,<sup>269</sup> Chief Justice Marshall considered whether the property of an enemy national, located on U.S. territory, could be seized following a declaration of war. The Court first addressed the claim that the President could not violate “the modern law of nations,” which assertedly forbid such seizures.<sup>270</sup> The Court refused to consider the argument, reasoning that the relevant rules of international

---

265. 13 U.S. (9 Cranch) 388 (1815).

266. *Id.* at 426.

267. *Id.* at 423.

268. *Id.* Elsewhere, the Court reasoned:

[R]eciprocating to the subjects of a nation, or retaliating on them, its unjust proceedings towards our citizens, is a political not a legal measure. It is for consideration of the government not of its Courts. . . . It is not for us to depart from the beaten track prescribed for us, and to tread the devious and intricate path of politics.

*Id.* at 422–23.

269. 12 U.S. (8 Cranch) 110 (1814).

270. *Id.* at 147.

law regarding seizures of enemy property were addressed to the U.S. political branches, not to U.S. courts. In analysis paralleling that used to distinguish between self-executing and non-self-executing treaties,<sup>271</sup> the Court concluded:

This argument must assume for its basis the position that modern usage constitutes a *rule which acts directly upon the thing itself by its own force*, and not through the sovereign power. This position is not allowed. This usage is a guide which the sovereign follows or abandons at his will. The rule, like other precepts of morality, of humanity, and even of wisdom, *is addressed to the judgment of the sovereign*; and although it cannot be disregarded by him without obloquy, yet it may be disregarded.<sup>272</sup>

As with prior prize decisions, and with U.S. treaties, the Court applied rules of customary international law but distinguished between those rules of international law that were addressed to, and directly applicable by, the judicial branch and those that were addressed to the political branches.<sup>273</sup> The Court concluded that, under the Constitution, the decision whether to confiscate property, on land, of an enemy national was one for Congress,<sup>274</sup> not the judiciary or the President, and that Congress had not approved confiscations of property in these circumstances.

---

271. *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (“[W]hen the terms of the stipulation import a contract, . . . *the treaty addresses itself to the political, not the judicial department*; and the legislature must execute the contract before it can become a rule for the Court.”) (emphasis added); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 244 (1796) (“No one can doubt that *a treaty may stipulate, that certain acts shall be done by the Legislature*; that other acts shall be done by the Executive; and others by the Judiciary.”) (emphasis added).

272. *Brown*, 12 U.S. (8 Cranch) at 128 (emphasis added).

273. The same analysis is reflected in *La Amistad de Rues*, 18 U.S. (5 Wheat.) 385 (1820), which held that, although U.S. courts will restore a prize, captured in violation of U.S. neutrality, to its owner, they will not entertain other claims arising from an allegedly unlawful capture. Justice Story reasoned that, even if a capture violated the law of nations, “it cannot be a matter of *judicial* complaint, that they are exercised with severity, even if the parties do transcend those rules which the customary laws of war justify.” *Id.* at 390. The Court reasoned that such claims “have never been held within the cognizance of the prize tribunals of neutral nations,” and that “[u]ntil Congress shall choose to prescribe a different rule, this Court will, in cases of this nature, confine itself to the exercise of the simple authority to decree restitution, and decline all inquiries into questions of damages for asserted wrongs.” *Id.* The rationale of *La Amistad* was again that some customary international law rules were addressed to, and applicable by, U.S. courts, but that other rules were not. *See also* *United States v. Arredondo*, 31 U.S. (6 Pet.) 691, 711–12 (1832) (applying rule of international law regarding acquisition of territory, which was otherwise addressed to political branches, based on specific statutory authorization).

274. *The Paquete Habana*, 175 U.S. 677, 716 (1900) (“When war breaks out, the question, What shall be done with enemy property in our country?—is a question rather of policy than of law. . . . [I]t is proper for the consideration of a department which can modify it at will; not for the consideration of a department which can pursue only the law as it is written. It is proper for the consideration of the

The Supreme Court adopted a similar approach in its 1900 decision in *The Paquete Habana*,<sup>275</sup> which considered the legality of a U.S. gunboat's seizure of two Spanish fishing vessels as prizes of war. The Court first observed that, by virtue of a Presidential Proclamation, it was "the general policy of the government to conduct the war in accordance with the principles of international law."<sup>276</sup> The Court then reviewed an extensive body of state practice and commentary, concluding that:

[B]y the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent states, that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war.<sup>277</sup>

The Court reasoned that "[i]nternational law is part of our law," but continued, noting that international law "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.*"<sup>278</sup> The Court emphasized that the rule of international law which it had identified "is one which *prize courts* administering the law of nations are bound *to take judicial notice of, and to give effect to*, in the absence of any treaty or other public act of their own government."<sup>279</sup> The Court concluded with the declaration that "it is the duty of this court, sitting as the highest prize court of the United States, and administering the law of nations,"<sup>280</sup> to hold the capture unlawful.

---

legislature, not of the executive or judiciary.").

275. 175 U.S. 677 (1900).

276. *Id.* at 712 (citing and quoting Presidential Proclamation No. 6, 30 Stat. 1769 (Apr. 22, 1898)); *see id.* at 700. Modernists sometimes suggest that "[t]he century-old case of *The Paquete Habana* is but one example of a routine Supreme Court decision that enforced a rule of customary international law against an executive official, without a trace of separation of powers concerns." Koh, *State Law?*, *supra* note 6, at 1842. That is inaccurate. The Court was particularly attentive to the President's express incorporation of international law by the Presidential Proclamation and to its own role as a prize court—a role authorized by Congress and the President which permitted the Court to apply the law of nations.

277. *Paquete Habana*, 175 U.S. at 708.

278. *Id.* at 700 (emphasis added). The Court qualified this reference to international law with the further comment that, "where 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." *Id.*

279. *Id.* at 708 (emphasis added).

280. *Id.* at 714.

Although routinely cited by modernists,<sup>281</sup> *Paquete Habana* instead supports a more nuanced approach to the status of customary international law in U.S. courts. The decision confirmed the authority of U.S. courts to apply rules of international law directly, but only when Congress and the President had so directed. That was made clear by the Court's emphasis upon the special character of federal jurisdiction over prize cases and the Presidential Proclamation providing for application of international law.<sup>282</sup> It was also made clear by the Court's numerous references to the political branches' ultimate authority over issues of customary international law, repeatedly referring to the "absence of any treaty or other public act of their own government in relation to the matter."<sup>283</sup> Although *Paquete Habana* stands for the proposition that U.S. courts may apply customary international law, it also makes clear that they may do so only in some circumstances, and in particular only where the political branches have provided for judicial application of a rule.

Outside the context of prize cases, other nineteenth century decisions adopted the same basic approach to customary international law. In *Oetjen v. Central Leather Co.*,<sup>284</sup> the Supreme Court applied what would later become known as the act of state doctrine. The Court first held that "clearly settled principles of law" established that recognition of foreign states was a decision for Congress and the President, which was "not subject to judicial inquiry or decision."<sup>285</sup> The Court then held that "principles of international law" established that:

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. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.<sup>286</sup>

The Court emphasized that these "principles of international law" were applicable "in the courts" of independent states and "rest[ed] at last upon

---

281. See Koh, *State Law?*, *supra* note 6, at 1842; Neuman, *supra* note 6, at 374; Henkin, *International Law as Law*, *supra* note 20, at 1555.

282. 175 U.S. at 708, 710, 712 (holding that the presidential proclamation issued on April 26, 1898 during the war with Spain "clearly manifest[ed] the general policy of the Government to conduct the war in accordance with the principles of international law sanctioned by the recent practice of nations") (citing Proclamation No. 7, 30 Stat. 1770 (Apr. 26, 1898)).

