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Customary International Law, the Separation of Powers, and the Choice of Law in Armed Conflicts and Wars

John C. Dehn

Loyola University Chicago, School of Law, jdehn@luc.edu

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CUSTOMARY INTERNATIONAL LAW, THE SEPARATION OF POWERS, AND THE CHOICE OF LAW IN ARMED CONFLICTS AND WARS

John C. Dehn[†]

After over fourteen years of continuous armed conflict, neither courts nor commentators are closer to a common understanding of how, or the extent to which, international and U.S. law interact to regulate acts of belligerency by the United States. This Article articulates and defends the first normative theory regarding the general relationship of customary international law to the U.S. legal system that fully harmonizes Supreme Court precedent. It then applies this theory to customary international laws of war to articulate the legal framework regulating the armed conflicts of the United States. It demonstrates that the relationship of customary international law to U.S. law differs in cases involving war and other exercises of “external” sovereign powers from cases involving “internal” powers of domestic governance. In cases involving the exercise of external sovereignty, including sovereign powers of war, the Supreme Court traditionally applied customary international law as an exogenous, nonfederal rule of decision. The Court articulated this “external” choice-of-law framework in Paquete Habana: “[W]here there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.”¹ The Article then examines the Court’s wartime and related jurisprudence in order to more thoroughly explicate the Paquete Habana framework in the context of armed conflicts, demonstrating the Court’s apparent understanding of the relationship of international laws of war to the Constitution and laws of the United States. This analysis not only confirms the Article’s general customary international law thesis, but also clarifies important

[†] Assistant Professor, Loyola University Chicago School of Law; Senior Fellow, West Point Center for the Rule of Law. The author thanks Henry Monaghan, Mark Weston Janis, Barry Sullivan, Harlan Cohen, James Gathii, Mike Zimmer, Tom Lee, Jens Ohlin, Margaret Moses, Peter Margulies, and James Pfander, as well as participants in the American Society of International Law’s International Law in Domestic Court’s Workshop, Loyola Chicago’s Constitutional Law Colloquium, and the Mid-American Jesuit Faculty Workshop, for their comments on earlier drafts. Thanks to Christian Colburn, Lauren Cannizzaro, Alison Wallace, and Lisa Wiggan for their research assistance. Thanks also to Elaine Nguyen, Alexander Newman, Bernard Tsepelman, Adam Riff, and the other editors of the *Cardozo Law Review* for their assistance in the editing process. Any remaining errors are the author’s sole responsibility.

¹ The Paquete Habana, 175 U.S. 677, 700 (1900).

implications of the Court's use of international law as an exogenous rule of decision, importantly, that such rules need not be consistent with the Constitution's separation of domestic powers or the Bill of Rights. Given the range of issues this Article clarifies, it should influence academic and judicial discourse regarding the relationship of customary international to U.S. law, particularly in cases involving the armed conflicts of the United States.

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INTRODUCTION

Although the Obama administration once hoped to bring an end to the armed conflicts that began with the attacks of September 11, 2001 (9/11),² circumstances have changed, and armed conflict with Islamist armed groups in foreign lands continue indefinitely.³ Yet, after more than fourteen years of armed conflict with such groups, neither courts nor commentators have a common understanding of how, or the extent to which, international and U.S. law interact to regulate acts of war by the United States. There are two central issues. The first is whether U.S. courts may apply customary or conventional international laws of war to constrain acts undertaken by the executive branch in armed conflict. If so, the next issue is whether international law provides only interpretive guidance for any applicable legislation or whether it provides a rule of decision in U.S. courts, either as federal common law or otherwise.

For example, in the 2004 case of *Hamdi v. Rumsfeld*,⁴ a plurality of the Supreme Court interpreted the post-9/11 Authorization for Use of Military Force (AUMF)⁵ to encompass the power to detain a putative enemy belligerent indefinitely—even a U.S. citizen—notwithstanding a general statutory prohibition of executive detention without congressional authorization.⁶ A plurality found this power to be a fundamental aspect of war permitted by international laws of war and therefore clearly, though impliedly, authorized by the post-9/11 AUMF.⁷ In 2010, however, two members of a three-judge panel of the Circuit Court of Appeals for the District of Columbia (D.C. Circuit) concluded that international law is irrelevant to interpreting the scope of AUMF detention authority unless Congress affirmatively indicates otherwise.⁸

² President Barack Obama, Remarks at the National Defense University (May 23, 2013) (transcript available at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>).

³ President Barack Obama, Statement on ISIL (Sept. 10, 2014) (transcript available at <http://www.whitehouse.gov/the-press-office/2014/09/10/statement-president-isil-1>).

⁴ 542 U.S. 507 (2004).

⁵ Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001).

⁶ See Non-Detention Act of 1971, Pub. L. No. 92-128, 85 Stat. 347 (codified as amended at 18 U.S.C. § 4001 (2012)); *Hamdi*, 542 U.S. at 518–19.

⁷ *Hamdi*, 542 U.S. at 518 (“We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the ‘necessary and appropriate force’ Congress has authorized the President to use.” (quoting AUMF § 2(a), 115 Stat. at 224)).

⁸ *Al-Bihani v. Obama*, 590 F.3d 866, 871 (D.C. Cir. 2010) (“[Defendant’s] arguments . . . rely heavily on the premise that the war powers granted by the AUMF and other statutes are limited by the international laws of war. This premise is mistaken. There is no

When denying en banc rehearing of this decision, several judges separately announced their belief that the panel's statements about the relevance of international law were not essential to its decision on the merits.⁹ In response, one panel member sharply contested that view, arguing the panel's opinion was binding precedent on the issue.¹⁰ Another argued at length that federal courts could not use international law as either a rule of decision or an interpretive aid without clear legislative intent to observe or incorporate it.¹¹ He asserted that neither the Geneva Conventions of 1949—to which the United States and most nations are party¹²—nor customary international laws of war are inherently enforceable in the courts of the United States.¹³

The Supreme Court has not squarely addressed the *independent* force or effect of customary or conventional international laws of war in the nation's courts for more than a century.¹⁴ In *Hamdi*, international law clearly provided only interpretive guidance for determining the particular "military force" authorized by the post-9/11 AUMF.¹⁵ In *Hamdan v. Rumsfeld*, the Court held that President Bush's military

indication in the AUMF, the Detainee Treatment Act of 2005, or the MCA of 2006 or 2009, that Congress intended the international laws of war to act as extra-textual limiting principles for the President's war powers under the AUMF. The international laws of war as a whole have not been implemented domestically by Congress and are therefore not a source of authority for U.S. courts." (citation omitted)).

⁹ *Al-Bihani v. Obama*, 619 F.3d 1, 1 (D.C. Cir. 2010) (Sentelle, C.J., concurring) ("We decline to en banc this case to determine the role of international law-of-war principles in interpreting the AUMF because, as the various opinions issued in the case indicate, the panel's discussion of that question is not necessary to the disposition of the merits.").

¹⁰ *Id.* at 2–4 (Brown, J., concurring).

¹¹ *Id.* at 22–53 (Kavanaugh, J., concurring).

¹² Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. There are 196 states party to these conventions. For a complete account, see INT'L COMM. OF THE RED CROSS, STATE PARTIES TO THE FOLLOWING INTERNATIONAL HUMANITARIAN LAW AND OTHER RELATED TREATIES 6 (2016).

¹³ *Al-Bihani*, 619 F.3d at 20 (Kavanaugh, J., concurring) ("[T]he 1949 Geneva Conventions are not self-executing treaties and thus are not domestic U.S. law."); *id.* at 23 ("[A]bsent incorporation into a statute or a self-executing treaty, such customary-international-law principles are not part of the domestic law of the United States that is enforceable in federal court.").

¹⁴ After a review of the relevant case law, the case appears to have been *Herrera v. United States*, 222 U.S. 558 (1912). Prior to *Hamdi*, the Court addressed the law of war as authority for the use of military commissions in *Ex parte Quirin*, 317 U.S. 1 (1942), *In re Yamashita*, 327 U.S. 1, 20 (1946), and *Madsen v. Kinsella*, 343 U.S. 341, 361–62 (1952). See discussion *infra* Section IV.B.3. However, in each case the Court noted that Congress had expressly authorized the tribunals at issue in Articles of War.

¹⁵ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

commissions order¹⁶ violated applicable international law due to a perceived conflict with a provision of what is known as “Common Article 3” of the Geneva Conventions of 1949.¹⁷ When doing so, however, the Court found that a federal statute authorizing the use of military commissions required compliance with Common Article 3, not that the treaty provided a rule of decision.¹⁸ Neither opinion, therefore, squarely addressed the inherent applicability of the 1949 Geneva Conventions or any related customary international law in the courts of the United States.

The lack of a uniform judicial approach to or understanding of the relationship of international to U.S. law echoes even broader and more diverse disagreement in legal commentary. With regard to treaties, disagreements largely focus on the circumstances under which treaty provisions should be deemed “self-executing,” and therefore “supreme federal law” enforceable in U.S. courts.¹⁹ Some commentators have argued that Article VI of the Constitution, which declares treaties to be “supreme Law of the Land,”²⁰ establishes a presumption that treaties are self-executing and preemptive federal law subject to limited

¹⁶ Military Order on Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

¹⁷ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). The term “Common Article 3” refers to the fact that Article 3 is identical in each of the four Geneva Conventions of 1949. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *supra* note 12; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, *supra* note 12; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 12; Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 12.

¹⁸ *Hamdan*, 548 U.S. at 628 (holding that “regardless of the nature of the rights conferred on Hamdan [by the Geneva Conventions of 1949], they are . . . part of the law of war” with which 10 U.S.C. § 821 requires compliance (citation omitted)). Prior to the Military Commissions Acts of 2006 and 2009, 10 U.S.C. § 821 stated only: “The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.” 10 U.S.C. § 821 (2000); see Military Commissions Act of 2006, Pub. L. No. 109-366, sec. 4, § 821, 120 Stat. 2600; see also Military Commissions Act of 2009, Pub. L. No. 111-84, sec. 1801, 123 Stat. 2190, 2574. Thus, the Court essentially held that § 821 “executed” the entirety of the law of war relevant to military commissions. *Hamdan*, 548 U.S. 557.

¹⁹ For a description of the doctrine, see *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (“Our constitution declares a treaty to be the law of the land. It is, consequently, 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.”), *overruled in part on other grounds by United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833). This was later referred to as a “self-executing” treaty. See *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *Bartram v. Robertson*, 122 U.S. 116, 120 (1887).

²⁰ U.S. CONST. art. VI, cl. 2.

exceptions.²¹ Conversely, the Supreme Court more recently held that unless a treaty “conveys an intention that it be ‘self-executing,’” it is not “federal law.”²² This appears to effectively establish a presumption against self-execution.²³ The lower courts have grappled with self-execution doctrine for roughly two centuries without developing a uniform understanding of its exact content or precise application.²⁴

Although there are a number of important treaties that contain international laws of war, their most important provisions are widely understood to be customary international law applicable in both international and noninternational armed conflicts.²⁵ For brevity, therefore, this article will obliquely deal with treaties as an aspect of the Supreme Court’s choice-of-law framework and eschew a more exhaustive theoretical examination of them.

Commentary regarding the relationship of customary international law to the U.S. legal system is more diverse. The so-called “modern” position is that customary international law is generally adopted as supreme federal common law binding upon both state and federal courts.²⁶ The “revisionist” view asserts that customary international law

²¹ LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 201 (2d ed. 1996); Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 602 (2008).

²² *Medellín v. Texas*, 552 U.S. 491, 504–05 (2008) (quoting *Igartúa-De La Rosa v. United States*, 417 F.3d 145, 150 (1st Cir. 2005) (en banc)); see also Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 446–49 (2000) (arguing that government clearly has power to make non-self-executing treaties); David H. Moore, Response, *Law(makers) of the Land: The Doctrine of Treaty Non-Self-Execution*, 122 HARV. L. REV. F. 32 (2009) (arguing that a presumption of treaty self-execution is unnecessary and inconsistent with treaty-making power).

²³ See *Medellín*, 552 U.S. at 546 (Breyer, J., dissenting) (asserting that the majority opinion “erects ‘clear statement’ presumptions” against self-execution); *id.* at 533 (Stevens, J., concurring) (characterizing the majority opinion as creating “a presumption against self-execution”).

²⁴ See generally Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L L. 695 (1995) (reviewing varied approaches by U.S. courts to self-execution doctrine).

²⁵ See generally Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT’L REV. RED CROSS 175 (2005) (explaining an International Committee of the Red Cross customary international law study and listing 161 putative rules of customary international law, most of which apply to both international and noninternational armed conflict). But see OFFICE OF GEN. COUNSEL, DEP’T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL 30 (2015) (“In most cases, treaty provisions do not reflect customary international law. . . . In some cases, a treaty provision may reflect customary international law. . . . A treaty provision may be based on an underlying principle that is an accepted part of customary law, but the precise language of the treaty provision may not reflect customary international law because there may be considerable disagreement . . .”).

²⁶ See Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984); Harold Hongju Koh, Commentary, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 (1997); Beth

is “general law” that takes effect in the U.S. legal system only when federal statutes, or state courts or legislatures, affirmatively enact or incorporate it.²⁷ This approach relies heavily on the Constitution’s allocation of domestic lawmaking powers and the Supreme Court’s decision in *Erie v. Tompkins*.²⁸ *Erie* held that “[t]here is no federal general common law,” and that state law provides the rule of decision in federal courts “[e]xcept in matters governed by the Federal Constitution or by acts of Congress”²⁹ as required by the Rules of Decision Act.³⁰

Because “[n]either the modern position nor the revisionist position fully accounts for the role that the traditional law of nations has played in the U.S. constitutional system,”³¹ commentators have developed additional approaches. Some assert that customary international law is “general law” that may provide a rule of decision in U.S. courts absent an applicable federal law, but do not clarify the full range of situations to which this doctrine would apply.³² Other commentary argues that the federal courts may create federal common law from customary international law in order to preserve the foreign affairs powers of the elected branches.³³ More recent commentary argues that customary

Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 *FORDHAM L. REV.* 393 (1997).

²⁷ See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 *HARV. L. REV.* 815 (1997); Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 *UCLA L. REV.* 665 (1986).

²⁸ 304 U.S. 64 (1938).

²⁹ *Id.* at 78.

³⁰ 28 U.S.C. § 1652 (2012) (“The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.”); see also 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, 810 (1998) (“[C]ustomary international law’s purported status today . . . is . . . in tension with the Supreme Court’s decision in *Erie Railroad v. Tompkins*.”).

³¹ Anthony J. Bellia Jr. & Bradford R. Clark, *The Law of Nations as Constitutional Law*, 98 *VA. L. REV.* 729, 743 (2012).

³² MICHAEL D. RAMSEY, *THE CONSTITUTION’S TEXT IN FOREIGN AFFAIRS* 342–61 (2007) (asserting that the law of nations may provide “a rule of decision, so long as it does not displace otherwise-constitutional state or federal law”); Ernest A. Young, *Sorting out the Debate over Customary International Law*, 42 *VA. J. INT’L L.* 365, 369–70 (2002) (arguing customary international law is neither state nor federal law, but “general” law that “would remain available for both state and federal courts to apply in appropriate cases as determined by traditional principles of the conflict of laws”).

³³ Anthony J. Bellia Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 *COLUM. L. REV.* 1, 9 (2009) (“Taken in historical context, the best reading of Supreme Court precedent . . . is that the law of nations does not apply as preemptive federal law by virtue of any general Article III power to fashion federal common law, but only when necessary to preserve and implement distinct Article I and Article II powers . . .”); Daniel J. Meltzer, Comment, *Customary International Law, Foreign Affairs, and Federal Common Law*, 42 *VA. J. INT’L L.* 513, 536 (2002) (finding judicial power “to make federal common law interstitially in the area of foreign affairs to serve important federal interests”).

international law should be considered “nonpreemptive, nonfederal” law applicable in federal, but not necessarily state, courts,³⁴ and other commentary argues that Articles I and II of the Constitution sometimes require courts to apply international law, making it a form of constitutional law.³⁵ Bringing matters full circle, a recent article provides a slightly qualified defense of the modern position and critiques the revisionist and several other “intermediate” positions.³⁶

A significant problem with much of this scholarship is that it does not distinguish among several very different types of contemporary customary international law. The most common type of customary international law, and the one central to this Article, is what I will refer to as the “inter-nation-state law of nations” or “traditional international law.”³⁷ Traditional international law creates primary rights and obligations *between* nation-states as well as their *respective* citizens.³⁸ It leaves matters of internal governance and private rights to the independent judgment of each nation-state. As will be later shown, “traditional international law” was by far the most prominent focus of international law, then known as the “law of nations,” at the time the Constitution was adopted and long thereafter.³⁹

An unrelated type of contemporary international law is what I term “*internal* human rights law”—what others have called “modern sovereignty-limiting rules.”⁴⁰ Internal human rights law purports to create *international* legal rights and obligations between a nation-state and its citizens or others within its territory and subject to its jurisdiction and control, matters traditionally within the unfettered discretion of each sovereign nation-state.⁴¹ To the extent that

³⁴ T. Alexander Aleinikoff, *International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate*, 98 AM. J. INT’L L. 91, 97–100 (2004).

³⁵ See generally Bellia & Clark, *supra* note 31.

³⁶ See generally Carlos M. Vázquez, *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 (2011).

³⁷ Jeremy Bentham coined the term “international law” in 1789 and defined it as the law applicable between states. See M.W. Janis, Comment, *Jeremy Bentham and the Fashioning of “International Law”*, 78 AM. J. INT’L L. 405, 408–09 (1984).

³⁸ I use the word “primary” in the sense that H.L.A. Hart used it, referring to a conduct-regulating rule, and distinguish it from what Hart called “secondary” rules of “recognition,” “change,” and “adjudication” that govern how primary rules are established, altered, and enforced. See generally H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994).

³⁹ See *infra* Section II.A.

⁴⁰ Bellia & Clark, *supra* note 31, at 744.

⁴¹ See, e.g., International Covenant on Civil and Political Rights (ICCPR) art. 2(1), Mar. 23, 1976, 999 U.N.T.S. 171, 173 (“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant . . .”). For a “rough picture of the [human rights] landscape,” see Eric A. Posner, Essay, *Human Welfare, Not Human Rights*, 108 COLUM. L. REV.

international human rights norms or instruments create rights and obligations between nation-states and *foreign* nations or peoples—a hotly contested issue—they fall within the scope of traditional international law.⁴² International law that purports to create primary rights and obligations between a state and its population is properly understood as internal human rights law. The interference of this law with traditional understandings of state sovereignty and internal governance make it functionally distinct from traditional international law, and therefore deserving of separate theoretical treatment.⁴³

Further adding to the confusion is the fact that the term “law of nations” was understood to encompass various “branches,” some of which were indeed “general” law applicable between or among individuals or commercial entities rather than states.⁴⁴ For example, the *lex mercatoria*, or law merchant, was a general commercial law considered a branch of the law of nations.⁴⁵ As the concept of the law of nations evolved post-Westphalia, however, commercial law came to be viewed by prominent jurists and the Supreme Court as “general” rather than “international” law.⁴⁶

This Article demonstrates that a state-to-state and positivist understanding of the “law of nations” developed in the works of jurists, and is evident in the decisions of the Supreme Court much earlier than is generally acknowledged. Commentary that combines all traditional branches of the law of nations together with contemporary internal human rights law for identical theoretical treatment rather than

1758, 1764 (2008). For a collection of all human rights declarations and covenants, see *Chapter IV: Human Rights*, UNITED NATIONS TREATY COLLECTION, <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en> (last visited June 13, 2016).

⁴² See, e.g., Beth van Schaack, *The United States’ Position on the Extraterritorial Application of Human Rights Obligations: Now Is the Time for Change*, 90 INT’L L. STUD. 20, 28 (2014) (surveying the range of possible ICCPR interpretations, including those that would create human rights obligations between signatories and foreign nationals under their “effective control”).

⁴³ See, e.g., Bellia & Clark, *supra* note 31, at 744 (“The modern position would treat all customary international law—including modern sovereignty-limiting rules—as self-executing federal common law applicable in state and federal courts. In some cases, however, this approach would undermine rather than further the Constitution’s allocation of powers.”).

⁴⁴ Bradley & Goldsmith, *supra* note 27.

⁴⁵ David L. Sloss, Michael D. Ramsey & William S. Dodge, *International Law in the Supreme Court to 1860*, in INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE 7, 27–28 (David L. Sloss, Michael D. Ramsey & William S. Dodge eds., 2011) (noting law merchant part of general common law).

⁴⁶ See *infra* Part II. *But see* Sloss, Ramsey & Dodge, *supra* note 45, at 27 (“[M]any commercial and maritime laws identified as general law were also sometimes described as branches of the law of nations.”).

separately analyzing each according to its purpose and function, is fundamentally flawed.⁴⁷

This Article first addresses the general relationship of traditional customary international law to the U.S. legal system, and then examines its specific application in cases involving armed conflicts with foreign entities. It reviews key developments in the Western understanding of the “law of nations,” clear inferences from the text of the Constitution and First Judiciary Act, as well as Supreme Court precedent and early American legal commentary to demonstrate that the Constitution’s Framers, First Congress, and early judges and jurists generally understood customary international law to be exogenous to the U.S. legal system but nevertheless inherently applicable to the United States and in its courts. It proposes a more nuanced theory of international law and rules of decision that distinguishes cases involving the exercise of “internal” sovereign powers of domestic governance from those involving the exercise of “external” sovereign powers. It concludes that in cases involving the exercise of external sovereign powers, such as foreign war powers, the Supreme Court applied international law as a nonfederal rule of decision. The Court articulated its constitutionally based choice-of-law framework in *Paquete Habana*: “[W]here there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.”⁴⁸

The Article then analyzes the Court’s decisions adjudicating the lawfulness of acts undertaken by the United States during armed conflict with foreign nations or groups. This analysis more thoroughly elucidates the *Paquete Habana* framework and the relationship of international laws of war to the Constitution, including the Bill of Rights, and federal statutes. It distinguishes such cases from those that involve the exercise of internal sovereign powers incident to war, as well as the extraterritorial exercise of what are typically internal sovereign powers over citizens abroad in times of peace. Unlike scholarship suggesting a conflict-of-laws approach to customary international law generally without clarifying its exact parameters or demonstrating its actual use by the Supreme Court,⁴⁹ this Article provides a more thorough explication of the Court’s traditional choice of law in matters involving external sovereignty.

⁴⁷ See, e.g., Sloss, Ramsey & Dodge, *supra* note 45, at 27–28 (using the Court’s approach to law merchant in *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), to argue the general proposition that all law of nations branches are general law).

⁴⁸ *The Paquete Habana*, 175 U.S. 677, 700 (1900).

⁴⁹ See sources cited *supra* note 32.

The Article has five parts. Part I briefly reviews the main thrust and assumption of contemporary commentary regarding the general relationship of customary international law to the U.S. legal system to identify a key assumption underlying the theories advanced: that customary international law is properly considered a natural-law-based “general law” rather than positivist law “enacted” by express or implied state consent. Part II retraces the jurisprudential development of the “law of nations” to demonstrate that by the time the Constitution was ratified, the term “law of nations” referred primarily to customary norms and treaties enacted by nation-states and binding *inter se* between consenting nations and, derivatively, their respective citizens. Part II also demonstrates that the Constitution’s text, certain acts of the First Congress, nineteenth-century Supreme Court decisions, and early American legal commentary all support the view that the inter-nation-state law of nations was largely exogenous, positivist law rather than a theoretical “general law” or a “federal common law.” It also proposes the constitutional basis for applying this exogenous law as a rule of decision in U.S. courts. Part III explains why the Supreme Court’s decision in *Erie* does not preclude resort to customary international law as a rule of decision in federal courts, and proposes and justifies a functional approach to the categorization of rules of decision based upon whether the government is exercising powers of internal or external sovereignty. Part IV more closely examines the Supreme Court’s approach to customary international law in cases involving belligerent acts in armed conflict, explaining the contours of the *Paquete Habana* framework. It also identifies and explains key differences in the Court’s understanding of separation of powers and Bill of Rights issues in this context from those related to matters of internal governance. Finally, Part V briefly suggests how this more nuanced understanding of the interaction between international and domestic law affects certain overarching doctrinal issues as well as specific contemporary legal issues.

This Article clarifies that, in appropriate cases, customary international law provides an obligatory, exogenous rule of decision for U.S. courts in the absence of a treaty or controlling legislative or executive act. Therefore, courts must identify and apply customary international norms in cases adjudicating an exercise of the nation’s war powers. Any potential constitutional “gloss”⁵⁰ from recent claims of plenary presidential power to violate international law should be eyed with suspicion.⁵¹ This is particularly so in light of recent scholarship

⁵⁰ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring).

⁵¹ Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 412 (2012) (“It has become apparent from political science scholarship,

noting the Executive's self-serving approach to legal interpretation⁵² and tendency to adhere to even constitutionally questionable internal executive branch "precedent."⁵³ In other words, neither courts nor scholars should interpret politically motivated congressional abdication of its responsibilities or exigency-driven executive overreach⁵⁴ to represent either branch's true understanding of the Constitution's allocation of powers or the relevance of international law to their exercise.

I. CUSTOMARY INTERNATIONAL LAW COMMENTARY

Customary international law is generally understood to arise "from a general and consistent practice of states followed by them from a sense of legal obligation."⁵⁵ In 1987, the Restatement (Third) of Foreign Relations Law adopted the position that customary "[i]nternational law and international agreements of the United States are law of the United States and supreme over the law of the several States."⁵⁶ Proponents of this position often rely on the so-called "canonical" statement of the Supreme Court in *Paquete Habana* that "[i]nternational law is part of our law."⁵⁷ A federal circuit court declared, "[t]he law of nations forms an integral part of the [general] common law, and . . . became a part of the common law of the United States upon the adoption of the

however, that the Madisonian [interbranch competition to preserve constitutional power] model does not accurately reflect the dynamics of modern congressional-executive relations.").

⁵² See generally Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189 (2006) (arguing that the executive branch properly uses constitutional avoidance doctrine in its internal legal interpretation to "defend" its powers and limit effect of laws enacted by Congress).

⁵³ See generally Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448 (2010) (arguing it is appropriate for the executive branch to follow its internal legal precedent, even if constitutionally questionable).

⁵⁴ See, e.g., JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 37 (paperback ed. 2009) (stating that "lawyers and Attorneys General over many decades," for presidents of both parties, are "driven by the outlook and exigencies of the presidency to assert more robust presidential powers, especially during a war or crisis, than ha[s] been officially approved by the Supreme Court or than is generally accepted in the legal academy or by Congress").

⁵⁵ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2) (AM. LAW INST. 1987); see also Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1055, 1060 (defining "international custom" as "a general practice accepted as law").

⁵⁶ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111(1); *id.* cmt. d.

⁵⁷ See, e.g., Vázquez, *supra* note 36, at 1516 ("The canonical expression of the modern position is the statement in *The Paquete Habana* that '[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.'" (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900) (footnote omitted) (alteration in original))).

Constitution,” and that “[f]ederal jurisdiction over cases involving international law is clear.”⁵⁸ Such broad pronouncements appear to ignore earlier Supreme Court decisions stating or holding, for example, that some cases implicating the customary law of nations do “not, in fact, arise under the Constitution or laws of the United States.”⁵⁹

Engaging the modern position on its terms, revisionist commentators, such as Professors Curtis Bradley and Jack Goldsmith, initially argued that the modern position mischaracterizes pre-*Erie* case law and, in any event, did not survive the Court’s pronouncement that there is no federal general common law.⁶⁰ Bradley and Goldsmith claimed that for the majority of the nation’s history, customary international law was considered “general common law.”⁶¹ As a constitutional matter, then, it could not be federal law unless incorporated as such by the elected branches.⁶² Later, however, Bradley, Goldsmith, and Professor David Moore endorsed viewing some jurisdiction-granting statutes as authorizing judicial incorporation of customary international law as federal law.⁶³ In the context of post-9/11 war powers, however, Bradley and Goldsmith opined that “[a]lthough the [international] laws of war inform the boundaries of what the AUMF authorizes, that simply means that as a general matter the AUMF authorizes no more than what the laws of war permit, not that it incorporates law-of-war prohibitions.”⁶⁴ In other words, in their view international laws of war enhance the President’s powers in war but never inherently limit them.⁶⁵ This position seems to flow from their belief that international law is best viewed as general rather than positivist law that the United States has participated in making, and that

⁵⁸ *Filartiga v. Pena-Irala*, 630 F.2d 876, 886–87 (2d Cir. 1980).

⁵⁹ *Am. Ins. Co. v. 356 Bales of Cotton (Canter)*, 26 U.S. (1 Pet.) 511, 545 (1828) (referring to admiralty law); see also *N.Y. Life Ins. Co. v. Hendren*, 92 U.S. 286, 286–87 (1875) (holding no extant issue of federal law because “the general laws of war, as recognized by the law of nations applicable to this case, were [not] in any respect *modified or suspended* by the constitution, laws, treaties, or executive proclamations, of the United States” (emphasis added)).

⁶⁰ Bradley & Goldsmith, *supra* note 27, at 868, 870.

⁶¹ *Id.* at 850.

⁶² *Id.* at 868 (“The Supreme Court’s modern federalism jurisprudence suggests the broader conclusion that [customary international law] is never supreme federal law in the absence of some authorization from the federal political branches.”).

⁶³ Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, *Sosa*, *Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869, 919–24 (2007).

⁶⁴ Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2097 (2005).

⁶⁵ For a different view, see generally John C. Dehn, *The Commander-in-Chief and the Necessities of War: A Conceptual Framework*, 83 TEMP. L. REV. 599 (2011) (distilling and explaining doctrines of military and public necessity from the Supreme Court’s wartime jurisprudence, both of which are limited by specifically applicable international or domestic law).

“there is a strong argument that the President has the domestic constitutional authority to violate customary international law.”⁶⁶

Even scholarship suggesting that customary international law could be applied in accordance with conflict-of-laws principles takes the position that customary international law is properly viewed as “general” law.⁶⁷ This likely results from conflation of the various historical branches of the law of nations, from an overly narrow view of legal positivism, from an Anglo-centric “common law” view of the law of nations, or from concern regarding the proper role or effect of contemporary international human rights law within the United States.⁶⁸ International human rights law—which primarily developed after World War II⁶⁹ and purports to define rights and obligations between sovereign nations and individuals within their territory and jurisdiction⁷⁰—is fundamentally different from the concept of the inter-nation-state law of nations that prevailed at the time of the Constitution’s framing. It therefore requires an entirely separate constitutional analysis. It is the inter-nation-state concept of international law that should inform our understanding of the status of traditional customary international law, particularly international laws regulating war, in the U.S. legal system.

II. THE POST-WESTPHALIA “LAW OF NATIONS”

Given the prevalent view that customary international law is properly considered “general law,”⁷¹ it is important to first distinguish

⁶⁶ Bradley & Goldsmith, *supra* note 64, at 2099.

⁶⁷ See Young, *supra* note 32, at 370; see also William A. Fletcher, Lecture, *International Human Rights in American Courts*, 93 VA. L. REV. 653, 672 (2007).

⁶⁸ See, e.g., Bradley, *supra* note 30, at 809 (“The modern position has become widely accepted only in the last twenty years, and to date it has been invoked primarily in international human rights litigation. . . . The potential consequences . . . , however, are far greater than merely opening the . . . federal courts to alien-alien suits under the Alien Tort Statute.”); see also Bellia & Clark, *supra* note 31, at 744 (“[M]odern and revisionist positions have attempted to use historical materials and judicial precedents to formulate a uniform rule governing how federal courts should treat all rules of customary international law, be they traditional sovereignty-respecting rules or later-emerging sovereignty-limiting rules.”).

⁶⁹ The first international human rights instrument purporting to articulate general human rights shared by all persons was the G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948), <http://www.un.org/en/universal-declaration-human-rights>.

⁷⁰ See, e.g., International Covenant on Civil and Political Rights, *supra* note 41, art. 2(1) (“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant . . .”).

⁷¹ Bradley & Goldsmith, *supra* note 27, at 849 (explaining that “the statement in *The Paquete Habana* that [customary international law] was ‘part of our law’” was “made under the rubric of general common law”); Bradford R. Clark, *Federal Common Law: A Structural*

the inter-nation-state law of nations from longstanding notions of a theoretical, often natural-law-based “general law.” To that end, it is helpful to briefly retrace broad jurisprudential developments in Western legal thought surrounding the term “law of nations.” This Part differentiates jurisprudential notions of a “general” or “common” law from the post-Westphalian concept of a positivist, inter-nation-state law of nations. It then demonstrates that the Constitution’s Framers, the Supreme Court, and important early American jurists understood the inter-nation-state law of nations to be created by state consent and entirely exogenous to the Constitution and laws of the United States but nevertheless applicable in U.S. courts to the extent not superseded by a requisite act of the U.S. government. Finally, it posits a constitutional basis for the courts to apply this concept of traditional international law as a rule of decision in appropriate cases.

A. *Key Law of Nations Developments in Western Legal Thought*

Western legal systems have long differentiated the laws of a society or community from theories of an ideal or general law broadly applicable or available to all societies. The Romans distinguished the *jus gentium*, a law common to all peoples based in or reflecting natural law, from the *jus civile*, or the internal law of the Roman people.⁷² Later, some parts of the European continent recognized a general *jus commune*, or “common law,” that developed from Roman and canon law.⁷³ Often, this “common” or “general” law applied directly in feudal Western European legal systems but could be superseded by local custom, statute, or proclamation.⁷⁴

Conversely, the Anglo-American concept of common law was “societal” or “internal” in orientation, informed in part by natural law, but established and developed by general customs of England and the reasoned decisions of judges in specific cases.⁷⁵ Although generally

Reinterpretation, 144 U. PA. L. REV. 1245, 1279–81 & n.169 (1996) (noting that before *Erie*, international law “operated as a set of background rules that courts applied in the absence of any binding sovereign command to the contrary”); Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 774 (2010) (“[T]hose portions of the common law known as the law of nations and the law merchant were perhaps universally held to be part of the ‘general law.’”).