283. *Paquete Habana*, 175 U.S. at 700, 708.

284. 246 U.S. 297 (1918).

285. *Id.* at 302.

286. *Id.* at 303 (quoting *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897)).

the highest considerations of international comity and expediency.”<sup>287</sup> The Court again relied on the character and content of the international law rules that it identified, which were addressed specifically to national courts: “the *courts of one country* will not sit in judgment on the acts of the government of another done within its own territory.”<sup>288</sup> Other early act of state decisions were to the same effect in describing the act of state doctrine as a rule of international law and that this rule was directly applicable in U.S. courts.<sup>289</sup>

In the twentieth century, judicial authority generally adopted the same approach, only applying particular rules of international law when expressly or impliedly authorized by the political branches. In applying maritime law in *The Western Maid*,<sup>290</sup> for example, Justice Holmes explained:

[W]e must realize that however ancient may be the traditions of maritime law, however diverse the sources from which it has been drawn, it derives its whole and only power in this country *from having been accepted and adopted by the United States*. There is no mystic over-law to which even the United States must bow. When a case is said to be governed by foreign law or by general maritime law that is only a short way of saying that for this purpose *the sovereign power takes up a rule suggested from without and makes it part of its own rules*.<sup>291</sup>

This analysis parallels that outlined above, in *Rose, Schooner Exchange*, and elsewhere, as well as that applied to U.S. treaties and other international agreements; all of these authorities recognize that the political branches may adopt a rule of international law, but that, until they do so, and provide for judicial application of the rule, U.S. courts have no authority to apply the rule.

More recent judicial decisions have adopted the same approach even more explicitly. Invariably, post-*Erie* discussion centers on *Banco Nacional de Cuba v. Sabbatino*,<sup>292</sup> where Justice Harlan formulated, and then applied, the modern act of state doctrine to decline inquiry into the

---

287. *Id.* at 302–04. The Supreme Court later held, in *Sabbatino*, that the act of state doctrine was not a rule of customary international law. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421–22, 421 n.22, 427 (1964). The Court adopted a different view in *Oetjen, Underhill*, and other earlier decisions.

288. *Oetjen*, 246 U.S. at 303 (emphasis added).

289. *Underhill*, 168 U.S. 250; *Ricaud v. Am. Metal Co.*, 246 U.S. 304 (1918).

290. 257 U.S. 419 (1922).

291. *Id.* at 432.

292. 376 U.S. 398 (1964).

lawfulness of a Cuban expropriation of property within Cuban territory. In the Court's words, the "act of state doctrine . . . precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory."<sup>293</sup> Perhaps inevitably, the Court's decision has been invoked by both modernists<sup>294</sup> and revisionists;<sup>295</sup> properly interpreted, however, the decision does not support either position.

The *Sabbatino* Court first made clear that the act of state doctrine was not a rule of customary international law, rejecting the contrary holdings in *Oetjen* and other early act of state decisions.<sup>296</sup> Instead, the Court held that the doctrine was mandated by separation of powers concerns, aimed at preventing judicial interference in the political branches' conduct of U.S. foreign relations.<sup>297</sup> In reaching this conclusion, Justice Harlan went out of his way<sup>298</sup> to hold that the act of state doctrine was federal law, using reasoning that is invariably cited in modernist writings. He quoted, with evident approval, a law review article written by Judge Jessup a year after *Erie*, which "cautioned that rules of international law should not be left to divergent and perhaps parochial state interpretations."<sup>299</sup> The Court then went on to say that this "basic rationale is *equally* applicable to the act of state doctrine."<sup>300</sup>

Importantly, however, the *Sabbatino* Court also held that the act of state doctrine precluded a U.S. court from applying customary international law to assess the validity of the Cuban expropriation. While recognizing that "United States courts apply international law as a part of our own in

293. *Id.* at 401.

294. See Koh, *State Law?*, *supra* note 6, at 1834; Neuman, *supra* note 6, at 378.

295. See Bradley & Goldsmith, *International Law*, *supra* note 4, at 859.

296. *Sabbatino*, 376 U.S. at 421–22, 421 n.22, 427. Cf. *Oetjen*, 246 U.S. at 302–03.

297. *Sabbatino*, 376 U.S. at 423–28.

298. Justice Harlan noted that the Court "could, perhaps, in this diversity action, avoid the question of deciding whether federal or state law is applicable to this aspect of the litigation," because New York courts had adopted a version of the act of state doctrine. *Id.* at 424. But the Court held instead that it was essential to apply federal law to the question whether the customary international law rules relied upon by *Sabbatino* could be applied in U.S. courts.

299. *Id.* at 425.

300. *Id.* (emphasis added). The Court also went on to cite decisions adopting rules of federal common law (e.g., *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943); *D'Oench, Duhme & Co. v. Fed. Deposit Ins. Corp.*, 315 U.S. 447 (1942)) and then declared that:

[T]he act of state doctrine is a principle of decision binding on federal and state courts alike, but compelled by neither international law nor the Constitution, [and its] continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs.

*Sabbatino*, 376 U.S. at 427–28.

appropriate circumstances,<sup>301</sup> the Court nonetheless declined to do so in *Sabbatino*, reasoning that:

[T]he greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact, rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice. It is also evident that some aspects of international law touch much more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches.<sup>302</sup>

Based on these conclusions about the content of the relevant international law rules, the Court held that it would not examine the validity of the Cuban expropriation under international law.<sup>303</sup>

The Court's analysis was precisely in keeping with the historic approach to customary international law in the United States. Justice Harlan acknowledged that international law was potentially applicable in U.S. courts, but also held that it would only be applied when the federal political branches had provided for judicial application of a particular rule of international law. As in *Rose, Schooner Exchange*, and *Paquete Habana*, the Court focused principally on the content and character of the relevant international law rule, including the degree of codification of the rule, the consensus regarding the rule, the risk of foreign relations interference, and the historic position of the political branches.<sup>304</sup>

This analysis does not support, and instead squarely contradicts, the modernist position that all customary international law is applicable in

---

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

302. *Id.* at 428 (emphasis added).

303. *Id.* at 428 (“Therefore, rather than laying down or reaffirming an inflexible and all-encompassing rule in this case, we decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.”). The Court emphasized the historic role of the Executive branch in espousing claims against foreign states and the risks that judicial consideration of expropriation claims would undermine or conflict with Executive branch efforts. *Id.* at 432–34.

304. As discussed above, the Court adopted different views of the act of state doctrine in *Oetjen* (which treated the doctrine as a rule of international law) and *Sabbatino* (which treated the doctrine as constitutionally-based). The critical point, however, is that, while adopting different rationales, in each case the Court looked to the character of particular rules of customary international law to determine whether they could be applied in U.S. courts.

U.S. courts (as some modernists have recognized<sup>305</sup>). The Court's analysis also does not support the revisionist claim that customary international law is applicable in U.S. courts only when expressly authorized by congressional legislation or a treaty.<sup>306</sup> Instead, *Sabbatino* made clear that customary international law would be applied by U.S. courts in a more expansive category of cases, depending upon factors that went well beyond express legislative authorization. As detailed above, these factors focused on the character and content of the relevant international law rule and the historic practice of the political branches (without requiring express legislative authorization).<sup>307</sup>

Most recently, the Supreme Court adopted substantially the same approach in *Sosa v. Alvarez-Machain*,<sup>308</sup> holding that the Alien Tort Statute<sup>309</sup> authorized federal courts "to hear claims in a very limited category defined by the law of nations and recognized at common law."<sup>310</sup> Again, although both modernists and revisionists have claimed support from the Court's opinion,<sup>311</sup> it provides only limited assistance to either, instead adopting a more nuanced approach.