⁷² HENRY WHEATON, HISTORY OF THE LAW OF NATIONS IN EUROPE AND AMERICA; FROM THE EARLIEST TIMES TO THE TREATY OF WASHINGTON, 1842, at 26–27 (1845).

⁷³ JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA 12 (3d ed. 2007).

⁷⁴ *Id.*

⁷⁵ 1 WILLIAM BLACKSTONE, COMMENTARIES *38–44 (describing the relationship of natural law to the common law of England).

applicable throughout England, English common law also allowed for local alteration by custom.⁷⁶

Both the civil and common law legal traditions, however, dealt almost exclusively with rights and obligations between or among subnational juridical persons, or between such persons and their sovereigns, rather than the law applicable between or among independent sovereign nations or peoples.⁷⁷ As the post-Westphalia concept of the nation-state developed, the Continent rejected the independent authority of the *jus commune* in favor of the law-making power of the territorial sovereign.⁷⁸ Given the insular nature of English common law, England's transformation into a post-Westphalia nation-state did not require altering the concept of common law that had there developed.⁷⁹ Clearly, however, both legal traditions clearly distinguished the idea of a theoretical universal or general law common to all societies or peoples from a specific sovereign's internal laws. The difference lay in the origins and substance of law. The common law tradition generally⁸⁰ viewed a society's law as preexisting and, to the extent not prescribed by a legislative body, deducible by reason; while the civil law tradition generally viewed law as created by sovereigns.

These differing views of the origins and nature of law eventually altered views of the *jus gentium* and law of nations after Westphalia. Beginning with Hugo Grotius in 1625, commentators began applying natural law principles to nation-states in their mutual relations to identify the nature and substance of rules that should govern them.⁸¹ With respect to the term *jus gentium*, "[t]he famous Jesuit, Francesco Suarez (1548–1617), was the first to see clearly that [it] had come in post-Roman times to mean two different things: (1) universal law and (2) international law."⁸² Samuel Pufendorf's eighteenth-century treatise confirms that the term "law of nations" also came to be used in two ways: as a general, theoretical, or ideal law *within* nation-states or

⁷⁶ *Id.* at *63 ("The *lex non scripta*, or unwritten [municipal] law [of England], includes not only *general customs*, or the common law properly so called; but also the *particular customs* of certain parts of the kingdom . . .").

⁷⁷ *See, e.g., id.* at *67–68 ("General customs . . . are the universal rule of the whole kingdom, and form the common law, in its . . . usual signification," governing such matters as trusts and estates, property, contracts, civil injuries, and crime).

⁷⁸ MERRYMAN & PÉREZ-PERDOMO, *supra* note 73, at 21. Many European nation-states nevertheless "received" the *jus commune* into their national legal systems due to its appeal as an "intellectually superior system." *Id.* at 10.

⁷⁹ *Id.* at 22.

⁸⁰ As with any general statement, there are exceptions.

⁸¹ *See generally* HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* (A.C. Campbell trans., M. Walter Dunne 1901) (1625).

⁸² Arthur Nussbaum, *The Significance of Roman Law in the History of International Law*, 100 U. PA. L. REV. 678, 682 (1952) (footnote omitted).

societies, and as the law applicable *between or among* nations.⁸³ These different concepts of the “law of nations” are evident in the commentary of the jurists most influential upon the early United States.

Professor Mark Weston Janis has observed that American lawyers of the founding generation would have viewed William Blackstone, Hugo Grotius, and Emmerich de Vattel as “principal sources of the law of nations.”⁸⁴ Other commentators have noted that Vattel⁸⁵ and Blackstone⁸⁶ in particular were important to the Constitution’s Framers, as well as to American judges and jurists. A close examination of each reveals some similarities and differences regarding the nature and origin of international law and its status in or relationship to municipal legal systems.

Although he articulated and applied natural law principles, Grotius viewed the law of nations in positivist terms. He explained that the rules of the law of nations arise from the consent of nations, not from the law of nature, and therefore may differ in different parts of the world.⁸⁷ This clearly articulates a positivist view of international law. As early American commentator Henry Wheaton later explained, “Grotius distinguished the law of nations from the natural law by the different

⁸³ See generally SAMUEL FREIHERR VON PUFENDORF, *OF THE LAW OF NATURE AND NATIONS* (photo. reprint 2007) (Basil Kennett trans., 4th ed. 1729), an eight-volume treatise outlining natural law principles, their application between or among individuals, and their application between or among nations or peoples in war and peace. Vattel described Pufendorf as having “not . . . separately treated of the law of nations, but has everywhere blended it with the law of nature.” EMMERICH DE VATTEL, *THE LAW OF NATIONS; OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS*, at x (photo. reprint 2011) (Joseph Chitty trans., new ed. 1834).

⁸⁴ MARK WESTON JANIS, *AMERICA AND THE LAW OF NATIONS 1776–1939*, at 11 (2010).

⁸⁵ JOHN FABIAN WITT, *LINCOLN’S CODE: THE LAWS OF WAR IN AMERICAN HISTORY* 16 (paperback ed. 2013) (“Vattel . . . quickly became the most widely read authority in Europe and its colonies on questions relating to a body of rules known as the law of nations . . .”); Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 471 (2011) (“Vattel’s treatise, *The Law of Nations*, was well known in England and the American states at the time of the Founding.”); Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 847 (2006) (“The treatise by the Swiss thinker Emmerich de Vattel . . . was the most valued of the international law texts the founding group used during the crucial decade between 1787 and 1797.”); Douglas J. Sylvester, *International Law as Sword or Shield? Early American Foreign Policy and the Law of Nations*, 32 N.Y.U. J. INT’L L. & POL. 1, 67 (1999) (observing that in American judicial decisions “in the 1780s and 1790s, there were nine citations to Pufendorf, sixteen to Grotius, twenty-five to Bynkershoek, and a staggering ninety-two to Vattel”).

⁸⁶ Sloss, Ramsey & Dodge, *supra* note 45, at 8 (“Two works in particular framed the early American view of the law of nations: Emmerich de Vattel’s *The Law of Nations* and William Blackstone’s *Commentaries on the Laws of England*.”).

⁸⁷ GROTIUS, *supra* note 81, at ch. 1, § XIV (“[T]he law of nations . . . deriv[es] its authority from the consent of all, or at least of many nations. It was proper to add MANY, because scarce[ly] any right can be found common to all nations, except the law of nature, which itself too is generally called the law of nations. Nay, frequently in one part of the world, that is held for the law of nations, which is not so in another.”).

nature of its origin and obligation, which he attributed to the general consent of nations as evidenced in their usage and practice.”⁸⁸ Indeed, many Western jurists of the founding era distinguished the concept of a theoretical, natural or general law from the positivist law of nations.⁸⁹ This is an important theoretical starting point. According to Grotius and many others, the inter-nation-state law of nations is neither synonymous with nor *directly* derived from natural law. It is discerned from examining the opinions and practice of nations.

Unlike Grotius, Blackstone stated that the “law of nations’ . . . depends entirely upon the rules of natural law, or upon mutual compacts, treaties, leagues, and agreements between” states.⁹⁰ Additionally, Blackstone clarified that the law of nations regulated the “mutual intercourse” of states.⁹¹ Blackstone therefore appears to have embraced both natural-law and positivist concepts of the law of nations. Later in his Commentaries, however, Blackstone wrote in more positivist terms:

The law of nations is a system of rules, deducible by natural reason, and *established by universal consent* among the civilized inhabitants of the world; in order to decide all disputes, to regulate all ceremonies and civilities, and to insure the observance of justice and good faith, in that intercourse which must frequently occur between two or more independent states, and the individuals belonging to each.⁹²

Here, Blackstone appears to accept that natural law informs the substance of the law of nations, but is not itself the law of nations. Although “deducible by natural reason,” it is “established by universal consent.” Note the similarity here to the definition of customary international law earlier articulated. Note also that Blackstone describes the law of nations as binding upon both states and their respective citizens.

Blackstone’s broader understanding of what constituted the law of nations appears to have affected his view of its status as municipal or societal law. Regarding its relationship to England’s municipal law, Blackstone stated that the “law of nations . . . is here adopted in its [sic] full extent by the common law [of England], and is held to be a part of the law of the land.”⁹³ Elsewhere, however, he distinguished England’s

⁸⁸ WHEATON, *supra* note 72, at 91.

⁸⁹ Henry Wheaton documents the views of several international jurists, from the well-known, such as Grotius, to the lesser-known, such as an English professor named Zouch. *Id.* at 88–106.

⁹⁰ 1 BLACKSTONE, *supra* note 75, at *43.

⁹¹ *Id.*

⁹² 4 WILLIAM BLACKSTONE, COMMENTARIES *66 (emphasis added).

⁹³ *Id.* at *67.

municipal common law from “the law of nature, the revealed law, and the law of nations.”⁹⁴ Perhaps to ameliorate this apparent inconsistency, Blackstone observed that “in mercantile questions, such as bills of exchange and the like: in all marine causes, relating to freight, average, demurrage, insurances, bottomry, and others of a similar nature; the law-merchant, which is a branch of the law of nations, is regularly and constantly adhered to.”⁹⁵ Note that he does not say the law merchant was perfectly adhered to. He next noted, “in all disputes relating to prizes, to shipwrecks, to hostages, and ransom bills, *there is no other rule of decision but this great universal law* [the law of nations], collected from history and usage, and such writers of all nations and languages as are generally approved and allowed of.”⁹⁶ Thus, Blackstone appears to have clearly understood that the *source* of the law of nations was distinct from and exogenous to the common law of England.⁹⁷

Equally clear, however, is Blackstone’s view that England’s courts should follow the law of nations in appropriate cases. He prefaced his statement regarding adoption of the law of nations into the common law of England by noting that

[i]n arbitrary states this law, wherever it contradicts or is not provided for by the municipal law of the country, is enforced by the royal power: but since in England no royal power can introduce a new law, or suspend the execution of the old, therefore the law of nations . . . is here adopted.”⁹⁸

This statement, too, adopts the view that the law of nations is both obligatory and exogenous to the common law of England. It simply clarifies how the law of nations was given municipal effect. Outside of England but in territories under its control, Blackstone says the responsibility for enforcing the law of nations fell to the Monarch.⁹⁹ Within England, Blackstone’s “adoption” of the law of nations by English common law seems to have been result-oriented. It was calculated to establish that the courts of England must follow the law of nations in appropriate cases, even if that law was not generally or

⁹⁴ 1 BLACKSTONE, *supra* note 75, at *44 (“Thus much I thought it necessary to premise concerning the law of nature, the revealed law, and the law of nations, before I proceeded to treat more fully of the principal subject of this section, municipal or civil law; that is, the rule by which particular districts, communities, or nations are governed . . .”).

⁹⁵ 4 BLACKSTONE, *supra* note 92, at *67.

⁹⁶ *Id.* (emphasis added).

⁹⁷ Professor Janis similarly noted, “Blackstone’s definition of the law of nations was source-based, that is to say that Blackstone distinguished the law of nations from municipal law on the grounds that the law of nations came from universal sources, municipal law from municipal sources.” Janis, *supra* note 37, at 407.

⁹⁸ 4 BLACKSTONE, *supra* note 92, at *67.

⁹⁹ *Id.*

specifically enacted by Parliament. Blackstone believed this allowed England to be “a part of the civilized world.”¹⁰⁰ Rather than suggest that English courts could simply apply an exogenous law of nations binding upon the nation and its citizens in appropriate cases, Blackstone, similar to many contemporary American commentators and judges,¹⁰¹ apparently thought it necessary that the law of nations be adopted or enacted into some form of municipal law before it could provide a rule of decision in national courts. Even if Blackstone was correct about this as a matter of eighteenth-century English law, England’s national, common law, legal system was nothing like the republican, multifaceted nation and legal system later created by the U.S. Constitution, consisting of a central government of limited powers and numerous subnational sovereigns with internal laws and legal systems. Therefore, the suggestion that the United States or its Constitution must have similarly “adopted” the law of nations as national, federal common law seems an overly simplistic assumption.

In many respects, the Swiss jurist Vattel viewed the law of nations similarly to Blackstone. Like Blackstone, Vattel viewed the nation-state as a distinct subject of law, and the rights and obligations of states *inter se* as necessarily different in source and content from municipal law.¹⁰² Vattel, however, differed from Blackstone in one important respect. Like Grotius, Vattel very clearly distinguished the “law of nations” from notions of a theoretical universal or general law based in, or flowing from, natural law. “All . . . treatises,” said Vattel, “in which the law of nations is blended and confounded with the ordinary law of nature, are incapable of conveying a distinct idea . . . of the sacred law of nations.”¹⁰³ He further noted that “[t]he Romans often confounded the law of nations with the law of nature . . . as being generally acknowledged and adopted by all civilized nations.”¹⁰⁴ He posited that the “right of embassies”¹⁰⁵ and “*feacial* law . . . [which related] to public treaties, and especially to war”¹⁰⁶ in Roman law were more akin to “[t]he moderns [who] are generally agreed in restricting the appellation of ‘the

¹⁰⁰ *Id.*

¹⁰¹ See *supra* notes 11, 27, 63, 64 and accompanying text.

¹⁰² According to Vattel, a state is “a moral person . . . susceptible of *obligations* and *rights*,” [Preliminaries] VATTEL, *supra* note 83, § 2, and one must “apply to nations the rules of the law of nature” to discern the rights and obligations of states, recognizing that rules may differ because states are different than people. *Id.* § 6; see also *id.* at x (“It did not escape the notice of [Barbeyrac] . . . that the rules and decisions of the law of nature cannot be purely and simply applied to sovereign states, and that they must necessarily undergo some modifications in order to accommodate them to the nature of the new subjects to which they are applied.”).

¹⁰³ *Id.* at vii.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at viii.

¹⁰⁶ *Id.*

law of nations' to that system of right and justice which ought to prevail *between* nations or sovereign states."¹⁰⁷ Clearly, Vattel understood the law of nations to be distinct from natural law and exogenous to the municipal law of nation-states.

Vattel understood the obligatory law of nations to be enacted law—the product of consent between or among nations rather than a theoretical, general law. He divided the law of nations into four categories: (1) the necessary law of nations, (2) the voluntary law of nations, (3) the conventional law of nations, and (4) the customary law of nations.¹⁰⁸ Based in natural law, the “necessary law” of nations was immutable, but binding only upon the conscience of the sovereign.¹⁰⁹ Put differently, natural law provided an edifice upon which the law of nations stood, but did not constitute a part of its substantive, obligatory rules. Vattel defined the obligatory, “positive law of nations” as including voluntary, customary, and conventional law because these “proceed from the will of Nations”: voluntary from presumed consent, conventional from express consent, and customary from tacit consent.¹¹⁰

To be sure, Vattel’s “voluntary law” category and its notion of “presumed consent” confusingly implies that states are unconditionally obligated to observe certain rules of international law.¹¹¹ This may be thought to suggest that a nonconsensual, natural-law obligation is at work. Read carefully and in light of his preface, though, Vattel’s voluntary law category encompassed the idea that the exact content of such rules was to be settled by the general concurrence of civilized states and their commentators—put otherwise, a general convergence in the practice and usages of states.¹¹² So understood, Vattel’s voluntary law category is a jurisprudential antecedent of contemporary customary international law, defined earlier,¹¹³ which appears to merge Vattel’s voluntary and customary law categories. Therefore, Vattel’s concept of voluntary law is better understood to be positivist law rather than natural-law-based general law.¹¹⁴

¹⁰⁷ *Id.* (emphasis added).

¹⁰⁸ [Preliminaries] VATTEL, *supra* note 83, §§ 7, 21, 24, 25, 26.

¹⁰⁹ *Id.* § 28.

¹¹⁰ *Id.* § 27.

¹¹¹ *Id.* §§ 6–7.

¹¹² Chitty’s commentary to Vattel’s treatise defines “the *universal voluntary law*” as “those rules which are considered to have become law by the *uniform practice* of nations *in general*, and by the manifest utility of the rules themselves.” *Id.* § 21 n.7.

¹¹³ See *supra* note 55 and accompanying text.

¹¹⁴ As Henry Wheaton later noted, the confusion surrounding Vattel’s use of the term “voluntary law” could have been avoided by equating it to “usage between nations.” WHEATON, *supra* note 72, at 189.

If there is room for the term “general” in Vattel’s account of the law of nations, it lies in his notion of voluntary law as a *universal* body of law. In this context, however, the term “general” is used in contrast to discreet rules adopted in agreements or customs between or among specific nations, or as Vattel put it with regard to treaties, “the conventional law of nations is not a *universal* but a *particular* law.”¹¹⁵ Thus, for Vattel, the “general” law of nations is not a natural-law based body of obligatory rules. It is generally applicable law defined by the practice of states.