The *Sosa* Court affirmed that, upon independence, the United States "were bound to receive the law of nations, in its modern state,"<sup>312</sup> and that "the domestic law of the United States recognizes the law of nations."<sup>313</sup> The Court then distinguished between different aspects of the law of nations, categorizing some rules as addressed to "the executive and

---

305. See, e.g., Stephens, *Law of Our Land*, *supra* note 6, at 450 (*Sabbatino* "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" (internal citation omitted)).

306. See *supra* section I.B; *supra* section II.A.2. It was clear that the *Sabbatino* Court did not hold that there was no applicable rule of international law, but rather that judicial application of such a rule had not been authorized. *Sabbatino*, 376 U.S. at 428–29 n.26 ("We do not, of course, mean to say that there is no international standard in this area; we conclude only that the matter is not meet for adjudication by domestic tribunals.").

307. Other decisions adopted comparable analyses, affirming the possibility that customary international law rules apply directly in U.S. courts, but requiring evidence of authorization by the political branches. See *Barclays Bank PLC v. Franchise Tax Board*, 512 U.S. 298, 327–28 (1994); *Mobil Oil Corp. v. Comm'r of Taxes*, 445 U.S. 425, 448 (1980).

308. 542 U.S. 692 (2004).

309. 28 U.S.C. § 1350 (2012).

310. *Sosa*, 542 U.S. at 712.

311. See *supra* Part I; *supra* notes 11–14.

312. *Sosa*, 542 U.S. at 714 (quoting *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 281 (1796)).

313. *Id.* at 729.

legislative domains, not the judicial,”<sup>314</sup> and other rules as falling “within the judicial sphere”<sup>315</sup> or “admitting of a judicial remedy.”<sup>316</sup> According to Justice Souter, in adopting the Alien Tort Statute, Congress did not intend merely to grant federal courts jurisdiction, but also to authorize federal courts to apply international law to a “modest set of actions” recognized at the time as violations of the law of nations.<sup>317</sup>

Finally, the *Sosa* Court held that nothing “categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law,” but that “a restrained conception” of this federal judicial authority should be used when courts consider “a new cause of action of this kind.”<sup>318</sup> The Court concluded that this legislatively mandated restraint required “any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.”<sup>319</sup> The Court cited *Erie* and emphasized the need generally “to look for legislative guidance before exercising innovative authority over substantive law,”<sup>320</sup> and to consider “the practical consequences of making that cause [of action] available to litigants in the federal courts.”<sup>321</sup> Applying this standard, the Court had little difficulty in concluding that *Sosa*’s claims did not rest on rules of customary international law that Congress had authorized the federal courts to apply.<sup>322</sup>

The Court’s opinion in *Sosa* provides very limited support to the modernists and revisionists, and instead adopts analysis paralleling that in this Article. On the one hand, the Court unequivocally rejected the notion that all customary international law rules are directly applicable in U.S. courts, holding instead that federal courts can only apply a “very limited” or “modest” set of rules under the Alien Tort Statute. That squarely contradicts the core of the modern position, which is that all customary

---

314. *Id.* at 714.

315. *Id.* at 715.

316. *Id.*

317. *Id.* at 720; *see also id.* at 721 (“[T]he ATS was meant to underwrite litigation of a narrow set of common law actions derived from the law of nations.”); *id.* at 724, 728–29.

318. *Id.* at 725; *see also id.* at 729 (ATS permits “further independent judicial recognition of actionable international norms”).

319. *Id.* at 725; *see also id.* at 731 (emphasizing need for “definite content and acceptance among civilized nations”).

320. *Id.* at 726.

321. *Id.* at 732–33.

322. *Id.* at 738.

international law is “our law,” presumptively applicable and preemptive in U.S. courts.

On the other hand, the *Sosa* Court also affirmed that some customary international law rules could be applied directly by U.S. courts, without express, or comparably specific, statutory authorization. In doing so, the Court focused on the content and character of particular rules of customary international law (including the specificity and unanimity of a particular rule) to determine whether judicial application was appropriate. This approach is fundamentally inconsistent with the revisionist insistence on specific legislative authorization for judicial application of international law norms, instead recognizing what Justice Souter termed in *Sosa* as the “discretion” of federal courts to undertake the “independent judicial recognition of actionable international norms,” based principally on the content of the relevant international law rule.<sup>323</sup> That “independent” judicial “discretion” is impossible to reconcile with the revisionist analysis.

The *Sosa* Court’s analysis again produces a result that is precisely consistent with the approach in *Rose*, *Schooner Exchange*, *Paquete Habana*, and *Sabbatino*, as well as that proposed in this Article. This analysis provides for direct judicial application of some, but not all, rules of customary international law, based upon an evaluation of the character and content of those rules and on the actions and intentions of the federal political branches. In addition to ensuring compliance with limits on independent judicial law-making, this approach parallels that used in determining whether provisions of U.S. treaties and other international agreements are self-executing, and ensures consistency in the treatment of all international law rules in U.S. courts.

## 2. *Federalism*

Judicial precedent also confirms that rules of customary international law are rules of federal law. It is true, of course, that pre-*Erie* decisions usually categorized customary international law as “general common law” rather than federal (or state) law.<sup>324</sup> As discussed above, however, that categorization presents, but does not answer, the question of how customary international law should be characterized in an era in which there is no longer any general federal common law. In answering this

---

323. *Id.* at 729; *see supra* section II.B.1. Prior to *Sosa*, the revisionists were also adamant that the ATS did not provide a basis for federal courts to make or apply rules of customary international law as federal law. *See* Bradley & Goldsmith, *Human Rights*, *supra* note 4, at 345–46.

324. *See supra* section I.B; *supra* section II.A.2.

question, since *Erie* gave the issue importance, U.S. courts have consistently categorized rules of international law as rules of federal law.

There is no dispute that, prior to *Erie*, various rules of the law of nations had the status of “general common law,” with federal and state courts free to interpret these rules as they considered appropriate.<sup>325</sup> Likewise, various rules of the law of nations were held not to constitute federal law for purposes of statutory “arising under” jurisdiction.<sup>326</sup> This clearly reflected the dominant approach toward customary international law prior to *Erie*.<sup>327</sup>

On the other hand, some pre-*Erie* decisions appeared to treat customary international law as applicable in state, as well as federal, courts. As discussed above, *Schooner Exchange* announced a rule of foreign sovereign immunity that limited the jurisdiction of “an *American* court,” not a federal court.<sup>328</sup> Moreover, the rationale for the Court’s decision—ensuring the Nation’s respect for the law of nations and sovereignty of foreign states—applied equally to federal and state courts; not surprisingly, state and federal courts applied foreign sovereign immunity with equal force.<sup>329</sup>

The same observations apply to the Supreme Court’s act of state decisions. Early act of state decisions applied what the Court characterized as principles of customary international law, supported by observations about judicial interference in the Nation’s foreign relations, to articulate a rule generally applicable to “the courts of one country,” not merely federal courts.<sup>330</sup> As *Sabbatino* later held, the rationale for this rule was equally applicable in both state and federal courts.<sup>331</sup> Similarly, federal courts’ prize decisions were effectively federal law, given the grants of exclusive federal subject matter jurisdiction in the field.<sup>332</sup> In

---

325. See *Oliver Am. Trading Co. v. Mexico*, 264 U.S. 440, 442–43 (1924); *Huntington v. Attrill*, 146 U.S. 657, 683 (1892); *United States v. Diekelman*, 92 U.S. 520, 524–28 (1875).