Vattel and Blackstone also concurred in the idea that the law of nations was binding not only between and among nation-states in their sovereign capacities, but also upon their respective nationals. As noted earlier, Blackstone stated that the law of nations regulated “mutual intercourse” of independent states¹¹⁶ and “the individuals belonging to each.”¹¹⁷ Vattel also understood the law of nations to be binding upon the whole of a nation, meaning not only its government, but also its national and subnational institutions and citizens.¹¹⁸ In other words, under the law of nations, individual citizens were obliged to respect—and could potentially violate—the rights of a foreign state derivatively possessed by its citizens or representatives.¹¹⁹ This was clearly reflected in two “offenses” against the law of nations articulated by Blackstone: the violation of the rights of ambassadors and the violation of safe conduct.¹²⁰ Such violations occurred between individuals but created national responsibility for the law of nations violation.¹²¹

This discussion raises an issue regarding the concept of “positive” law or legal “positivism.” John Austin’s widely accepted definition of legal positivism defines law as a superior sovereign command or declaration.¹²² The absence of a supranational sovereign in the international legal system might thereby require assigning customary and conventional international law to the category of “general” rather

¹¹⁵ [Preliminaries] VATTEL, *supra* note 83, § 24 (emphasis added).

¹¹⁶ 1 BLACKSTONE, *supra* note 75, at *43.

¹¹⁷ 4 BLACKSTONE, *supra* note 92, at *66.

¹¹⁸ [Preliminaries] VATTEL, *supra* note 83, § 3 (explaining law of nations describes “in what manner *States*, as such, *ought* to regulate all their actions . . . [and] the *Obligations* of a people, as well . . . towards other nations”).

¹¹⁹ Bellia & Clark, *supra* note 85, at 456 (“[T]he First Congress enacted the [Alien Tort Statute] as part of a broader framework to redress offenses against other nations by US citizens.”); Lee, *supra* note 85, at 836–37 (listing three categories of individual violations of the law of nations within the scope of the Alien Tort Statute).

¹²⁰ 4 BLACKSTONE, *supra* note 92, at *68.

¹²¹ See Bellia & Clark, *supra* note 85, at 472–77; Lee, *supra* note 85, at 836–37 (discussing injuries to aliens considered a violation of express or implied safe conducts).

¹²² See generally JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (London, J. Murray 1832).

than positive law.¹²³ Vattel's approach, like that of Grotius, adopts the view that sovereigns create or "enact" law by mutual consent or agreement.¹²⁴ It is in this sense that their view of traditional international law is "positivist" if not "positive."

To the extent that international law creates legal obligations not only between nation-states but also binding upon their respective citizens, it satisfies Austin's concept of positivism, in that a sovereign creates rules binding upon those under its authority. Nevertheless, international law falls short of Austin's definition of legal positivism in its state-to-state application. Although further discussion of this point is beyond the scope of this Article, I nevertheless adopt Vattel's, Grotius's, and to some uncertain extent, even Blackstone's, view of the law of nations as enacted, positivist law exogenous to national legal systems. I next argue that the Constitution's Framers, the First Congress, and the Supreme Court viewed it similarly, albeit somewhat inconsistently so.¹²⁵

B. *The Law of Nations in the Early United States*

Much evidence indicates that the Constitution's Framers, the First Congress, and, at least by the very early nineteenth century, the Supreme Court of the United States, all understood the law of nations precisely as did Vattel and Grotius without Blackstone's "adoption" gloss. This Section examines the Constitution's text, the First Judiciary Act, and nineteenth-century decisions of the Supreme Court to demonstrate that there is ample evidence that the law of nations was understood to be a body of exogenous, positivist law rather than federal common law created by adopting a "general" law of nations. It then briefly shows that American commentators, including Wheaton, James Kent, Joseph Story, and others, shared this understanding of the law of nations and its relationship to the Constitution and laws of the United

¹²³ *Id.* at 208 ("[I]t inevitably follows, that the law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author."); see also Monaghan, *supra* note 71, at 777 ("[I]n 1788, no one would have used the word 'made' in reference to the law of nations or the law merchant. These bodies of law were discovered, not enacted." (footnote omitted)).

¹²⁴ *But see* AUSTIN, *supra* note 122, at 208 ("[T]he law obtaining between nations is law (improperly so called) set by general opinion.").

¹²⁵ *But see* Monaghan, *supra* note 71, at 774 (noting that the law merchant and law of nations "were conceived of as 'declaratory' in nature, part of a universal law, which in turn was rooted in the natural law"). H.L.A. Hart would later attempt to square international law with positivism by eliminating a Hobbesian sovereign as necessary to the creation of a primary rule of law. See generally Anthony A. D'Amato, Note, *The Neo-Positivist Concept of International Law*, 59 AM. J. INT'L L. 321 (1965) (explaining and critiquing Hart's approach).

States. Finally, it posits a constitutional basis for courts to apply the customary inter-nation-state law of nations as a rule of decision.

1. Inferences from the Constitution's Text and the First Judiciary Act

Many inferences about the relationship of customary international law to the U.S. legal system can be drawn from aspects of the Constitution's text coupled with the First Judiciary Act. For example, the Framers' decision to vest Congress with the power "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations"¹²⁶ indicates that the Framers did not believe federal law would generally or automatically incorporate the customary law of nations. Otherwise, such offenses would not require legislation to enable federal courts to punish them, as Blackstone indicated was the case regarding such offenses in England.¹²⁷

Indeed, contrary to some claims, commentary from the constitutional convention suggests that the Offenses Clause was not necessary to clarify the content of the law of nations, but rather to identify and categorize the nature of violations that would be punishable under U.S. law.¹²⁸ For example, Gouverneur Morris asserted, "The word *define* is proper *when applied to offences* in this case; the law of (nations) being often too vague and deficient to be a rule."¹²⁹ The main objection to the Offenses Clause was that it would be arrogant for the United States to assume the power to "define" the law of nations.¹³⁰ The obvious sentiment was that as law created by the consent of some or many nations, the United States had no independent authority to define the customary law of nations.

Later commentary clarifies that the gist Gouverneur Morris's statement was the need to clarify how offenses would be classified and punished. In *The Federalist*, James Madison observed the following with regard to the Offenses Clause:

¹²⁶ U.S. CONST. art. I, § 8, cl. 10.

¹²⁷ 4 BLACKSTONE, *supra* note 92, at *67–68.

¹²⁸ *But see, e.g., Al-Bihani v. Obama*, 619 F.3d 1, 13–14 (D.C. Cir. 2010) (claiming that the Offenses Clause needed to refine the law of nations).

¹²⁹ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 615 (Max Farrand ed., 1911) [hereinafter FARRAND] (second emphasis added) (statement of Gouverneur Morris). Indeed, the main objection to the clause was that it would be extremely arrogant for the United States to assume the power to *define* the law of nations.

¹³⁰ *See id.* ("To pretend to *define* the law of nations which depended on the authority of all the Civilized Nations of the World, would have a look of arrogance[] that would make us ridiculous." (statement of James Wilson)).

A definition of felonies on the high seas is evidently requisite. Felony is a term of loose signification, even in the common law of England; and of various import in the statute law of that kingdom. But neither the common nor the statute law of that, or of any other nation, ought to be a standard for the proceedings of this, unless previously made its own by legislative adoption.¹³¹

Supreme Court Justice Joseph Story similarly noted, “whatever may be the true import of the word felony at the common law, with reference to municipal offences, in relation to offences on the high seas, its meaning is necessarily somewhat indeterminate.”¹³² Story said the same was true of other offenses against the law of nations.¹³³ In other words, because the law of nations did not (indeed, could not) classify the nature of various violations in a nation’s municipal law as “felony” or “misdemeanor,” the Offenses Clause was needed so that Congress could do so.

Take piracy as an example. Story stated “piracy is perfectly well known and understood in the law of nations” and that “[t]he common law, too, recognises, and punishes piracy as an offence, not against its own municipal code, but as an offence against the universal law of nations.”¹³⁴ He then noted that piracy “was no felony, whereof the common law took any knowledge, &c.; but was only punishable by the civil law.”¹³⁵ Thus, the classification of, and appropriate penal sanction for, piracy within the U.S. legal system would require federal legislation.

Congress obliged in the Crimes Act of 1790,¹³⁶ punishing a variety of law-of-nations violations, and again in 1819.¹³⁷ With regard to piracy, the latter provided

[t]hat if any person or persons whatsoever, shall, on the high seas, commit the crime of piracy, as defined by the law of nations, and such offender or offenders, shall afterwards be brought into or found in the United States, every such offender or offenders shall, upon conviction thereof . . . be punished with death.¹³⁸

Note that Congress did not find it necessary to clarify what conduct constitutes the crime of piracy. It merely prescribed who may be

¹³¹ THE FEDERALIST NO. 42 (James Madison).

¹³² 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1157 (1833).

¹³³ *Id.* § 1158.

¹³⁴ *Id.* § 1154.

¹³⁵ *Id.* § 1157. When debating the need for the Offenses Clause, Madison also noted “felony at common law is vague” and did not think that felonies should be defined by English common law. 2 FARRAND, *supra* note 129, at 316 (statement of James Madison).

¹³⁶ Crimes Act of 1790, ch. 9, 1 Stat. 112, 114.

¹³⁷ Act of Mar. 3, 1819, ch. 77, § 5, 3 Stat. 510, 513–14.

¹³⁸ *Id.*

punished by, and the punishment to be adjudged in, a court of the United States. The adoption of such federal law to prescribe punishment for even well-established offenses against the law of nations pursuant to the Offenses Clause suggests that neither the Framers nor the First Congress understood the law of nations to be federal common law.

Additionally, Congress's use of the Offenses Clause to allow the judiciary to provide a tort remedy for all law-of-nations violations provides additional evidence that the Offenses Clause was not necessary to refine the substance of the law of nations.¹³⁹ The First Congress vested jurisdiction in the federal courts, "concurrent" with state courts, over "all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States."¹⁴⁰ Now commonly known as the Alien Tort Statute or Alien Tort Claims Act,¹⁴¹ this general grant of jurisdiction strongly suggests that the law of nations was sufficiently determinate for general judicial implementation.¹⁴² Using the Offenses Clause in this way also supports viewing the law of nations as an exogenous but inherently applicable and enforceable body of law, one external to the Constitution and laws of the United States, but binding upon the nation and its citizens. By recognizing that concurrent jurisdiction existed in state courts, the First Congress also revealed its understanding that the law of nations is inherently applicable within the states and their legal systems as well as in federal courts. This does not mean, however, that Congress viewed the law of nations as supreme *federal law*.

The text of Article III of the Constitution indicates that the Constitution's Framers also viewed the law of nations as exogenous to, rather than as part of, federal law. It first vested the Supreme Court and other federal courts created by Congress with jurisdiction over cases and

¹³⁹ See Beth Stephens, *Federalism and Foreign Affairs: Congress's Power to "Define and Punish . . . Offenses Against the Law of Nations"*, 42 WM. & MARY L. REV. 447, 504 (2000) ("Just as the term 'offense' encompasses civil as well as criminal wrongs, the term 'punish' includes civil as well as criminal consequences."); see also J. Andrew Kent, *Congress's Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 TEX. L. REV. 843, 852-53 (2007) (arguing that the Law of Nations Clause allows Congress broad discretion to punish individuals, foreign states, or even one of the several states for violating customary international law).

¹⁴⁰ Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (codified as amended at 28 U.S.C. § 1350 (2012)).

¹⁴¹ Now codified at 28 U.S.C. § 1350.

¹⁴² Although the Supreme Court would later narrow the nature of law-of-nations violations sufficiently determinate to justify a judicial remedy, it did so with reference to law-of-nations violations that were well settled at the time of the Constitution's framing and the First Judiciary Act. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004) ("[W]e are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.").

controversies “arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.”¹⁴³ It then vested the federal courts with jurisdiction over parties and subject matter likely to implicate the inter-nation-state law of nations, including: “all Cases affecting Ambassadors, other public Ministers and Consuls”; cases “between a State, or the Citizens thereof, and foreign States, Citizens or Subjects”; and “all Cases of admiralty and maritime Jurisdiction.”¹⁴⁴ These specific grants of jurisdiction would have been redundant to “arising under” jurisdiction and largely unnecessary if the “Laws of the United States” necessarily included the law of nations as federal common law (except in the rare cases where *only* state law would be relevant). In order to give meaning to the entire text of Article III, the law of nations must be viewed as distinct from, rather than part of, the laws of the United States.

And finally, another aspect of the First Judiciary Act strongly indicates that the law of nations was not understood to be federal common law. The Act also provided: “the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.”¹⁴⁵ If the law of nations were federal common law, this section of the Act would have been quite problematic. It would arguably prevent federal courts from applying the law of nations in a common law trial because neither the law of nations nor federal common law is listed as a permissible rule of decision. Such a result would have been contrary to the clear intent of the Alien Tort Statute, discussed earlier, and particularly absurd given that the Constitution expressly granted the federal courts power to resolve cases most likely to implicate the law of nations.

As shown in the next Section, although the Supreme Court squarely rejected the notion that the customary law of nations had been adopted as federal common law, it nonetheless used the customary law of nations as a rule of decision in appropriate cases. This approach

¹⁴³ U.S. CONST. art. III, § 2, cl. 1.

¹⁴⁴ *Id.*; see also THE FEDERALIST NO. 80 (Alexander Hamilton) (“As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned.”); Bellia & Clark, *supra* note 85, at 449 (“Article III authorized federal court jurisdiction over a variety of civil cases implicating the law of nations and US foreign relations, including admiralty disputes, cases affecting ambassadors, and controversies between foreign citizens and citizens of the United States.”); Lee, *supra* note 85, at 835–36 (explaining constitutional grants of jurisdiction necessary to adjudicate cases arising under the customary law of nations).

¹⁴⁵ Judiciary Act of 1789 § 34.

further demonstrates its status as exogenous law applicable to the United States and in its courts unless superseded.

2. The Supreme Court's View of the Law of Nations

As early as 1793, the Supreme Court observed that even prior to ratifying the Constitution, “the United States had, by taking a place among the nations of the earth, become amenable to the laws of nations.”¹⁴⁶ In 1795, the Supreme Court stated that questions of prize in U.S. courts were “guided by the law of Nations.”¹⁴⁷ This phrasing indicates that the Court viewed the law of nations as exogenous, a preexisting law to which the new United States had become subject. Views regarding its precise domestic status varied. While it may be true that “American lawyers and judges repeated [Blackstone’s adoption] principle constantly, often in language nearly identical to Blackstone’s,”¹⁴⁸ the emergence of a positivist and entirely exogenous view of the law of nations appeared in Supreme Court decisions at the very dawn of the nineteenth century.

For example, in 1801, with regard to the law of war branch of the law of nations, Chief Justice John Marshall opined “that [C]ongress may authorize general hostilities, in which case the general laws of war apply to our situation; or partial hostilities, in which case the laws of war, so far as they actually apply to our situation, must be noticed.”¹⁴⁹ It is clear from this that Marshall thought the Court was obliged to observe and apply relevant aspects of the law of nations. With respect to that law, however, his words “must be noticed” indicate that he did not view it as domestic law. This choice of terms with reference to the law of nations, not unique to this case,¹⁵⁰ indicates that the law of nations was not observed or applied as an adopted, general law. Rather, it signals that the law of nations was understood to be an exogenous body of law that may affect certain aspects of a case before the Court. The use of the term

¹⁴⁶ See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793).

¹⁴⁷ *Penhallow v. Doane’s Adm’rs*, 3 U.S. (3 Dall.) 54, 88 (1795); see also *id.* at 91 (Iredell, J., dissenting) (stating that all prize causes “are to be determined by the law of nations”).

¹⁴⁸ William S. Dodge, *Customary International Law, Congress and the Courts: Origins of the Later-in-Time Rule*, in *MAKING TRANSNATIONAL LAW WORK IN THE GLOBAL ECONOMY: ESSAYS IN HONOUR OF DETLEV VAGTS* 531, 536 (Pieter H. F. Bekker, Rudolf Dolzer & Michael Waibel eds., 2010).

¹⁴⁹ *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28 (1801).

¹⁵⁰ *The Paquete Habana*, 175 U.S. 677, 708 (1900) (“This rule of international law 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 in relation to the matter.”); *The Scotia*, 81 U.S. (14 Wall.) 170, 188 (1871) (“[B]y common consent of mankind, these rules have been acquiesced in as of general obligation. Of that fact we think we may take judicial notice.”).

“general” also clearly meant only to refer to the full, universal body of the laws of war rather than to suggest that they were “general law.” Hamilton had earlier shown a similar understanding of the “general law of nations” in *The Federalist*.¹⁵¹

In *New York Life Insurance v. Hendren*, the Supreme Court clearly stated that international laws of war are not inherently federal law.¹⁵² It found, “the general laws of war, as recognized by the law of nations applicable to this case, were [not] in any respect *modified or suspended* by the constitution, laws, treaties, or executive proclamations, of the United States.”¹⁵³ For this reason, the Court held that the case involved no issue of federal law, and that the Court therefore lacked jurisdiction to review a state court’s judgment regarding the effect of the law of war on an insurance policy.¹⁵⁴ The Court’s conclusion in this case is incomprehensible without recognizing that it did not view the law of nations as adopted federal common law. And again, the Court clearly used the term “general” to denote “universal” rather than “particular” law, not as a reference to the law of war as natural-law-based “general law.”¹⁵⁵

Similarly, the Court considered admiralty law to be independent from, rather than part of, domestic law in both the U.S. and in England.¹⁵⁶ In 1828, Chief Justice Marshall clarified that “[a] case in admiralty does not, in fact, arise under the Constitution or laws of the United States,”¹⁵⁷ but that, nevertheless, “the law, admiralty and maritime, as it has existed for ages, is applied by our Courts to the cases as they arise.”¹⁵⁸ This view of maritime law was later reiterated in *The Scotia*, in which the Court explained:

It must be conceded, however, that the rights and merits of a case may be governed by a *different law* from that which controls a court in which a remedy may be sought. The question still remains, what was the law of the place where the collision occurred, and at the time when it occurred. Conceding that it was *not* the law of the United States, nor that of Great Britain, nor the concurrent regulations of the two governments, but that it was the law of the sea Undoubtedly, no single nation can change the law of the sea. That law is of universal obligation, and no statute of one or two nations can create

¹⁵¹ See THE FEDERALIST NO. 80 (Alexander Hamilton) (distinguishing “general law of nations” from “treaties”).