326. *New York Life Ins. Co. v. Hendren*, 92 U.S. 286, 286–87 (1876) (the Supreme Court lacked jurisdiction to consider claims arising under “general laws of war, as recognized by the law of nations,” because claims did not arise under “the constitution, laws, treaties or executive proclamations, of the United States”).

327. See *Huntington*, 146 U.S. at 683; *San Francisco v. Scott*, 111 U.S. 768, 769 (1884).

328. See *The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 135 (1812).

329. JOSEPH W. DELLAPENNA, *SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS* 113 (2nd ed. 2003).

330. *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 303 (1918); *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

331. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416–17 (1964).

332. See *supra* section II.B.1; *supra* note 262.

practice, therefore, much of the customary international law applied by U.S. courts prior to *Erie* was effectively national law, not state law.

More fundamentally, pre-*Erie* judicial authority offers very limited assistance in determining whether customary international law rules are state or federal law, because pre-*Erie* courts treated international law as something else entirely: general common law. This characterization does little to address the question of how international law should be categorized if *not* as general common law. Moreover, this characterization of international law occurred in the context of a conception of law, and a relation of state and federal courts, that blurred or disregarded contemporary distinctions between state and federal law, instead conceiving of state and federal courts as being engaged in a cooperative endeavor to find an external corpus of customary international law.<sup>333</sup> Only when *Erie* abandoned that endeavor and its underlying conception of general common law did the status of international law as state or federal law become important.

After the issue became important, post-*Erie* judicial authority provided relatively clear treatment of the status of customary international law. As discussed above, *Sabbatino* unequivocally endorsed the conclusion that “rules of international law should not be left to divergent and perhaps parochial state interpretations,” and then used that conclusion as the basis for holding that the act of state doctrine “equally” should be characterized as a rule of federal law.<sup>334</sup> That decision leaves no serious doubt that rules of customary international law are rules of federal common law;<sup>335</sup> efforts to explain this aspect of *Sabbatino* on other grounds are revisionist history.<sup>336</sup>

---

333. See Young, *Sorting Out*, *supra* note 19, at 394 (“By the end of the nineteenth century, however, the general commercial law had become de facto preemptive of contrary state rules – as, in fact, had some of the more clearly ‘international’ portions of the law of nations.”); 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, 1575–76 (1984) (“Even if the Court had no legal authority over the state courts on questions of general common law, it had a prominent, central and respected position in the American legal system . . . the state and federal courts created a remarkably uniform American law of marine insurance.”).

334. *Sabbatino*, 376 U.S. at 425, 427.

335. See Koh, *State Law?*, *supra* note 6, at 1833–34; Neuman, *supra* note 6, at 376.

336. See Bradley & Goldsmith, *International Law*, *supra* note 4, at 859–60. The suggestion that *Sabbatino* “only” held that the act of state doctrine, and not rules of customary international law, is federal law is particularly difficult to follow. The Court held that the act of state doctrine was a rule of federal common law in order to ensure a uniform approach to the question when customary international law rules would be applied by U.S. federal and state courts. The notion that this issue must be subject to a uniform federal rule, but the underlying rules of customary international law would not be, is untenable.

Other post-*Erie* decisions have confirmed that customary international law is federal law. In *First National City Bank v. Banco Para el Comercio Exterior de Cuba* (“*Bancec*”),<sup>337</sup> the Supreme Court adopted a rule of corporate attribution for companies owned by foreign states, formulating principles “common to both international law and federal common law.”<sup>338</sup> The Court applied these federal common law rules, derived from international law, notwithstanding the fact that no federal legislation addressed the issue<sup>339</sup> and that state (and foreign) law did address the issue.<sup>340</sup> Likewise, the Court’s opinion in *Sosa v. Alvarez-Machain* made clear that the content of the customary international law claims that were authorized under the Alien Tort Statute—and the question whether those claims were in fact so authorized—were governed by federal law.<sup>341</sup> In Justice Souter’s words, citing *Sabbatino* and other federal common law authorities, “*Erie* did not in terms bar any judicial recognition of new substantive rules, no matter what the circumstances, and post-*Erie* understanding has identified limited enclaves in which federal courts may derive some substantive law in a common law way.”<sup>342</sup>

These authorities are also consistent with more general standards governing the development of federal common law rules. Those standards have been discussed extensively elsewhere,<sup>343</sup> and their application here follows non-controversially from the discussion above. In summary, the Nation’s foreign relations and international legal obligations are an area “involving ‘uniquely federal interests’ . . . committed by the Constitution and laws of the United States to federal control.”<sup>344</sup> That is confirmed by

---

337. 462 U.S. 611 (1983).

338. *Id.* at 623.

339. As the Court noted, the FSIA did not prescribe any rule regarding the attribution of corporate responsibility. *Id.* at 620. On the other hand, as in prize cases and cases under the ATS, the Court was exercising jurisdiction pursuant to a grant of subject matter jurisdiction directed specifically at international disputes (i.e., the FSIA). *Id.* at 619.

340. *Id.* at 622; *id.* at 622 n.11.

341. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 730 (2004).

342. *Id.* at 729–30 (citing *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) (“[I]nternational disputes implicating . . . our relations with foreign nations” are an area where “federal common law” rules are appropriate.)); *see also Sosa*, 542 U.S. at 723, 730. Revisionist suggestions that *Sosa* did not adopt a rule of federal common law are also untenable. *See Dodge, After Sosa*, *supra* note 223.

343. *See generally* Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245 (1996); Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881 (1986); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1 (1985).

344. *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988).

the holdings in *Sabbatino*, *Sosa*, *Garamendi*, and elsewhere.<sup>345</sup> Moreover, as also discussed above,<sup>346</sup> independent state court decisions about the content of international law (and U.S. international legal obligations) undermine, and conflict with, federal authority in the field and the ability of the federal government to speak with one voice.<sup>347</sup> As the Court declared in *Sabbatino*, *Bancec* and *Sosa*, this provides ample basis for treating customary international law as a matter of federal common law.

These decisions and the analysis outlined above are impossible to reconcile with the limited conception of federal common law at the heart of the revisionist position. Rather, *Sabbatino* and its progeny declare broadly that “rules of international law” must be treated as federal law, not subject to “divergent and perhaps parochial state interpretations.”<sup>348</sup> That, of course, does not resolve the question of whether these rules of federal law are applicable directly in U.S. courts, which requires separate analysis. But it does make clear that rules of international law, like the act of state doctrine, were not what the Supreme Court had in mind when it decided *Erie*.

### III. CUSTOMARY INTERNATIONAL LAW: NON-SELF-EXECUTING FEDERAL COMMON LAW

As discussed above, both constitutional text and purposes, as well as judicial authority, require characterizing all rules of customary international law as federal law, rather than state (or foreign) law. Notwithstanding that conclusion, the same sources also provide that U.S. courts (both federal and state) may not apply a rule of customary international law unless the federal political branches have provided for judicial application of the rule. This approach treats all international legal obligations of the United States—treaties, other international agreements, and customary international law—in the same basic manner, and ensures observance of *Erie*’s limits on the federal courts’ law-making authority. In doing so, this approach safeguards both federal authority over the Nation’s foreign relations and constitutional limits on unauthorized law-making by the judiciary.

The approach outlined above can be readily applied and produces sensible, consistent results. As discussed below, this approach permits

---

345. See *supra* section II.A.2; *supra* section II.B.1.

346. See *supra* section II.A.1.

347. See *Atherton v. FDIC*, 519 U.S. 213, 218 (1997) (“[T]he guiding principle is that a significant conflict between some federal policy or interest and the use of state law . . . must first be specifically shown.”); *Radcliffe Materials*, 451 U.S. at 640.

348. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964).

some, but not all, rules of customary international law to be given direct effect in U.S. courts, depending on the character and content of those rules and the intentions of the federal political branches. In particular, this analysis requires determining whether the political branches have expressly or impliedly provided for U.S. courts to apply a particular rule of customary international law. More specifically, the analysis requires inquiry into considerations paralleling those that apply when determining whether a U.S. treaty or other international agreement is self-executing.

This analysis differs in critical respects from both the modernist and revisionist positions. Unlike both the modernists and revisionists, this analysis treats all rules of customary international law as federal law, regardless of whether those rules are directly applicable in U.S. courts.<sup>349</sup> This analysis also differs from the modernist position by requiring an inquiry into political branch approval of judicial application of customary international law, rather than concluding that the federal courts' constitutional authority to make federal common law independently authorizes application of all rules of customary international law applicable in U.S. courts.<sup>350</sup> Conversely, the analysis outlined below also differs from the revisionist position by providing a less categorical, more expansive approach to determining when the political branches have provided for judicial application of a rule of customary international law.<sup>351</sup> Not surprisingly, this analysis produces results that differ from both the modernist and revisionist positions, providing for more frequent application of customary international law than the revisionists and less frequent application than the modernists.

#### A. *No Clear Statement or Legislative Act Requirement*

Preliminarily, and contrary to some statements of the revisionist position,<sup>352</sup> the analysis proposed above does not limit U.S. courts to applying customary international law only when expressly authorized to do so by congressional legislation or a treaty. That position, adopted in some revisionist analysis, is untenable for multiple reasons.

---

349. See *supra* section II.A.1; *supra* note 135; *infra* section III.A.

350. See Koh, *State Law?*, *supra* note 6, at 1825–26, 1835 n.60; Neuman, *supra* note 6, at 372 n.6.

351. As discussed below, the analysis proposed in this Article does not adopt either a clear or express statement requirement, or a requirement for legislative (or treaty) authorization. See *supra* section II.B.2; *infra* section III.A. More fundamentally, the analysis proposed below focuses on the content and character of the relevant rule of customary international law, rather than looking exclusively to Legislative or Executive branch actions (such as congressional legislation or formal executive suggestions).

352. See *supra* section I.B; *supra* section II.B.1.

First, there is no reason to require express language or a clear statement to authorize judicial application of customary international law in congressional legislation, treaty provisions, or otherwise. Rather, generally applicable standards for interpreting legislation and treaties<sup>353</sup> should apply in determining whether the Legislative branch has provided for judicial application of international law. That is the approach that best ascertains Congress's will,<sup>354</sup> as well as the approach that has historically been taken by U.S. courts; those courts have readily implied authorization to apply international law rules from jurisdictional grants (like maritime jurisdiction and the Alien Tort Statute)<sup>355</sup> and from the content and character of international law rules (in international agreements and under customary international law).<sup>356</sup> It is also the approach that serves best to ensure that the intentions of Congress and the President with regard to U.S. foreign relations are given full effect: a rule requiring clear or express authorization by the political branches would necessarily frustrate those intentions in a material number of cases.

Second, there is also no reason to conclude that only congressional legislation (or a treaty), as distinguished from Executive branch actions, can provide for judicial application of international law. Contrary to some statements of the revisionist position,<sup>357</sup> neither constitutional text and structure nor judicial authority support a categorical requirement of congressional authorization for application of international law by U.S. courts. Instead, the extent to which Executive, as opposed to Legislative, authorization may support judicial application of international law rules depends on the distribution of foreign affairs authority between the President and Congress under the Constitution. Detailed discussion of the

---

353. Standard canons of construction permit the interpretation of both legislation and treaties to determine legislative intent in the absence of express language. *BG Group PLC v. Republic of Argentina*, \_\_ U.S. \_\_, 134 S. Ct. 1198, 1209 (2014) (“[I]n the absence of explicit language in a treaty demonstrating that the parties intended a different delegation of authority, our ordinary interpretive framework applies.”); *Sale v. Haitian Ctrs. Council*, 509 U.S. 155, 206 (1993) (“Even where congressional intent is unexpressed, however, a statute must be assessed according to its intended scope.”).

354. William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 637–38 (1992); John F. Manning, *Textualism and The Equity of the Statute*, 101 COLUM. L. REV. 1, 124–26 (2001).

355. *See supra* section II.B.1 (citing *The Schooner Adeline*, 13 U.S. (9 Cranch) 244, 287 (1815) (admiralty jurisdiction over prize cases); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004) (ATS jurisdiction over violations of law of nations)).

356. *See supra* section II.B.1 (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 432–33 (1964); *Sosa*, 542 U.S. at 734–38).

357. *See supra* section I.B.; *supra* section II.A.2; Bradley & Goldsmith, *Human Rights*, *supra* note 4, at 354.

subject is beyond the scope of this Article, but, however it is resolved, it does not support the categorical rule suggested in some revisionist analyses.

Consideration of the scope of the President's foreign relations power arises against the background of persistent controversy about the distribution of the Nation's foreign affairs powers between Congress and the President. In Professor Corwin's words, "[t]he Constitution . . . is an invitation to struggle for the privilege of directing American foreign policy."<sup>358</sup> As a result, different conceptions of the allocation of foreign affairs powers between the President and Congress have prevailed at different times in the Nation's history. In the early nineteenth century, Congress's authority in matters affecting U.S. foreign relations was sweeping, and nearly exclusive.<sup>359</sup> By the mid-twentieth century, however, the President's foreign relations powers were almost as broad as those previously assigned to Congress.<sup>360</sup> Most recently, the allocation of foreign affairs authority has been less categorical, with the President's authority varying, depending on the extent of legislative support, acquiescence, or opposition, and on historical practice regarding particular issues.<sup>361</sup>

In practice, the Executive branch's authority to independently authorize judicial application of international law rules has been recognized in a wide range of cases—including with respect to immunity from U.S. judicial and legislative jurisdiction,<sup>362</sup> claims settlement,<sup>363</sup> and seizures of private property.<sup>364</sup> Moreover, many contemporary actions of

---

358. EDWIN S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787-1984*, at 201 (5th ed. 1984); see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-35 (1952) (Jackson, J., concurring) (Framers' intentions "must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh").

359. *Brown v. United States*, 12 U.S. (8 Cranch) 110, 128 (1814) (Congress, not the President, has constitutional authority to prescribe rules regarding expropriation of private property during war); *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177-78 (1804) (President's instructions to seize French vessels conflicted with congressional legislation and were unlawful).

360. See generally *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) ("[V]ery delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations.").

361. Compare *Youngstown Sheet*, 343 U.S. at 637, and *Dames & Moore v. Regan*, 453 U.S. 654 (1981), with *Zivotofsky ex rel. Zivotofsky v. Kerry*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 2076, 2090 (2015) ("[J]udicial precedent and historical practice teach that it is for the President alone," and not Congress, "to make the specific decision of what foreign power he will recognize as legitimate.").

362. See *supra* section II.A.1; *supra* note 132; *supra* section II.A.2; *Berizzi Bros. Co. v. Steamship Pesaro*, 271 U.S. 562, 574 (1926); *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 143 (1812).