¹⁵² *N.Y. Life Ins. Co. v. Hendren*, 92 U.S. 286 (1875).

¹⁵³ *Id.* at 286–87 (emphasis added).

¹⁵⁴ *Id.*

¹⁵⁵ *But see* Bradley, *supra* note 30, at 812 (“Prior to *Erie*, customary international law . . . had the status of general common law.”).

¹⁵⁶ *Bellia & Clark*, *supra* note 33, at 11.

¹⁵⁷ *Am. Ins. Co. v. 356 Bales of Cotton (Canter)*, 26 U.S. (1 Pet.) 511, 545 (1828).

¹⁵⁸ *Id.* at 546.

obligations for the world. Like all the laws of nations, it rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct. Whatever may have been its origin, whether in the usages of navigation or in the ordinances of maritime states, or in both, it has become the law of the sea only by the concurrent sanction of . . . nations.¹⁵⁹

These statements quite clearly articulate a view of the law of nations as positivist law established by “common consent” and external to the U.S. legal system but applicable in its courts. The Court also clearly stated that this applies, not as domestic law, but as the law governing aspects of a case properly before the Court. Importantly, the Court also indicated that this law is applied in the absence of a relevant treaty, in its words, “concurrent regulations of the two governments,”¹⁶⁰ without suggesting that any such bilateral treaty would necessarily become federal law. Thus, had a treaty governed the matter before the Court, the Court likely would have applied any relevant rules established by the treaty rather than general international rules applicable to all nations.

The Supreme Court’s prize law jurisprudence further confirms the view that customary international law was entirely exogenous to, rather than part of, U.S. law. Prize law was considered a species of admiralty law; the Court repeatedly affirmed that a general grant of admiralty jurisdiction was sufficient to permit federal courts to exercise jurisdiction in prize cases.¹⁶¹ Prize law coupled war powers and property rights with access to judicial review. It therefore provides a unique and important lens through which to examine the relationship of the customary law of nations to U.S. law.

Under the laws of war of the eighteenth and nineteenth centuries, a general state of war automatically terminated commercial intercourse between hostile nations¹⁶² and permitted a nation to wage war against the commercial interests of an enemy state and its nationals.¹⁶³ The practice of seizing commercial ships and their cargo as prize of war was

¹⁵⁹ *The Scotia*, 81 U.S. (14 Wall.) 170, 187 (1871) (emphasis added).

¹⁶⁰ *Id.*

¹⁶¹ *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546, 557–58 (1818) (“The jurisdiction of the district court to entertain this suit, by virtue of its general admiralty and maritime jurisdiction, and independent of the special provisions of the prize act of the 26th of June 1812 has been so repeatedly decided by this court, that it cannot be permitted again to be judicially brought into doubt.” (citation omitted)).

¹⁶² FRANCIS H. UPTON, *THE LAW OF NATIONS AFFECTING COMMERCE DURING WAR: WITH A REVIEW OF THE JURISDICTION, PRACTICE AND PROCEEDINGS OF PRIZE COURTS* 16 (N.Y., John S. Voorhies 1863); 2 WILLIAM WINTHROP, *MILITARY LAW* 4–5 (Washington, D.C., W.H. Morrison 1886) (collecting sources).

¹⁶³ UPTON, *supra* note 162, at 37.

the maritime manifestation of this state of affairs. Suspected enemy ships were captured and brought into ports for judicial adjudication as to vessel and cargo.¹⁶⁴ Those belonging or imputed to the enemy were condemned, and the proceeds vested in the capturing sovereign, typically minus remuneration for the capturing vessel and crew.¹⁶⁵ The vast expanses of the high seas provided ample opportunity for individuals to attempt to avoid or exploit constraints on trade imposed by war. Some vessel owners engaged in trade through third-party nationals whose countries were neutral as to a given conflict.¹⁶⁶ Other ship captains engaged in acts of war as privateers with national commissions, and others in acts of piracy.¹⁶⁷ Courts exercising prize jurisdiction determined the amenability of various ships and their cargo to capture and condemnation.¹⁶⁸

The Supreme Court held that prize proceedings were specialized in both form and substance. According to Justice Story,

[n]o proceedings can be more unlike than those in the Courts of common law and in the admiralty. In prize causes, in an especial manner, the allegations, the proofs and the proceedings are, in general, modelled [sic] upon the civil law, with such additions and alterations as the practice of nations and the rights of belligerents and neutrals unavoidably impose.¹⁶⁹

Two years later, the Court added an appendix to a cursory opinion, which began:

I[n] the Appendix to the first volume of these Reports . . . a summary sketch was attempted of the practice in prize causes in some of its most important particulars. It has been suggested that a more enlarged view of the principles and practice of prize courts might be useful, and in case of a future war, save much embarrassment to captors and claimants. With this view the following additional sketch is submitted to the learned reader.¹⁷⁰

¹⁶⁴ See, e.g., DONALD A. PETRIE, *THE PRIZE GAME: LAWFUL LOOTING ON THE HIGH SEAS IN THE DAYS OF FIGHTING SAIL* 1–2 (1999). The need for careful parsing of ship and cargo is demonstrated by *The Nereide*, 13 U.S. (9 Cranch) 388 (1815), in which the Court exempted the goods of a Spanish national (neutral) on an enemy (English) vessel from condemnation.

¹⁶⁵ PETRIE, *supra* note 164, at 5–6. Note that the sovereign’s share was often waived for privateers (privately owned vessels and crews commissioned to supplement national navies in times of war) “in order to induce private parties to make the investments, and take the risks necessary to aid the national war effort against a maritime enemy.” *Id.* at 3.

¹⁶⁶ *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) (involving perhaps one of the most interesting examples of this type of trade); see *infra* Section IV.A.

¹⁶⁷ Cf. PETRIE, *supra* note 164, at 69.

¹⁶⁸ *Id.* at 9.

¹⁶⁹ *The Schooner Adeline*, 13 U.S. (9 Cranch) 244, 284 (1815).

¹⁷⁰ *The London Packet*, 15 U.S. (2 Wheat.) 371, app. at 1 (1817).

The Court then provided a heavily referenced treatise of customary international rules governing prize practice, including not only substantive law, but also evidentiary burdens and permissible methods of proof.¹⁷¹ Thus, not only was substantive prize law inherently applicable in U.S. courts, so too were its rules of evidence and procedure. This is undoubtedly because the Rules Enabling Act,¹⁷² which allows the federal judiciary to promulgate rules of procedure and evidence, would not arrive for over a century after this decision. Prior to the Rules Enabling Act, federal courts followed the “conformity principle” in actions at law, conforming their rules to those of the jurisdiction in which they sat, typically state courts.¹⁷³ Thus, the Court’s understanding that not only substantive but also *procedural* prize law applied in federal courts strongly confirms the view that the Court understood the customary law of nations to be an entirely exogenous but obligatory body and system of law.¹⁷⁴ Otherwise, it would probably have recommended following international law as federal common law while observing state rules of procedure and evidence.

The Supreme Court’s positivist view of the substantive law of nations sometimes waived, even in the Marshall Court. For example, in the 1814 case of *Brown v. United States*, Chief Justice Marshall found that pervasive contemporary state treaty practice had modified a general law-of-nations rule allowing the immediate seizure of enemy commercial property upon the outbreak of war.¹⁷⁵ This is clearly a positivist approach, in that in Marshall’s view, pervasive state practice established a new customary rule. The next year, Marshall described the “unwritten” law of nations less positivist terms:

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. This law is in part unwritten, and in part conventional. To ascertain that which is unwritten, we resort to the great principles of reason and justice . . .¹⁷⁶

¹⁷¹ *Id.*

¹⁷² Pub. L. No. 73-415, 48 Stat. 1064 (1934).

¹⁷³ Charles E. Clark, *The Influence of Federal Procedural Reform*, 13 LAW & CONTEMP. PROBS. 144, 145-46 (1948).

¹⁷⁴ See WHEATON, *supra* note 72, at 108 (“The rule, by which the prize courts . . . are bound to proceed in adjudicating such cases, is not the municipal law of their own country, but the general law of nations . . . by which their own country is bound to other states.”).

¹⁷⁵ See *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814); see also discussion *infra* Section IV.C.

¹⁷⁶ *Thirty Hogsheads of Sugar v. Boyle*, 13 U.S. (9 Cranch) 191, 198 (1815).

Some argue this statement references natural law and is proof that the law of nations was understood to be general law.¹⁷⁷ In the next passage of the same opinion, however, Marshall recognized that other states' view of the law of nations were relevant to fixing its content.

[T]hese principles will be differently understood by different nations under different circumstances, we consider them as being, in some degree, fixed and rendered stable by a series of judicial decisions. The decisions of the Courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with respect. The decisions of the Courts of every country show how the law of nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this.¹⁷⁸

In other words, natural law principles, including reason and justice, informed the content of the law of nations. But states ultimately determined its substance, whether through diplomatic (in treaties) or judicial means, or through other state practice. Just as Jeremy Bentham critiqued Blackstone, we must not confuse that upon which the customary law of nations *depends*, natural law, for that which the customary law of nations *is*, especially today, positivist law.¹⁷⁹ The Marshall Court appears to have understood it to be generally applicable law established by universal consent or convergence in international opinion rather than a theoretical “general law” established by nature and discovered solely through reason.

To the extent that the Court sometimes relied upon an Anglo-American common law approach to interstitially fill gaps in “settled” international law, this should not undermine the positivist approach that appeared as early as 1814 in *Brown*, was reiterated in 1871 in *The Scotia*,¹⁸⁰ and became firmly entrenched by 1900 in *Paquete Habana*. This more contemporary, positivist concept of customary international law certainly affects how U.S. courts should now determine the substance of international norms establishing a rule of decision. However, this Anglo-American common law approach to determining the substance of customary international law does not change the fundamental understanding that U.S. courts observed and applied it as an exogenous but obligatory body of law in appropriate cases.

¹⁷⁷ Bradley & Goldsmith, *supra* note 27, at 822–23.

¹⁷⁸ *Thirty Hogsheads of Sugar*, 13 U.S. (9 Cranch) at 198.

¹⁷⁹ See Janis, *supra* note 37, at 406 (citing JEREMY BENTHAM, *A Comment on the Commentaries*, in *A COMMENT ON THE COMMENTARIES AND A FRAGMENT ON GOVERNMENT* 36–37 (J.H. Burns & H.L.A. Hart eds., 1977)).

¹⁸⁰ *The Scotia*, 81 U.S. (14 Wall.) 170 (1871); see also *supra* text accompanying note 159.

3. Early American Legal Commentary

Early American legal commentary also adopted an entirely exogenous view of law of nations. James Kent, author of “the first great American law treatise,”¹⁸¹ clarified that the law of nations encompassed “the external rights and duties of nations.”¹⁸² Henry Wheaton observed that there are two bodies of public law: “internal” (*droit public interne*) and “external” (*droit public externe*).¹⁸³ He equated the former to constitutional law¹⁸⁴ and the latter to international law.¹⁸⁵ And former Judge Advocate General of the U.S. Army, George B. Davis, also observed that “national” or “municipal” law governed “the relations of citizens to the state and to each other . . . while those which regulate the intercourse of sovereign states with each other are known as ‘international’ laws.”¹⁸⁶ As Professor Arthur Mark Weisburd later explained, and is readily evident in the writings of Vattel and Grotius, and in cases such as *The Scotia*, “human agency creates law,” and courts must look “to the appropriate [human] agency to determine a particular law’s content.”¹⁸⁷ Weisburd’s statement would have been more complete and precise if he had appended “and source.” The government of a sovereign nation-state is the “human agency” of its people that promulgates internal, or municipal, law. Human agency in the form of express or implied consent by two or more sovereign nation-states creates external, international law. Such law is not properly equated to “general” law in the *jus gentium* or Anglo-American common law sense of the term.

C. *Why the Law of Nations as a Nonfederal Rule of Decision?*

Neither the law of nations generally nor customary international law are specifically addressed in the Supremacy Clause or Rules of Decision Act. How, then, does customary international law provide a rule of decision without incorporation through the Offenses Clause or the exercise of another power of Congress? Why did Chief Justice

¹⁸¹ JANIS, *supra* note 84, at 50.

¹⁸² 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 21 (N.Y., O. Halsted 1826).

¹⁸³ 1 HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 35–36 (William Beach Lawrence ed., 2d ed. 1863).

¹⁸⁴ *Id.* at 35.

¹⁸⁵ *Id.* at 36.

¹⁸⁶ GEORGE B. DAVIS, THE ELEMENTS OF INTERNATIONAL LAW WITH AN ACCOUNT OF ITS ORIGIN, SOURCES AND HISTORICAL DEVELOPMENT 1 (1900).

¹⁸⁷ A.M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT’L L. 1, 51 (1995).

Marshall say the international laws of war “*must* be noticed,”¹⁸⁸ and that admiralty law is unquestionably applied in appropriate cases?¹⁸⁹ Why did Justice Story believe that both substantive and procedural prize law applied in federal courts?

The answers to these questions derive from an understanding of the customary law of nations as exogenous, obligatory, and positivist law rather than general law adopted as common law. Customary international law is “part of our law” not because it is federal law, but because the United States was a member of what was then understood to be the community of “civilized nations” to which the law of nations applied.¹⁹⁰ A proper exercise of “[t]he judicial Power of the United States”¹⁹¹ therefore requires courts and judges to observe the customary, state-to-state law of nations, like other sources of law, when applicable.¹⁹² To use the words of the Court, “a jurist must search . . . in those principles of action which are sanctioned by the usages, the national acts, and the general assent, of that portion of the world of which he considers himself as a part.”¹⁹³ Or as the Court later stated, “[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.”¹⁹⁴ Indeed, because customary international law is positivist law created at least in part by the actions of elected United States government officials, it would seem particularly inappropriate for a U.S. court to refuse to consider or apply it when relevant.

There is an even more fundamental reason that customary international law should not be considered federal common law: neither the Constitution and laws of the United States, nor the laws of the several states, necessarily apply to every aspect of every case brought before a U.S. court. This is particularly true when the United States

¹⁸⁸ *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28 (1801); *see supra* text accompanying note 149.

¹⁸⁹ *See* *The London Packet*, 15 U.S. (2 Wheat.) 371 app. at 1 (1817); *supra* note 170 and accompanying text.

¹⁹⁰ *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“[W]here there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of *civilized nations* . . .” (emphasis added)).

¹⁹¹ U.S. CONST. art. III, § 1.

¹⁹² RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111(1), (3) (AM. LAW INST. 1987) (“International law . . . [is] law of the United States and supreme over the law of the several States . . . [and] [c]ourts in the United States are bound to give effect to international law.”). With due respect to the esteemed authors, this conflates the nature, source, status, and effect of international law. Treaties are made supreme law in the United States by the Supremacy Clause; customary international law is obligatory by its nature, but may or may not create a federal question in the form of foreign affairs federalism, *see infra* notes 382–84 and accompanying text, in its application to the facts of a given case.

¹⁹³ *The Antelope*, 23 U.S. (10 Wheat.) 66, 121 (1825).

¹⁹⁴ *Paquete Habana*, 175 U.S. at 700.

exercises external sovereign powers, such as the war powers, and particularly when U.S. courts exercise jurisdiction over cases arising outside of the United States. As Blackstone said regarding cases involving prize, shipwreck, and others, in those cases “there is no other rule of decision but [the law of nations].”¹⁹⁵ This fundamental limitation on the extraterritorial competence of U.S. municipal law, whether common law or statute, explains why *Erie* does not necessarily affect the resort to international law as a rule of decision in cases involving the exercise of external sovereign powers.

III. CLARIFYING THE NATURE AND SOURCE OF FEDERAL RULES OF DECISION

Because the revisionist position claims *Erie* generally precludes the resort to customary international law as a rule of decision without express or fairly implied incorporation by the federal elected branches or state law, it is important to closely examine the origins of that decision. They began in 1789 when, as earlier discussed, the First Judiciary Act provided, “the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law . . . in cases where they apply.”¹⁹⁶ This is now known as the Rules of Decision Act.¹⁹⁷

Until the Court’s 1938 decision in *Erie*, federal courts followed the doctrine of *Swift v. Tyson*.¹⁹⁸ In common law cases involving parties with diverse U.S. state citizenship, “the laws of the several states” included only “the rules and enactments promulgated by the legislative authority thereof, or long-established local customs having the force of laws.”¹⁹⁹ Regarding questions of “general law,” the *Swift* court held that federal courts were not bound by state court decisions “where the state tribunals are called upon . . . to ascertain, upon general reasoning and legal analogies . . . what is the just rule . . . to govern the case.”²⁰⁰ This Part analyzes precisely how and why the *Erie* Court overruled *Swift*, and why the *Erie* decision does not affect the Court’s use of customary international law as a rule of decision in cases involving the exercise of external sovereign powers by the United States. It also distinguishes

¹⁹⁵ 4 BLACKSTONE, *supra* note 92, at *67.