363. See *supra* section II.A.2; *Belmont*, 301 U.S. at 336-37; *Pink*, 315 U.S. at 233.

364. See *supra* section II.B.2; *The Paquete Habana*, 175 U.S. 677, 712 (1900) (relying on

the Executive branch occur in fields where Congress has legislated, often granting the President a substantial measure of executive authority; alternatively, Congress often acquiesces in the Executive's conduct of the Nation's foreign relations.<sup>365</sup> In most cases, therefore, the issue will not be whether the Executive branch, acting against Congress's will, can authorize application of a particular rule of international law, but whether the Executive, acting with a measure of legislative support, can do so. As a consequence, the President's authority over aspects of U.S. foreign relations—including the power to authorize judicial application of particular rules of customary international law—will depend upon a close analysis of legislative and executive actions (and inactions) in a specific setting, just as the Court undertook in *Sabbatino*, *Dames & Moore*, *Garamendi*, and other recent decisions.

In these circumstances, a categorical requirement for congressional legislation (or a treaty) would obstruct and complicate the political branches' conduct of the Nation's foreign relations by constraining the manner in which those branches exercise their constitutional authority. Likewise, such a requirement would disserve, rather than advance, separation of powers objectives by refusing to give effect to the will of the political branches in their conduct of U.S. foreign relations. Instead, as U.S. courts have historically done, the proper approach requires a careful assessment of the existence and character of both Legislative and Executive branch authorization for judicial application of particular rules of customary international law. As noted above, these issues are beyond the scope of this Article, but they plainly provide for a broad scope of Executive branch action even in the absence of express or implied legislative authorization.<sup>366</sup>

#### B. *Self-Executing Versus Non-Self-Executing Federal Common Law*

In determining whether the political branches have provided for judicial application of a particular customary international law rule, the approach proposed in this Article requires assessing considerations

---

Presidential Proclamation).

365. Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1297–305 (1988); Rebecca Ingber, *International Law Constraints as Executive Power*, 57 HARV. INT'L L. J. 49, 84–90 (2016).

366. The Tate Letter and Executive positions on other forms of immunity are obvious examples. See *supra* section II.A.1; *supra* note 132. The Supreme Court's refusal to give effect to the President's authorization for judicial application of international law in *Medellín* is a recent, and controversial, example of limits on the scope of Executive authority. *Medellín v. Texas*, 552 U.S. 491, 490–99, 523–32 (2008).

paralleling those relevant to determining the self-executing status of a U.S. treaty or other international agreement. This standard is readily applied and produces sensible results that are more consistent with existing judicial authority than either the modernist or revisionist position.

It is true, as some commentators have observed, that the considerations relevant to determining whether a treaty is self-executing have not been consistently defined.<sup>367</sup> These considerations can nonetheless be identified with sufficient clarity to permit reliably determining when a treaty provision is directly applicable in U.S. courts, as occurs routinely in practice.<sup>368</sup> As discussed below, a similar analysis can readily be applied by analogy in the context of customary international law, much as was done in *Sabbatino* and *Sosa*.<sup>369</sup>

Preliminarily, if the U.S. political branches have persistently objected to a rule of customary international law, then the United States will not be bound by the rule as a matter of international law,<sup>370</sup> and U.S. courts will have no reason (or authority) to apply that rule. This is no different from cases where the United States has not ratified a treaty: in these instances, there is no treaty or other rule of international law to be executed by U.S. courts.<sup>371</sup> Importantly, the question whether the United States has persistently objected, and whether there is any rule of customary international law to bind the United States, is an issue of federal law, not state law.

Likewise, where the United States has not participated in the formation of a rule of customary international law, that rule will ordinarily not be directly applicable in U.S. courts. In these instances, there will be U.S. acquiescence in the formation of the relevant international rule, but there

---

367. Carlos M. Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 695 (1995); Wu, *supra* note 178, at 579 (describing task of determining whether treaty is self-executing as "recipe for chaos in judicial clothing"); David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1, 4 (2002); see RESTATEMENT (FOURTH) § 106 cmt. e.

368. See *supra* section II.A.2; section III.A. In any event, dissatisfaction with standards for determining a treaty's self-executing status can be addressed through refinement of these standards.

369. See *supra* section II.B.1.

370. See *supra* section II.A.1; RESTATEMENT (THIRD) § 102 cmt. d.

371. This illustrates the importance of categorizing all rules of customary international law as federal law: a state court decision, adopting a rule of customary international law opposed by the federal political branches, could deny the United States persistent objector status, contradicting the United States's position as espoused by the federal political branches and subjecting the (entire) United States to the rule. See *supra* section II.A.1. As discussed above, where federal courts, applying federal law, determine that the political branches have not authorized judicial application of a rule of customary international law, that determination would be binding on state courts, precluding their application of that rule of law. See *supra* section II.A.1; *supra* section II.B.1.

will (by hypothesis) be no evidence of any affirmative intention by the political branches of the United States to authorize direct application of the rule by U.S. courts. Absent such affirmative action by the political branches, again determined as a matter of federal law, there will generally be no basis for concluding that those branches have authorized application of the rule in U.S. courts,<sup>372</sup> and, absent such authorization, no basis for judicial application of the rule. Instead, courts should apply a rule of customary international law only when the U.S. political branches have affirmatively provided for that rule to be self-executing.<sup>373</sup>

Assuming that the United States has participated in formation of a rule of customary international law, there is no justification for adopting a general presumption either for or against judicial application of that rule. The weight of authority is against any presumption that all U.S. treaties and international agreements are automatically either self-executing or non-self-executing. Although some authorities have argued for a presumption that all treaties are self-executing,<sup>374</sup> the Supreme Court and most other authorities have rejected that approach, declining to presume generally that all treaties are either self-executing or non-self-executing.<sup>375</sup> Instead, as discussed below, the better view (reflected in judicial authority) is that the self-executing status of treaties depends on a careful inquiry into the character and content of the specific treaty and on other evidence of political branch intentions regarding the treaty's status.

A similar approach is appropriate for determining whether a rule of customary international law is self-executing. If treaties, formally made in writing and ratified by the Senate, are not presumed to be self-executing, there is no reason that customary international law rules, lacking comparable formality and precision, should be presumed to be

---

372. See RESTATEMENT (FOURTH) § 106 cmt. d (“Whether a treaty provision is self-executing is normally determined by the intent or understanding of the U.S. treaty-makers . . .”); *id.* reporters’ note 2.

373. See *supra* section II.B.1.

374. Carlos M. Vázquez, *Treaties as Law of the Law: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 610 (2008); Ernest A. Young, *Treaties as “Part of Our Law,”* 88 TEX. L. REV. 91, 94, 94 n.22 (2009); see also RESTATEMENT (THIRD) § 111 reporters’ note 5 (“strong presumption” that “political branches” consider treaties self-executing if not implemented).

375. *Medellín v. Texas*, 552 U.S. 491, 512–14 (2008); *id.* at 551–62 (Breyer, J., dissenting) (describing multiple factors bearing on whether a treaty is self-executing); RESTATEMENT (SECOND) § 141(1)(a), (2)(a); see Paul B. Stephan, *Treaties in the Supreme Court, 1946–2000*, in INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE 317 (David L. Sloss et al. eds., 2011); Ingrid Wuerth, *Medellín: The New, New Formalism?*, 13 LEWIS & CLARK L. REV. 1, 3–5 (2009); RESTATEMENT (FOURTH) § 106 reporters’ note 3 (“[C]ase law has not established a presumption for or against self-execution.”).

self-executing. Conversely, if the political branches have undertaken an international legal obligation on behalf of the Nation, but have not taken legislative steps to implement compliance with that obligation, there should be no presumption against judicial application of the rule.<sup>376</sup>

In determining whether the U.S. political branches have provided for judicial application of a customary international law rule, the same basic analysis employed for treaties should be used. That analysis provides a workable means of ensuring that the political branches' intentions, and the international commitments of the United States, are given effect. It avoids the categorical results of either the modernist or revisionist position, while applying an analysis that, despite academic criticism,<sup>377</sup> has functioned satisfactorily in the context of treaties for two centuries.

Applying this analysis, a critical consideration in determining whether a rule of customary international law is directly applicable in U.S. courts is the content of the rule, just as the text of a treaty provision is central to determining whether it is self-executing.<sup>378</sup> The text or content of a treaty generally provides direct evidence of the political branches' intentions with regard to the treaty's self-executing character, and, for the same reasons, the terms of a rule of customary international law generally provide similar evidence of the self-executing character of that rule. Thus, where the political branches assent to rules of customary international law providing foreign states, heads of state, and foreign consuls with immunity in national court proceedings,<sup>379</sup> or prescribing a particular choice of law rule,<sup>380</sup> the terms and content of those rules themselves evidence the intentions of the political branches that the rules apply directly in U.S. courts (because, by their terms, those rules are addressed to the judiciary).

Consistent with this, and as discussed above, U.S. decisions applying jurisdictional immunities imposed by customary international law emphasized that these rules were by their own terms "addressed to" the

---

376. Cf. RESTATEMENT (THIRD) § 111 reporters' note 5 ("[I]f the Executive Branch has not requested implementing legislation and Congress has not enacted such legislation, there is a strong presumption that the treaty has been considered self-executing by the political branches, and should be considered self-executing by the courts.").

377. See *supra* section II.A.2; *supra* note 164.

378. *Bond v. United States*, \_\_\_ U.S. \_\_\_, 134 S. Ct. 2077, 2084 (2014); *Medellín*, 552 U.S. at 519; *Olympic Airways v. Husain*, 540 U.S. 644, 649, 657 (2004); see RESTATEMENT (FOURTH) § 106 reporters' note 2.

379. See *supra* section II.A.1; *supra* section II.B.1.

380. See *supra* section II.B.2 (discussing *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983)).

courts,<sup>381</sup> while concluding that rules regarding recognition of governments, new substantive causes of action, or the proper circumstances for retaliation were “addressed to” the Legislative and Executive branches.<sup>382</sup> In each case, the content of the relevant rule of customary international law itself evidences political branch authorization of judicial application of the rule.

Other aspects of the content of treaty provisions, and by analogy, rules of customary international law, also bear on their self-executing character.<sup>383</sup> Where a treaty provision is phrased in general or aspirational terms,<sup>384</sup> or provides for future implementing actions by individual nations,<sup>385</sup> then U.S. courts have generally held the treaty non-self-executing. Conversely, treaty provisions that are specific, mandatory, and complete in character, not contemplating future implementing actions, have typically been held self-executing.<sup>386</sup> The same analysis applies to customary international law, where courts have applied specific and mandatory rules, as evidenced again by decisions involving foreign state, head-of-state, and consular immunities.<sup>387</sup> In contrast, U.S. courts have refused to apply ill-defined, indefinite, or aspirational rules of customary international law.<sup>388</sup> That is made explicit in *Sosa* (which considered

381. See *supra* section II.B.1 (discussing *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918) (act of state doctrine addressed to courts); *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812) (rules regarding judicial immunity addressed to courts); *Rose v. Himely*, 8 U.S. (4 Cranch) 241 (1808) (rules regarding recognition of judgments and judicial jurisdiction addressed to courts)).

382. See *supra* section II.B.1 (discussing *The Nereide*, 13 U.S. (9 Cranch) 388 (1815) (rules regarding reciprocity or retaliation addressed to legislature); *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814) (rules regarding seizure of property addressed to legislature)).

383. See *Medellin*, 552 U.S. at 507 (“[W]e have also considered . . . the negotiation and drafting history of the treaty as well as ‘the postratification understanding’ of signatory nations.”); *id.* at 549 (Breyer, J., dissenting) (“[T]his Court has found the provision’s subject matter of particular importance.”); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004) (“[T]he Senate[’s] . . . ratification of the International Covenant on Civil and Political Rights declared that the substantive provisions of the document were not self-executing.”).

384. See, e.g., *Medellin*, 552 U.S. at 550 (Breyer, J., dissenting) (“Other things being equal, where rights are specific and readily enforceable, the treaty provision more likely ‘addresses’ the judiciary.”).

385. See *Bond v. United States*, \_\_\_ U.S. \_\_\_, 134 S. Ct. 2077, 2084 (“[The Convention] provides that ‘[e]ach State Party shall, in accordance with its constitutional processes, adopt the necessary measures to implement its obligations under this Convention.’”); *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 315 (1829) (provision of treaty “seems to be the language of contract; and if it is, the ratification and confirmation which are promised must be the act of the legislature”).

386. See, e.g., *El Al Israel Airlines v. Tsui Yuan Tseng*, 525 U.S. 155, 157 (1999) (“[g]iven the Convention’s comprehensive scheme of liability rules and its textual emphasis on uniformity”).

387. See *supra* section II.A.1; *supra* section II.B.1.

388. See *Sosa*, 542 U.S. at 725 (requiring “a norm of international character accepted by the civilized world and defined with a specificity”); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398,

whether an asserted rule is “a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18<sup>th</sup> century paradigms we have recognized”),<sup>389</sup> and *Sabbatino* (which considered “the degree of codification or consensus concerning a particular area of international law”).<sup>390</sup>

Furthermore, where a treaty would undermine the political branches’ foreign relations authority,<sup>391</sup> or core aspects of the states’ sovereignty over local social and political relations,<sup>392</sup> courts have been reluctant to hold the treaty self-executing. Conversely, where a treaty prescribes commercial or procedural rules, applicable to relations between private parties, it is more likely to be self-executing,<sup>393</sup> particularly when those rules concern international matters.<sup>394</sup> The same analysis once more applies with equal force to customary international law: where a rule of international law would displace traditional state regulation of social relations (e.g., race or religious discrimination) or political structure (e.g., right to vote), the rule is likely non-self-executing. In contrast, rules establishing uniform international commercial regulations or dispute resolution procedures are more likely self-executing. Again, the principal

428 (1964) (“[T]he Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government . . . in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.”).

389. *Sosa*, 542 U.S. at 725.

390. *Sabbatino*, 376 U.S. at 428; see also RESTATEMENT (FOURTH) § 106 reporters’ note 2 (“courts will consider whether the treaty provision is sufficiently precise or obligatory” and whether “it imposes obligations or creates authorities designed to have immediate effect, as opposed to contemplating additional legal measures”).

391. *Medellín*, 552 U.S. at 550 (Breyer, J., dissenting) (“Would it create constitutionally undesirable conflict with the other branches?”); see also Wu, *supra* note 178, at 587–97.

392. *Compare Medellín*, 552 U.S. at 532, *Bond v. United States*, \_\_\_ U.S. \_\_\_, 134 S. Ct. 2077, 2089 (“[W]e will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction.”) (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)), and Oona A. Hathaway et al., *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 YALE J. INT’L L. 51, 60–63 (2012), with *Neilsen v. Johnson*, 279 U.S. 47, 52 (1929) (“[A]s the treaty-making power is independent of and superior to the legislative power of the states, the meaning of treaty provisions so construed is not restricted by any necessity of avoiding possible conflict with State legislation . . .”).

393. See *Medellín*, 552 U.S. at 550 (Breyer, J., dissenting) (“[D]oes it concern the adjudication of traditional private legal rights such as rights to own property, to conduct a business, or to obtain civil tort recovery? If so, it may well address itself to the judiciary.”); Hathaway et al, *supra* note 392, at 63 (treaties likely to be self-executing if they affect “economic or commercial relations between individuals . . . [or] transnational liability or litigation”).