¹⁹⁶ Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 (codified as amended at 28 U.S.C. § 1652 (2012)).

¹⁹⁷ See *supra* note 30 and accompanying text.

¹⁹⁸ 41 U.S. (16 Pet.) 1 (1842), *overruled by* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

¹⁹⁹ *Id.* at 18.

²⁰⁰ *Id.* at 19.

such cases from those in which the Court has clearly created constitutionally based federal common law by observing fundamental international legal principles and the Constitution's separation of powers.

A. *Erie's Domestic, Common Law Logic*

Erie involved a suit brought by a Pennsylvania resident for injuries he suffered while traveling a footpath along a railroad right of way in that state.²⁰¹ He sued in a federal court in New York because the railroad was incorporated there, invoking diversity of state citizenship jurisdiction.²⁰² The trial court refused to consider Pennsylvania common law, finding the issue to be one of general law reserved to its independent judgment by *Swift*; the plaintiff won a substantial judgment.²⁰³ On appeal, Erie Railroad claimed the federal trial court should have applied Pennsylvania law in accordance with the clear language of the Rules of Decision Act.²⁰⁴

The Supreme Court agreed. It found that the *Swift* doctrine had been applied to a broad range of local cases, including “questions of purely commercial law . . . the obligations under contracts entered into and to be performed within the state . . . the liability for torts committed within the State upon persons resident or property located there, . . . and the right to exemplary or punitive damages.”²⁰⁵ The Court also noted federal courts had disregarded “state decisions construing local deeds, mineral conveyances, and even devises of real estate.”²⁰⁶ Insisting that state law must govern “any case” not involving the Constitution, statutes, or treaties of the United States, the Court declared “[t]here is no federal general common law.”²⁰⁷ Neither Article III courts nor Congress have “power to declare substantive rules of common law *applicable in a state* whether they be local in their nature or ‘general,’ be they commercial law or a part of the law of torts.”²⁰⁸

None of this is objectionable except for the Court's imprecise and overbroad statement, “[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in *any case* is

²⁰¹ *Erie*, 304 U.S. 64.

²⁰² *Id.* at 69.

²⁰³ *Id.* at 70.

²⁰⁴ *Id.* at 71.

²⁰⁵ *Id.* at 75–76.

²⁰⁶ *Id.* at 76 (footnotes omitted).

²⁰⁷ *Id.* at 78.

²⁰⁸ *Id.* (emphasis added).

the law of the state.”²⁰⁹ That statement elides the qualifying language in the First Judiciary Act: “in trials at common law . . . *in cases where they apply*,”²¹⁰ and the context of *Erie*, a diversity of state citizenship case. By adding these qualifications, it becomes clear that neither the Constitution nor the Rules of Decision Act preclude the possibility that other sources of law, whether foreign or international, might govern the rights of parties otherwise properly before a federal court.²¹¹ For example, another diversity of state citizenship case decided shortly after *Erie*, *Klaxon Co. v. Stentor Electric Manufacturing Co.*, held that federal courts must apply the conflict-of-laws rules of the state in which they sit.²¹² This, too, was a decision about the relationship of federal courts hearing diversity cases to state law rather than the relationship of public international to municipal law.

In fact, it would be odd for either federal or state common law to govern the rights of an individual detained outside the United States, or the rights to a ship and its cargo seized on the high seas. As explained earlier, the Anglo-American concept of common law is insular and inherently societal or internal; it is therefore primarily territorial.²¹³ Indeed, *Erie*'s logic strongly reinforces this view. Similarly, the presumption against extraterritorial application of U.S. law recognizes traditional limits on the powers of state sovereignty, providing that “[w]hen a statute gives no clear indication of an extraterritorial application, it has none.”²¹⁴ This reflects the “presumption that United States law governs domestically but does not rule the world.”²¹⁵ This presumption therefore reinforces a necessary distinction not only between domestic and foreign law, but also between municipal and international law. Moreover, nineteenth century American commentators recognized only limited permissible bases for the extraterritorial application of municipal laws.²¹⁶ Thus, to argue that *Erie*

²⁰⁹ *Id.* (emphasis added).

²¹⁰ Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 (codified as amended at 28 U.S.C. § 1652 (2012)) (emphasis added).

²¹¹ See, e.g., *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3, 4–5 (1975) (requiring application of state conflict-of-laws rules in a diversity case, which might—in the context of the case—result in the application of Cambodian substantive tort law).

²¹² *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941) (“We are of opinion that the prohibition declared in *Erie* . . . extends to the field of conflict of laws. . . . Otherwise the accident of *diversity of citizenship* would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side.” (emphasis added)).

²¹³ See 4 BLACKSTONE, *supra* note 92, at *66–68.

²¹⁴ *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010).

²¹⁵ *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007).

²¹⁶ See, e.g., 1 WHEATON, *supra* note 183, at 231 (recognizing territoriality, the punishment of crimes aboard “public and private vessels on the high seas” and aboard “public vessels in foreign ports,” punishment of nationals for municipal crimes wherever committed, and certain

entirely precludes resort to international law as a rule of decision, particularly in cases arising extraterritorially or involving the exercise of external sovereign powers, is to ignore not only the context and reasoning of *Erie* but also long-held understandings of the extraterritorial competence of domestic or municipal law, both common and statutory.

Some suggest that in overruling *Swift* and not just its various outgrowths, the Court rejected the inherent applicability of international law, in the form of the law merchant.²¹⁷ Recall, though, that although Blackstone included the law merchant as part of the law of nations typically followed at English common law, he distinguished it from other areas of law, such as prize and shipwrecks, in which the *only* rule of decision could be the law of nations.²¹⁸ Vattel did not even include the law merchant in his explication of the law of nations. In fact, Vattel asserted that individual nation-states “are obliged to protect commerce . . . by good laws, in which every merchant, whether citizen or foreigner, may find security. In general, it is equally the interest and the duty of every nation to have wise and equitable commercial laws established *in the country*.”²¹⁹ In short, Vattel had already relegated commercial law to the realm of municipal rather than international or “general” law,²²⁰ where it remains today as so-called “private” international law.²²¹

To the extent the law merchant remained relevant to the Supreme Court, it was indeed as general common law rather than an exogenous, positivist law of nations. The Supreme Court referenced the “law-merchant” or “*lex mercatoria*” only sparingly after *Swift*, twice when exercising its general interpretive authority under the *Swift* line of cases.²²² Otherwise, between *Swift* and *Erie*, the Court only twice referred to treatises with “*lex mercatoria*” in the title,²²³ and twice referenced the “law merchant” when interpreting or applying a federal

“offences against the law of nations, by whomsoever and wheresoever committed” as potential bases of extraterritorial jurisdiction).

²¹⁷ See Michael D. Ramsey, *Customary International Law in the Supreme Court, 1901–1945*, in INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE, *supra* note 45, at 225, 243–44 (“*Swift* itself was in a sense an international law case (arising from the *lex mercatoria*) . . .”).

²¹⁸ See *supra* note 96 and accompanying text.

²¹⁹ 1 VATTEL, *supra* note 83, § 109 (emphasis added).

²²⁰ The author was unable to locate a single use of either “*lex mercatoria*” or “law merchant” in Vattel’s treatise.

²²¹ See, e.g., Trimble, *supra* note 27, at 273–74.

²²² *Smith v. Alabama*, 124 U.S. 465, 478 (1888); *Bank of U.S. v. United States*, 43 U.S. (2 How.) 711 (1844).

²²³ *Nat’l Bank of the Republic v. Millard*, 77 U.S. (10 Wall.) 152, 154 n.4 (1869); *United States v. Carr*, 49 U.S. (8 How.) 1, 7 (1850).

statute containing that term.²²⁴ Furthermore, *Hendren* was decided in 1875, during the heyday of the *Swift* doctrine, and yet the Court clearly held that the law-of-war branch of the law of nations was not federal law conferring arising-under appellate jurisdiction.²²⁵ All of this strongly indicates that the Court no longer, if it ever had, viewed the law merchant as part of an exogenous law of nations generally incorporated by federal common law. Indeed, England's courts had also long permitted local deviations from the law merchant.²²⁶

B. *Federal Rules of Decision for External Affairs*

Only two years prior to *Erie*, in *United States v. Curtiss-Wright Export Corp.*, the Supreme Court clearly endorsed the proposition that the constitutional separation-of-powers analysis and selection of rules of decision differ in cases involving matters of external sovereignty.²²⁷ Holding that Congress could delegate its powers to the executive in matters of foreign affairs (at a time when such delegations of legislative power to the executive were not permitted in domestic matters),²²⁸ the Court reasoned, “[t]he broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs.”²²⁹ Putting aside the Court's discussion of the source of the federal government's external sovereign powers, which

²²⁴ *Indep. Sch. Dist. of Ackley v. Hall*, 113 U.S. 135, 138 (1885); *Town of Thompson v. Perrine*, 106 U.S. 589, 592 (1883).

²²⁵ See *supra* note 154 and accompanying text.

²²⁶ *Bellia & Clark*, *supra* note 33, at 15 (“When [English] courts adopted the law merchant (a branch of the law of nations) as part of the common law, the law merchant was subject to local deviations as part of the common law.”).

²²⁷ *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936).

²²⁸ See *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928) (“[I]n carrying out that constitutional division into three branches it is a breach of the national fundamental law if Congress gives up its legislative power and transfers it to the President, or to the judicial branch”); *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892) (“That [C]ongress cannot delegate legislative power to the [P]resident is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the [C]onstitution.”). *But see* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1722 (2002) (“Nondelegation is nothing more than a controversial theory that floated around the margins of nineteenth-century constitutionalism—a theory that wasn't clearly adopted by the Supreme Court until 1892, and even then only in dictum.”). The Court eventually approved of delegation of legislative power to the executive branch so long as Congress provides an “intelligible principle.” *Hampton*, 276 U.S. at 409 (“If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.”).

²²⁹ *Curtiss-Wright*, 299 U.S. at 315–16.

has been heavily debated,²³⁰ the Court clearly signaled that the separation-of-powers analysis and rules of decision differ in matters involving “external sovereignty.”²³¹

To support this proposition, the Court sensibly noted, “neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens” and that “operations of the nation in such territory must be governed by treaties, international understandings and compacts, and the principles of international law.”²³² Thus, the Court clarified that the Constitution and laws of the United States primarily apply to internal U.S. matters, an approach it had also followed in relation to unincorporated territories, or insular possessions.²³³ Treaties and international customs have a different purpose and nature, and therefore regulate the external acts of the government in appropriate cases. As the Court said in *Paquete Habana*, 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.”²³⁴

It is for all of these reasons that the *Paquete Habana* Court held “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.”²³⁵ This statement clarifies potential sources of rules of decision in matters involving an exercise of external sovereignty. Because *Paquete Habana* involved the capture of, and rights to, foreign flagged coastal fishing vessels and cargo seized during an international armed conflict in Cuban coastal waters, the law of nations would regulate the rights to the vessel and cargo, rather than any U.S. federal or state common law. Additionally, because the case involved an aspect of the war with Spain, potentially controlling legislative or executive acts must refer to exercises of the nation’s war powers rather than the federal government’s internal lawmaking powers.²³⁶

²³⁰ For an excellent analysis of *Curtiss-Wright* and whether U.S. foreign affairs powers stem from delegation of those powers by the ratifying states or as an incident of sovereignty in the international system, see RAMSEY, *supra* note 32, at 13–48.

²³¹ *Curtiss-Wright*, 299 U.S. at 318.

²³² *Id.* (citing *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909)).

²³³ *Benner v. Porter*, 50 U.S. (9 How.) 235, 242 (1850) (“[Territories] are not organized under the Constitution, nor subject to its complex distribution of the powers of government, as the organic law; but are the creations, exclusively, of the legislative department, and subject to its supervision and control.”). Admission of a territory into the Union as a state was the point at which it became subject to the Constitution’s internal provisions and separation of powers. *Id.* at 242–43. (“The admission of the State into the Union brought the Territory under the full and complete operation of the Federal Constitution, and the judicial power of the Union could be exercised only in conformity to the provisions of that instrument.”).

²³⁴ *The Paquete Habana*, 175 U.S. 677, 700 (1900).

²³⁵ *Id.*

²³⁶ *See infra* Part IV.

In this context, then, a controlling judicial decision would be one that has settled: (1) the controlling nature of a legislative or executive act, (2) the applicability and judicial enforceability of a relevant treaty, or (3) as in *Thirty Hogsheads of Sugar v. Boyle*, discussed earlier,²³⁷ the content of any relevant customary international law.²³⁸ For example, the Court's conclusion in *Paquete Habana*—that customary international law exempted coastal fishing vessels from prize capture—would settle the content of that particular international rule for subsequent cases in U.S. courts. No lower court would later need to engage in the lengthy analysis undertaken in *Paquete Habana* to determine the substance of customary international law on that issue. Thus, Supreme Court precedent might settle certain aspects of the choice of law analysis, including the content of relevant international law, without having adopted customary international law as federal common law.

C. *Distinguishing Internal from External Rules of Decision*

There are clearly cases in which a federal court's observance of customary international law must be understood to create a federal common law rule based upon the Constitution's separation of powers.²³⁹ A paradigmatic example is *The Schooner Exchange v. McFaddon*, in which the Court observed the international legal principle of sovereign immunity in a suit concerning a foreign public vessel in a U.S. port.²⁴⁰ Because the decision provided a rule limiting the power of domestic courts established by the Constitution and federal statutes, the case must be viewed as creating municipal federal common law—now statutorily superseded by the Foreign Sovereign Immunities Act.²⁴¹

A similar case is *Banco Nacional de Cuba v. Sabbatino*, in which the Court observed the "act of state" doctrine.²⁴² The Court relied heavily on the Constitution's separation of foreign affairs powers in deciding that it could not review the acts of a recognized foreign government in its own territory.²⁴³ This doctrine, however, stems in large part from general

²³⁷ See *supra* notes 174, 176 and accompanying text.

²³⁸ Regarding the Court's conclusively determining the latter, see *Thirty Hogsheads of Sugar v. Boyle*, 13 U.S. (9 Cranch) 191, 198 (1815) ("The decisions of the Courts of every country show how the law of nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this.").

²³⁹ See generally Henry P. Monaghan, Foreword, *Constitutional Common Law*, 89 HARV. L. REV. 1, 2–3 (1975). This discussion is not meant to exclude other forms of federal common law.

²⁴⁰ *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812).

²⁴¹ The Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended in scattered sections of 28 U.S.C.).

²⁴² *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

²⁴³ *Id.* at 401.

international legal principles regarding sovereign equality, territorial integrity, and political independence.

The Court's implicit reliance on these international legal principles in *Sabbatino* is more obvious in *Sabbatino*'s predecessor, *Underhill v. Hernandez*.²⁴⁴ In *Underhill*, the Court clearly invoked well-settled international legal principles, stating, "[e]very 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."²⁴⁵ The Court then clarified that "[r]edress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves."²⁴⁶ In other words, such cases involved matters to be resolved through external sovereign powers of diplomacy rather than domestic judicial powers. These cases must therefore be viewed as having derived from principles of international law, which necessarily inform the proper view of the Constitution's separation of both domestic and foreign affairs powers,²⁴⁷ a municipal rule of decision regarding the availability of redress in federal courts.²⁴⁸

That *Sabbatino* and *Underhill* should be understood to create a constitutionally based federal common law from international norms and the separation of powers is further demonstrated by cases in which the Court observed what might be termed a corollary doctrine based in international neutrality law. As early as 1795, the Supreme Court observed the law of nations rule that those commissioned by foreign governments to engage in prize practice "are not amenable before the tribunals of neutral powers for their conduct."²⁴⁹ Following this basic principle, in *The Nueva Anna & Liebre*,²⁵⁰ the Court refused to give effect to the judgment of a Mexican admiralty court, finding that the

²⁴⁴ *Underhill v. Hernandez*, 168 U.S. 250 (1897).

²⁴⁵ *Id.* at 252.

²⁴⁶ *Id.*

²⁴⁷ See generally Bellia & Clark, *supra* note 31.

²⁴⁸ See Bellia & Clark, *supra* note 33, at 9 (arguing that *Sabbatino* applied a "constitutionally derived" rule of decision to preserve federal political branch control over the conduct of foreign affairs); Ernest A. Young, *Historical Practice and the Contemporary Debate over Customary International Law*, 109 COLUM. L. REV. SIDEBAR 31, 39 (2009) ("[T]he Court made clear that its power to fashion federal common law rules to protect the foreign relations prerogatives of the political branches did not depend upon the law of nations."). While it is true that the Court made this claim, *Sabbatino*, 376 U.S. at 398, it is unlikely the *Underhill* or *Sabbatino* Courts would have developed or applied the act of state doctrine in the absence of the basic principles of international law recognized in *Underhill*. Those principles necessarily inform the separation of powers issues. Of course, the Court's "power" to fashion federal common law must reside, if anywhere, within the Constitution's vesting of the "judicial Power of the United States" in "one supreme Court," U.S. CONST. art. III, § 1, rather than international law.

²⁴⁹ *United States v. Peters*, 3 U.S. (3 Dall.) 121, 130–31 (1795).

²⁵⁰ *The Nueva Anna & Liebre*, 19 U.S. (6 Wheat.) 193 (1821).

United States government had not “hitherto acknowledged the existence of any Mexican republic or state at war with Spain” so that the Court could not consider as legal “any acts done under the flag and commission of such republic or state” without violating U.S. neutrality obligations.²⁵¹ In *United States v. Palmer*,²⁵² the Court held that if the U.S. government remained neutral with regard to a war between another country (in this case, Spain) and its revolting colony, the Court could not apply a domestic criminal law in such a way as to violate that neutrality.²⁵³ “To decide otherwise,” the Court said, “would be to determine that the war prosecuted by one of the parties was unlawful, and would . . . arrange the nation to which the court belongs against that party. This would transcend the limits prescribed to the judicial department.”²⁵⁴ Each of these cases involve a domestic rule of decision based in the Constitution’s separation of foreign affairs powers, which effects the proper role of the national courts in the dispute.

More recently, the Supreme Court indicated that certain foreign official immunities might apply in U.S. courts in the absence of federal legislation, stating that “[e]ven if a suit is not governed by the [Foreign Sovereign Immunities] Act, it may still be barred by foreign sovereign immunity under the common law.”²⁵⁵ The court did not clarify whether it was referring to federal common law or the common law of one of the several states. It remanded the case to allow the district court to first pass on these important questions.²⁵⁶ Given the logic of *McFadden* and *Sabbatino*, it seems fairly obvious that this must be a constitutionally based issue of federal common law delimiting the power of domestic courts in matters affecting foreign affairs.²⁵⁷

Of course, any municipal U.S. rule of decision incorporating, or derived in part from, international law must conform to all *relevant*

²⁵¹ *Id.* at 193–94; *see also* *Rose v. Himely*, 8 U.S. (4 Cranch) 241 (1808) (reaching a similar result with regard to a prize judgment by Santo Domingo while at war with France), *overruled in part* by *Hudson v. Guestier*, 10 U.S. (6 Cranch) 281 (1810).

²⁵² *United States v. Palmer*, 16 U.S. (3 Wheat.) 610 (1818). Specifically, the Court held that “[i]t may be said, generally, that if the government remains neutral, and recognizes the existence of a civil war, its courts cannot consider as criminal those acts of hostility which war authorizes, and which the new government may direct against its enemy.” *Id.* at 635; *see also* *The Divina Pastora*, 17 U.S. (4 Wheat.) 52, 63–64 (1819) (holding that the government of a neutral country—in this case, the United States—cannot adjudge the legality of captures *jure belli* made by a revolutionary colonial government against its enemy—in this case, Spain).

²⁵³ *Palmer*, 16 U.S. (3 Wheat.) at 635.

²⁵⁴ *Id.*

²⁵⁵ *Samantar v. Yousuf*, 560 U.S. 305, 324 (2010).

²⁵⁶ *Id.* at 325–26.

²⁵⁷ *See Vázquez*, *supra* note 36, at 1538 (“Although the Court did not specify the nature of this common law, the Court’s discussion of the pre-FSIA regime leaves no doubt that it regarded the relevant law as federal, not State, law.”).

constitutional requirements, including the Bill of Rights.²⁵⁸ As will be demonstrated shortly, potentially applicable constitutional constraints have not been observed or applied in cases where the Court has given effect to the customary international laws of war.²⁵⁹ This reinforces the idea that the mere resort to international law as a rule of decision should not be understood to create municipal common law. It also reinforces the principle that the relevant constitutional analysis necessarily differs in cases involving the exercise of external sovereign powers.

There are two primary reasons why no one approach to the domestic status or effect of international law in U.S. law has gained general acceptance. First, many scholars (and judges) postulate “one size fits all” theories²⁶⁰ or offer more nuanced approaches without fully addressing or explaining their historical antecedents.²⁶¹ As demonstrated above, the Court has frequently observed international law, but not always in the same way or for the same reasons. There is second a point of confusion: subsidiary procedural or substantive rights, including remedial rights, *may be* domestic in nature as *The Scotia* indicates,²⁶² and as is the case with the Alien Tort Statute and its Anglo-American common law tort cause of action and remedy.²⁶³ But the fact

²⁵⁸ Reid v. Covert, 354 U.S. 1 (1957) (determining with regard to civilian U.S. nationals abroad that a treaty could not expand the scope of military criminal jurisdiction beyond constitutional limits); The Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 620–21 (1870) (finding with regard to a treaty between the United States and an Indian tribe *within U.S. territory* that “[i]t need hardly be said that a *treaty* cannot change the Constitution or be held valid if it be in violation of that instrument”); see also HENKIN, *supra* note 21, at 237 (noting that all forms of international law are subordinate to “constitutional prohibitions, notably those of the Bill of Rights” without distinguishing between internal and external rules of decision).

²⁵⁹ See *infra* Part III.

²⁶⁰ See sources cited *supra* notes 26–27.

²⁶¹ See Weisburd, *supra* note 187, at 49 (concluding that “[i]n the same way that courts will, when required by relevant conflicts rules, apply the law of some foreign nation, so they would apply international law in proper cases,” without explaining what cases those might be); Young, *supra* note 32, at 468 (“I would allow courts to employ customary norms so long as they can point to an otherwise valid choice of law rule that would permit application of customary law in the circumstances at issue.”).

²⁶² *The Scotia*, 81 U.S. (14 Wall.) 170, 187 (1871) (“[T]he rights and merits of a case may be governed by a *different law* from that which controls a court in which a remedy may be sought.” (emphasis added)).

²⁶³ In *Sosa v. Alvarez-Machain*, the Supreme Court concluded that the Alien Tort Statute “is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004). The common law tort cause of action (or remedial right) is a unique aspect of English common law legal systems. The international law violation it vindicates, however, need not be domesticated in order to provide such a remedy. Indeed, many cases arise in foreign countries and it would be odd to view the violations of the law of nations giving rise to them as the violation of a domesticated international law, which is then extraterritorially applied. Cf. Curtis A. Bradley & Jack L. Goldsmith, III, *The Current Illegitimacy of International Human Rights Litigation*, 66 *FORDHAM L. REV.* 319, 330 (1997).

that municipal law may also be relevant to some aspect of a case does not transform the international nature of an applicable conduct-regulating rule when “questions of right” or duty are affected by it.²⁶⁴ A careful reading of the Court’s cases involving exercises of the nation’s war powers demonstrates the validity of this more nuanced approach.

IV. *PAQUETE HABANA* DOCTRINE AND THE SUPREME COURT’S WARTIME JURISPRUDENCE

The validity and contours of this choice of law approach to categorizing rules of decision involving international law is further demonstrated by the Court’s wartime jurisprudence. First, recall that the Constitution allocates war powers to the executive and legislative branches. The President is designated Commander-in-Chief,²⁶⁵ while Congress is vested with the powers to: declare war, grant letters of marque and reprisal, and make rules for captures on land and water;²⁶⁶ to raise, maintain, and make rules for the government and regulation of the armed forces;²⁶⁷ and “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”²⁶⁸ Questions regarding which branch, if any, is supreme to the other in various matters of war are certainly not new.²⁶⁹ When precedent is properly interpreted, however, the Court’s general approach has been to uphold statutes within Congress’ broad constitutional competencies in the face of any conflicting Executive Branch actions.²⁷⁰ The case law strongly indicates that while the Executive possesses the “power to employ all military measures . . . reasonably calculated to defeat a national enemy,” those measures must “not [be] prohibited by applicable law,” including both international and any specifically applicable U.S. law.²⁷¹ The previous analysis explains why this is generally the case. This Part

²⁶⁴ *The Paquete Habana*, 175 U.S. 677, 700 (1900).

²⁶⁵ U.S. CONST. art. II, § 2.

²⁶⁶ U.S. CONST. art. I, § 8, cl. 11.

²⁶⁷ *Id.* cls. 12–14.

²⁶⁸ *Id.* cl. 18.

²⁶⁹ See David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941 (2008); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008); Bradley & Goldsmith, *supra* note 64, at 2094; Ryan Goodman & Derek Jinks, *International Law, U.S. War Powers, and the Global War on Terrorism*, 118 HARV. L. REV. 2653 (2005).

²⁷⁰ See generally Dehn, *supra* note 65 (describing the Court’s approach towards congressional action that conflicts with that of the executive branch).

²⁷¹ *Id.* at 605.

further investigates the Court's choice-of-law approach in its wartime and closely related jurisprudence.

The contemporary international law of war, known as international humanitarian law or the law of armed conflict, largely consists of conventional and customary constraints on the permissible means and methods of warfare. Contemporary international humanitarian law oftentimes prohibits conduct once permitted by the law of war. Before the Second World War, for example, wars between nations or peoples included some aspects their economies and citizenry.²⁷² The law of war regulated the rights and obligations of the belligerent parties and their citizens, permitting such things as the confiscation of enemy debts and property.²⁷³ In other words, war completely altered the legal relationship of a state and its citizens to enemy nations and citizens. This Part demonstrates that as the law of war evolved and constraints on war increased, the Supreme Court consistently observed customary international law as a relevant rule of decision in appropriate cases. While doing so, the Court also clarified the Constitution's separation of war powers and other constitutional questions informing a proper application of the *Paquete Habana* choice-of-law framework.

This Part more fully explicates the *Paquete Habana* framework. It demonstrates that the Supreme Court traditionally applied customary international law applicable to armed conflict with foreign nations, powers, or peoples as an exogenous rule of decision. It also demonstrates that the Court did not understand these rules of decision or the matters to which they pertain to be constrained or qualified by the Constitution's assignment of *internal* sovereign powers or the Bill of Rights, but rather its allocation of external sovereign powers.²⁷⁴

²⁷² UPTON, *supra* note 162, at 6–7 (citing sources); *see also id.* at 16 (“The existence of war places each individual citizen of the respective belligerent nations in a condition of common hostility.”).

²⁷³ *Id.* at 36–37 (discussing confiscation of property); *id.* at 40–41 (discussing confiscation of debts).

²⁷⁴ As earlier noted, some U.S. law incorporates and implements this law in ways that necessarily create domestic law. *See* The War Crimes Act of 1996, Pub. L. No. 104-192, 110 Stat. 2104 (codified as amended at 18 U.S.C. § 2441 (2012)) (establishing federal offenses incorporating customary and conventional law-of-war violations); John C. Dehn, *The Hamdan Case and the Application of a Municipal Offense: The Common Law Origins of ‘Murder in Violation of the Law of War’*, 7 J. INT’L CRIM. JUST. 63 (2009) (arguing that Winthrop commentary postulates municipal U.S. common law war crimes); *see also* United States v. Smith, 18 U.S. (5 Wheat.) 153, 158–59 (1820) (clarifying *federal* crime of piracy made punishable by Congress incorporates law of nations by reference).

A. *Prize Law*

Prize law's importance was earlier discussed.²⁷⁵ However, some might assume that prize law's status as a part of admiralty law weakens its precedential value. The Supreme Court has only "generally treated the high seas the same as foreign soil for purposes of the presumption against extraterritorial application" of domestic law.²⁷⁶ If admiralty law is "law of the place" as indicated in *The Scotia*,²⁷⁷ and prize law is a species of admiralty law, then broad doctrinal claims based upon the Court's approach in prize cases might be undermined by simply noting that they arise in areas where all states lack comprehensive authority to independently legislate. However, cases like *Paquete Habana*, in which the captures occurred in coastal waters, clarify that prize law also applied to captures within the territory of a nation, meaning its territorial and internal navigable waters. Thus, the true value of the Court's prize case decisions is more nuanced. Because prize cases involved the use of war powers and invoked a special body of international rules, the Court's prize decisions contain important insights about the rules of decision applicable to acts of belligerency by the United States. Indeed, two of the most commonly referenced Supreme Court decisions involving international law, *Murray v. Schooner Charming Betsy* and *Paquete Habana*, are prize cases.

Three seminal cases speak volumes about the relationship of international law to the Constitution and its separation of war powers. First, consider *Charming Betsy*,²⁷⁸ in which the Court held that a vessel and cargo belonging to the citizen of a neutral state could not be seized as prize, nor could authority to do so be implied from congressional authorization to interdict trade between the U.S. and France.²⁷⁹ The main issue in the case was the status of the ship's owner. United States citizens sold the *Charming Betsy* to a U.S.-born Danish burgher who filled it with American produce for trade with France.²⁸⁰ A French

²⁷⁵ See *supra* text accompanying notes 161–74.

²⁷⁶ *Kiobel v. Royal Dutch Petrol. Co.*, 133 S. Ct. 1659, 1667 (2013) (citing *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 173–74 (1993), as an example of the Court "declining to apply a provision of the Immigration and Nationality Act to conduct occurring on the high seas"); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 440 (1989) (declining to apply a provision of the Foreign Sovereign Immunities Act of 1976 in a case arising on high seas).

²⁷⁷ 81 U.S. (14 Wall.) 170, 187 (1871).

²⁷⁸ *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

²⁷⁹ *Id.* at 121. Under the law of nations, the property of nationals of neutral countries was not subject to capture if engaged in international trade in ports not subject to blockade. Doing so would have been considered an act of war against the neutral nation. See UPTON, *supra* note 162, at 259–77 (providing an overview of prize law).

²⁸⁰ *Charming Betsy*, 6 U.S. at 115–16.

privateer captured the ship, which was later captured by a U.S. warship and brought to a U.S. court for prize adjudication as a U.S. vessel engaged in prohibited commerce with France.²⁸¹

The Court found that the burgher was the true owner of the vessel, and that he was properly considered a subject of Denmark, which was neutral to the conflict between France and the United States.²⁸² It also observed, “the building of vessels in the United States for sale to neutrals, in the islands, is, during war, a profitable business, which Congress cannot be intended to have prohibited, unless that intent be manifested by express words or a very plain and necessary implication.”²⁸³ The Court then noted, “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations.”²⁸⁴ Because the owner was a Danish burgher, the Court concluded that he did not fall within the terms of the statute prohibiting commercial intercourse, which was limited to transactions between the French and “any person or persons, resident within the United States or under their protection.”²⁸⁵ Therefore, neither vessel nor cargo were subject to forfeiture.²⁸⁶

The precise role of the law of nations in the Court’s decision can be debated. One way to view the Court’s references to the law of nations is merely as an aid to interpreting the scope of the federal statute at issue. After all, the Court’s main goal was to determine whether the relevant statute encompassed the seizure, and the case is generally cited as demonstrating a canon of statutory interpretation.²⁸⁷

Such a limited reading does not account for the actual result in the case. By determining that the statute did not authorize the seizure, the Court effectively applied customary international law regarding the rights of neutrals. There was no controlling legislative act to displace

²⁸¹ *Id.* at 116.

²⁸² *Id.* at 120–21.

²⁸³ *Id.* at 118 (emphasis omitted).

²⁸⁴ *Id.*

²⁸⁵ *Id.* (emphasis omitted). The Court engaged in an interesting discussion of whether the owner’s prior U.S. citizenship had been relinquished or whether, as a prior citizen, he was still “under the protection” of the United States. *Id.* at 119–21.

²⁸⁶ *Id.* at 121.

²⁸⁷ See, e.g., Roger P. Alford, *Foreign Relations as a Matter of Interpretation: The Use and Abuse of Charming Betsy*, 67 OHIO ST. L.J. 1339 (2006); Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 488–91 (1998) (outlining various ways in which the *Charming Betsy* canon has been used to avoid construing statutes as violating or permitting violation of various treaty and customary international law obligations); Ingrid Brunk Wuerth, *Authorizations for the Use of Force, International Law, and the Charming Betsy Canon*, 46 B.C. L. REV. 293 (2005).

international neutrality law.²⁸⁸ Applicable federal legislation established a state of limited war, thereby displacing general admiralty law and invoking prize law between the warring nations and neutrality law as to uninvolved nations. The legislation was therefore “controlling” in this sense. The Executive’s reasonable, but in the Court’s view, erroneous, identification of the ship as subject to seizure and forfeiture,²⁸⁹ however, was not controlling upon the Court. Ultimately, in the terms of the *Paquete Habana* framework, because there was no treaty, and no constitutionally controlling legislative or executive act, the Court applied the customs and usages of civilized nations protecting the rights of neutrals as a rule of decision.

Moreover, Congress’s power to provide for the forfeiture of American vessels and cargo engaged in prohibited commerce was not questioned despite the Bill of Rights implications. Through the exercise of its war powers, Congress could apparently divest U.S. residents and citizens of their commercial property for public use,²⁹⁰ free from the constraints of the Compensation Clause.²⁹¹ As will be shown, the inapplicability of the Bill of Rights to otherwise lawfully adopted war measures is a recurring theme in the Court’s wartime jurisprudence.