394. See generally *Olympic Airways v. Husain*, 540 U.S. 644 (2004) (Warsaw Convention is self-executing); *Bacardi Corp. of Am. v. Domenech*, 311 U.S. 150 (1940) (Berne Convention and Paris Convention are self-executing).

focus is on the content and character of the relevant rule of international law.

Another indicia of the political branches' intentions regarding the status of a treaty are statements during negotiation and ratification of the treaty<sup>395</sup> and, albeit less clearly, post-ratification statements.<sup>396</sup> The same considerations apply with equal force to political branch statements made in connection with the formation and application of rules of customary international law. Thus, formal statements by the Executive branch, like the Tate Letter (concerning foreign sovereign immunity),<sup>397</sup> or positions taken by the Executive in litigation (as in *Schooner Exchange*, *Bancec*, or *Sosa*)<sup>398</sup> have been given substantial weight in determining whether to apply a rule of customary international law.

In determining whether a treaty provision is self-executing, courts have also considered the status of related treaties.<sup>399</sup> The same analysis applies in the context of customary international law, where the existence of reservations, understandings, or declarations with respect to treaties prescribing similar international obligations should be directly relevant to the status of a rule of customary international law. If the U.S. political branches ratify a treaty guaranteeing particular rights (e.g., voting rights, freedom of religion), but on the condition that the treaty is non-self-executing,<sup>400</sup> then derivative or analogous rules of customary international law should also be non-self-executing.<sup>401</sup>

A specialized grant of federal subject matter jurisdiction is also relevant to authorization for judicial application of international law rules. As

---

395. RESTATEMENT (THIRD) § 111 cmt. h (“[A]ccount must be taken of any statement by the President in concluding the agreement or in submitting it to the Senate for consent or to the Congress.”); *Medellín*, 552 U.S. at 534 (“[W]hereas the Senate has issued declarations of non-self-execution when ratifying some treaties, it did not do so with respect to the United Nations Charter.”); see also Bradley, *Treaty Duality*, *supra* note 164, at 149–56.

396. Compare RESTATEMENT (THIRD) § 111 cmt. h, with Bradley, *Treaty Duality*, *supra* note 164, at 156–57.

397. Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep’t of State, to Phillip B. Perlman, U.S. Att’y Gen. (May 19, 1952), reprinted in *Changing Policy Concerning the Granting of Sovereign Immunity to Foreign Governments*, 26 Dep’t St. Bull. 984, 984–85 (1952).

398. See *supra* section II.B.1; *supra* section II.B.2; *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *First Nat’l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983); *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812).

399. See *Abbott v. Abbott*, 560 U.S. 1, 15–20 (2010); *Medellín*, 552 U.S. at 506–14.

400. See Bradley & Goldsmith, *Human Rights*, *supra* note 4, at 330–31.

401. *Sosa*, 542 U.S. at 728 (“Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law, as when its ratification of the International Covenant on Civil and Political Rights declared that the substantive provisions of the document were not self-executing.”).

discussed above, specialized jurisdictional grants were present in prize cases (admiralty jurisdiction), claims under the law of nations (*Sosa* and the Alien Tort Statute), and choice of law rules for attribution of liability to foreign states (*Bancec* and the Foreign Sovereign Immunities Act).<sup>402</sup> These specialized jurisdictional grants have, rightly, been interpreted as impliedly providing for the federal courts to apply the body of law that was most relevant and obviously applicable to claims falling within the courts' jurisdiction, in each instance leading to a conclusion that the federal courts may (and must) apply relevant rules of customary international law.<sup>403</sup>

Application of this analysis does not produce the categorical results of either the modernist or revisionist positions. Instead, this analysis requires more nuanced consideration of the content and character of particular customary international law rules and the positions of the political branches regarding those rules. In general, these considerations produce unsurprising and sensible results, consistent with the weight of judicial authority. Many rules of traditional customary international law—concerning jurisdictional immunities and limitations,<sup>404</sup> state succession and attribution,<sup>405</sup> and treaty validity and interpretation<sup>406</sup>—would likely be directly applicable in U.S. courts. On the other hand, many “new” rules of customary international law—involving emerging human rights protections,<sup>407</sup> limits on the use of force,<sup>408</sup> and environmental obligations<sup>409</sup>—would presumptively be non-self-executing. The decisive questions in each case would be the content and character of the rule of international law—whether new or old—and the intentions of the political branches regarding that rule.

---

402. See *supra* section II.B.1 (discussing the prize cases and Alien Tort Statute); *supra* section II.B.2 (discussing FSIA); *United States v. Arredondo*, 31 U.S. (6 Pet.) 691, 712 (1832) (“[T]he law giving jurisdiction to hear and determine this case not only authorises but requires us to decide it according to the law of nations and the stipulations of the treaty.w”).

403. The existence of a specialized jurisdictional grant authorizing application of customary international law in some categories of cases (e.g., prize cases; ATS) does not mean that U.S. courts are authorized to apply all rules of customary international law. Rather, only those rules that fall within the relevant subject matter and that are addressed to the courts, as distinguished from the political branches, will ordinarily be applicable in judicial proceedings.

404. RESTATEMENT (THIRD) §§ 401–16, 421–23.

405. *Id.* §§ 208–10.

406. *Id.* §§ 311, 321, 325–26, 331.

407. *Id.* §§ 701–03.

408. *Id.* §§ 101 cmt. a, 905.

409. CRAWFORD, *supra* note 97, at 353–64.

Finally, these results would limit the risks of judicial interference with U.S. foreign relations. The international law rules that would be directly applicable in U.S. courts would typically limit, rather than extend, judicial actions against foreign states and their nationals,<sup>410</sup> or provide uniform federal rules for the application of other international law rules.<sup>411</sup> In both instances, there would generally be minimal risk of offense to foreign states or interference with U.S. foreign policy. Indeed, the conduct of U.S. foreign relations by the political branches would be facilitated, by ensuring that customary international law rules which they intended to be applicable in U.S. courts were in fact applied, while precluding application of such rules when it had not been authorized.

## CONCLUSION

The application of customary international law by U.S. courts raises intricate, and difficult, questions. None of the existing, categorical answers to those questions is satisfactory. This Article proposes an analysis to simplify and rationalize resolution of these issues. It does so by treating all rules of customary international law—like all treaties and other international agreements—as rules of federal law, subject to uniform interpretation by federal courts. In addition, this analysis requires—again as with treaties and other international agreements—an affirmative showing that the federal political branches have, either expressly or impliedly, provided for judicial application of customary international law. This inquiry requires evaluation of the character and content of the relevant international law rule, as well as statements of the political branches, related international agreements, and the effect of particular rules on traditional state regulatory authority and federal foreign relations interests.

In contrast to existing analyses, the approach proposed in this Article produces sensible results that safeguard both separation of powers and federalism interests. On the one hand, this analysis ensures that the federal political branches' conduct of the Nation's foreign relations is not undermined by divergent or parochial state court interpretations of customary international law. On the other hand, this analysis limits the risks of interference by the federal courts in the conduct of U.S. foreign relations and unauthorized judicial law-making by requiring an affirmative showing that the U.S. political branches have provided for

---

410. Immunity from U.S. jurisdiction and presumptions against the extraterritorial application of national law are good examples. *See supra* section II.A.1; section II.B.1.

411. Rules regarding treaty validity and interpretation and attribution of liability are good examples. *See supra* section II.A.1.

judicial application of particular rules of customary international law. In so doing, the proposed analysis simplifies and rationalizes the internal relationships between the several American sovereignties while simultaneously strengthening American sovereignty in dealing with external powers.