In *Little v. Barreme*, decided in the same year as *Charming Betsy*, the Court addressed a situation involving more limited hostilities with France and resolved a different aspect of the choice-of-law framework involving the Constitution’s separation of war powers between the President and Congress.²⁹² To implement a general policy prohibiting commercial intercourse with France, Congress authorized only the seizure of *American* ships traveling to French ports.²⁹³ Pursuant to executive orders authorizing a broader range of seizures, a naval commander seized and sought condemnation of a Danish ship,

²⁸⁸ *Charming Betsy*, 6 U.S. at 119 (“If it was intended that any American vessel sold to a neutral should, in the possession of that neutral, be liable to the commercial disabilities imposed on her while she belonged to citizens of the United States, such extraordinary intent ought to have been plainly expressed . . .” (emphasis omitted)).

²⁸⁹ The Court went to great lengths to find that Captain Murray ought not to be held personally liable for a marine trespass. *Id.* at 123–24 (“Although there does not appear to have been such cause to suspect the *Charming Betsy* and her cargo to have been American, as would justify captain *Murray* in bringing her in for adjudication, yet many other circumstances combine with the fairness of his character to produce a conviction that he acted upon correct motives, from a sense of duty; for which reason this hard case ought not to be rendered still more so by a decision in any respect oppressive.”).

²⁹⁰ Recall the earlier discussion of prize law where proceeds from the sale of captured property vested in the capturing state were also used to compensate ship owners and crew. *See supra* notes 162–68 and accompanying text.

²⁹¹ U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”).

²⁹² *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804).

²⁹³ *Id.* at 177–78.

suspected of being American, traveling *from* a French to a Danish port.²⁹⁴ Although Captain Little's actions complied with his orders, they clearly violated the statute.²⁹⁵ For that reason alone, the Court found the seizure unlawful.²⁹⁶

In *Little*, however, the Court did not review the constitutional power of Congress to enact either the substance or limited implementing measures of its nonintercourse policy, despite a conflicting executive order. Also absent is any hint of impropriety surrounding Congress's decision to limit the effect of this war measure to American ships and cargo. Using its war powers, Congress's preferred policy and narrow means of implementation were controlling on both the Court and the executive, and were, again, apparently not limited by the Compensation Clause.

Finally, let us more fully consider *Paquete Habana*, which involved two fishing vessels seized off the coast of Cuba and brought to Key West for prize adjudication.²⁹⁷ The trial court ruled that they were not exempt from seizure as prize.²⁹⁸ The Supreme Court disagreed, finding "[b]y an ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law, coast fishing vessels, pursuing their vocation . . . have been recognized as exempt, with their cargoes and crews, from capture as prize of war."²⁹⁹ Because the vessel was exempt from capture "by the general consent of civilized nations," it could not "be condemned by a prize court, for want of a distinct exemption in a treaty or other public act of the government."³⁰⁰

The Court indicated, however, that an act of government authorizing capture might be an "act of Congress or order of the President."³⁰¹ *Charming Betsy* had already strongly implied that Congress could authorize captures in violation of the rights of those exempt from capture under the law of nations. *Paquete Habana* confirms this view. Unfortunately, *Paquete Habana* was not clear regarding the circumstances under which an order from the President or any lower executive branch official might lawfully authorize conduct inconsistent with the law of nations. *Charming Betsy* indicates that congressional authorization may be needed.

²⁹⁴ *Id.* at 178.

²⁹⁵ *Id.* at 179. The Court emphasized that the ship could not have been lawfully seized even if it had been American, undoubtedly, because it was travelling *from* a French port rather than *to* it. *Id.*

²⁹⁶ *Id.*

²⁹⁷ The *Paquete Habana*, 175 U.S. 677, 678–79 (1900).

²⁹⁸ *Id.* at 679.

²⁹⁹ *Id.* at 686.

³⁰⁰ *Id.* at 711.

³⁰¹ *Id.*

Charming Betsy and *Paquete Habana* both clarify that the customary law of nations provides a rule of decision in cases where it applies, unless Congress or possibly the President clearly and expressly indicate otherwise. We are left to wonder, however, whether the President's power to violate international law is equal, if subordinate, to that of Congress. *Little* established that legislation prevails in the event of plain and unavoidable conflict between a duly enacted statute and an executive order. But these decisions simply do not clarify the full range of potentially controlling executive acts.

For the sole purpose of providing examples of controlling executive acts in war, two cases from the Civil War are helpful. The first is *The Prize Cases*, arising from President Lincoln's decision to blockade Southern ports after the attack on Fort Sumter.³⁰² The main question before the Supreme Court was whether the President had authority to impose a blockade without a declaration of war from Congress.³⁰³ Finding that he did,³⁰⁴ that the law of nations applies to a civil war,³⁰⁵ and that the blockade conformed to international law,³⁰⁶ the Court applied international law to adjudicate the disposition of captured ships and cargo.³⁰⁷ Thus, these executive acts were controlling, but only to the extent consistent with international law.

In his *Hendren* dissent, Justice Bradley provided other examples of controlling executive acts. He stated, "in many things that *prima facie* belong to international law, the government will adopt its own regulations: such as the extent to which intercourse shall be prohibited; how far property of enemies shall be confiscated; what shall be deemed contraband."³⁰⁸ In other words, some executive war measures are placed

³⁰² *The Prize Cases*, 67 U.S. (2 Black) 635, 640–42 (1862).

³⁰³ *Id.*

³⁰⁴ *Id.* at 668.

³⁰⁵ *Id.* at 667–68 ("When the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the Courts of Justice cannot be kept open, *civil war exists* and hostilities may be prosecuted on the same footing as if those opposing the Government were foreign enemies invading the land."); see also *The Venice*, 69 U.S. (2 Wall.) 258, 274 (1864) ("The rule which declares that war makes all the citizens or subjects of one belligerent enemies of the Government and of all the citizens or subjects of the other, applies equally to civil and to international wars." (citing *The Prize Cases*, 67 U.S. at 666, 687–88 (Nelson, J., dissenting))).

³⁰⁶ *The Prize Cases*, 67 U.S. at 671.

³⁰⁷ *Id.* at 674–82.

³⁰⁸ *N.Y. Life Ins. Co. v. Hendren*, 92 U.S. 286, 288 (1875) (Bradley, J., dissenting). Justice Bradley continued:

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

within the President's discretion by acts of Congress and require the courts to apply international law. Other executive war measures might implement broad authorities of international law in specific ways. Either could be a controlling executive act for purposes of the *Paquete Habana* framework. Neither situation necessarily permits the President to violate applicable international law.³⁰⁹ Indeed, the Court's review in *The Prize Cases* echoes *Charming Betsy*, in that the Court reviewed both the imposition and specific implementation of the blockade for compliance with customary international law. This suggests the president may not generally violate clearly established customary international law.

B. *The Law of War as a Rule of Decision in Foreign Territory*

1. A Preliminary Note About Foreign Territory

Before discussing cases in which the Court has addressed the choice of law in armed conflict for cases arising within foreign territory, this Section will first clarify the point at which the Court believes foreign territory held or occupied by U.S. military forces becomes U.S. territory—the main issue in *Fleming v. Page*.³¹⁰ *Fleming* involved a duty imposed on goods from the port of Tampico, a Mexican port under U.S. military occupation as the result of a congressionally declared war with Mexico.³¹¹ The issue was whether Tampico was still properly considered a foreign port, and whether the goods were therefore “foreign goods” subject to the duty.³¹²

In deciding that Tampico was still foreign territory, the Court noted that a declaration of war should not be understood to “imply an authority to the President to enlarge the limits of the United States by

Id. (emphasis added). While this might be read to support the view that international law is federal law, it is clear Justice Bradley is expressing the idea that international law is law for the courts and that because war is a federal function, the Court should find federal jurisdiction in such cases, likely from the act authorizing hostilities, when present. That is why it is U.S. law only “for the time being.” *Id.*

³⁰⁹ Controlling executive acts could include battlefield “reprisal” powers, meaning acts that might otherwise violate international laws of war but were permitted under specific circumstances to repress and punish an enemy violation. Originally a form of collective punishment in a wide variety of contexts, they are mostly prohibited by contemporary customary and conventional international humanitarian law. See generally FRITS KALSHOVEN, *BELLIGERENT REPRISALS* (2d ed. 2005). In the United States, prominent scholars called this “retaliation.” See WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 796–98 (2d ed. 1920). Because not addressed by the Court, the topic will require separate analysis.

³¹⁰ 50 U.S. (9 How.) 603 (1850).

³¹¹ *Id.* at 614.

³¹² *Id.*

subjugating the enemy's country."³¹³ It continued, "this can be done only by the treaty-making power or the legislative authority, and is not a part of the power conferred upon the President by [a] declaration of war."³¹⁴ Although the President "may invade the hostile country, and subject it to the sovereignty and authority of the United States[,] . . . his conquests do not enlarge the boundaries of this Union, *nor extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power.*"³¹⁵ Thus, the mere presence of the U.S. military, even as an occupier, does not extend the full measure of the Constitution and laws of the United States to that territory. The Court's approach on this point was consistent in later cases involving the temporary military occupation of Cuba³¹⁶ as well as the military occupations of Puerto Rico and the Philippines.³¹⁷

2. War with Mexico and Beyond

In *Jecker v. Montgomery*, the Court addressed a different way in which the Constitution limits the belligerent acts of the Executive in foreign territory.³¹⁸ *Jecker* involved the constitutional status of military prize courts established, along with other military tribunals trying both common law crimes and offenses against the laws of war,³¹⁹ in occupied Mexico. The Court first clarified that prize captures "are for the benefit of the sovereign under whose authority they are made; and the validity of the seizure and the question of prize or no prize can be determined in his own courts only, upon which he has conferred jurisdiction to try the question."³²⁰ After the Court held that jurisdiction over prize cases was vested by the Constitution and laws of the United States in Article III courts,³²¹ it distinguished the prize courts from other military tribunals in Mexico.

³¹³ *Id.*

³¹⁴ *Id.* at 615.

³¹⁵ *Id.* (emphasis added).

³¹⁶ See *Neely v. Henkel*, 180 U.S. 109 (1901).

³¹⁷ See *The Diamond Rings*, 183 U.S. 176, 178 (1901) (holding that the Philippines are no longer foreign territory after being ceded to the United States by treaty); *De Lima v. Bidwell*, 182 U.S. 1 (1901) (reaching same result as to Puerto Rico). This approach also squares with the Court's approach to unincorporated territories. See *supra* note 233.

³¹⁸ *Jecker v. Montgomery*, 54 U.S. (13 How.) 498 (1851).

³¹⁹ WINTHROP, *supra* note 309 at 832–33 (tracing origins and practice of punishing law-of-war violations, including military commissions and councils of war in Mexico). The court at issue was established at Monterey, California, by the commander of American forces acting as governor of the territory. *Jecker*, 54 U.S. (13 How.) at 512.

³²⁰ *Jecker*, 54 U.S. (13 How.) at 515.

³²¹ *Id.*

The courts, established or sanctioned in Mexico during the war by the commanders of the American forces, were nothing more than the agents of the military power, to assist it in preserving order in the conquered territory, and to protect the inhabitants in their persons and property while it was occupied by the American arms. They were subject to the military power, and their decisions under its control, whenever the commanding officer thought proper to interfere. They were not courts of the United States, and had no right to adjudicate upon a question of prize or no prize.³²²

Although these military tribunals could not adjudicate matters dedicated to the national courts by the Constitution and federal statute, the Court appeared to have no concern regarding their ability to punish common law crimes and law-of-war violations in occupied foreign territory. The ability to establish such tribunals remains an aspect of international laws of war to this day.³²³ The Court, albeit in dictum, appears to have distinguished and approved of these tribunals as a permissible exercise of the nation's war powers when consistent with international laws of war. This implies that the law of nations marks the outer limits of permissible executive discretion in war.

Note that these military tribunals were also not limited in any other respect by the Constitution and laws of the United States. Composed of military officers and applying procedural rules from the Articles of War by analogy,³²⁴ military tribunals imposed punishment without observing constitutional protections applicable in Article III federal courts. Although this may seem unobjectionable on the ground that those

³²² *Id.*

³²³ For example, under Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 12, art. 64, such a tribunal may apply the "penal laws of the occupied territory," which "shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention." An occupier may also adopt new security measures so long it announces them in the language of the inhabitants, and may then "hand over the accused to its properly constituted, non-political military courts," in the case of the United States, military commissions, to adjudicate violations. *Id.* art. 65–66. Individual civilians may also be punished by an occupying army for violations of the laws and customs of war committed before occupation by a hostile army. *Id.* art. 70.

³²⁴ Because applied by analogy, violations of these rules did not necessarily invalidate a conviction. WINTHROP, *supra* note 309, at 841 ("In the absence of any statute or regulation governing the proceedings of military commissions, the same are commonly conducted according to the rules and forms governing courts-martial . . . are indeed more summary in their action than are the courts held under the Articles of war . . . their proceedings . . . will not be rendered *illegal* by the omission of details required upon trials by courts-martial . . ."). *But see* David Glazier, *Precedents Lost: The Neglected History of the Military Commission*, 46 VA. J. INT'L L. 5, 41–42 (2005) (noting a "practice of close conformance to court-martial procedures").

punished were foreigners in foreign land,³²⁵ the tribunals punished crimes both by and against U.S. persons.³²⁶ The Supreme Court later held that military commissions are exempt from any jury trial requirement, even when punishing U.S. citizens.³²⁷

The Court's approach to international law and the Constitution remained consistent when adjudicating various aspects of the military occupation of Mexican lands. In *Cross v. Harrison*, the Court upheld a port tax at San Francisco imposed by U.S. military authorities occupying "all of Upper California" after ousting the Mexican government.³²⁸ It did so because it found the tax to be within the belligerent rights of a conqueror and authorized by the "constitutional commander-in-chief," even though Congress "had not passed an act to extend the collection of tonnage and import duties to the ports of California."³²⁹ Similarly, in *Leitensdorfer v. Webb*, the Court upheld the executive's occupation laws and courts in New Mexico until "revoked or modified . . . either by direct legislation on the part of Congress, or by that of the Territorial Government in the exercise of powers delegated by Congress," in part because doing so was consistent with the law of nations.³³⁰

Many insights regarding the *Paquete Habana* framework and potentially relevant aspects of the Constitution are evident in these cases. First, in each, a rule of decision affecting the outcome was either an applicable legislative act or constitutional provision (*Fleming and Jecker*) or the customary international law (all others). The various executive acts were not upheld as "controlling executive . . . act[s]" that might *supersede* applicable customs and usages of civilized nations, as suggested in *Paquete Habana*.³³¹ They were upheld in each case because they were found to be consistent with customary international law. Furthermore, the Court upheld many executive acts without affirmative and specific legislative authority or delegation and notwithstanding their constitutional commitment to other branches of the government in domestic matters. And finally, permissible measures adopted during war or occupation were not constrained by Bill of Rights provisions otherwise applicable to similar acts of domestic governance. This was

³²⁵ Erika Myers, *Conquering Peace: Military Commissions as a Lawfare Strategy in the Mexican War*, 35 AM. J. CRIM. L. 201, 212 (2008).

³²⁶ Glazier, *supra* note 324, at 33.

³²⁷ *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1863).

³²⁸ *Cross v. Harrison*, 57 U.S. (16 How.) 164, 189–90 (1853).

³²⁹ *Id.*

³³⁰ *Leitensdorfer v. Webb*, 61 U.S. (20 How.) 176, 177–78 (1857).

³³¹ *The Paquete Habana*, 175 U.S. 677, 700 (1900).

even true of military tribunals imposing criminal punishment because “[t]hey were not courts of the United States.”³³²

3. The Second World War

In its scant opportunities to review cases arising in foreign territory during the Second World War, the Supreme Court adhered to this choice of law approach. One case worth noting, however, is *Hirota v. MacArthur*, in which the Court held in a brief, per curiam opinion that “courts of the United States have no power or authority to review, to affirm, set aside or annul the judgments and sentences” by the International Military Tribunal for the Far East because it was not “a tribunal of the United States” even though convened by General MacArthur pursuant to international agreements.³³³ Without jurisdiction, the Court had no occasion to determine the rule of decision. Had it done so, however, *Hirota* may have provided an example in which a (non-self-executing) treaty provided the rule of decision.

In *Johnson v. Eisentrager*, the Court held that German nationals convicted by a military tribunal and detained in occupied Germany had no right to seek writs of habeas corpus in U.S. courts.³³⁴ Although the Court disclaimed jurisdiction, it did so in part on a law-of-nations basis, noting, “our law does not abolish inherent distinctions recognized throughout the civilized world . . . between aliens of friendly and of enemy allegiance.”³³⁵ Even though the decision addressed a foreign affairs matter and relied in part on the law of nations, it dealt with the jurisdiction of U.S. courts created by Congress. Therefore, this case is best viewed as a decision in which the Court created federal common law from the law of nations and the Constitution’s allocation of powers.

In *Madsen v. Kinsella*, the Court upheld the conviction of a civilian spouse by a U.S. military commission applying German penal law in occupied Germany.³³⁶ After finding that Congress had preserved the jurisdiction of such tribunals in the Articles of War,³³⁷ the Court noted,

³³² *Jecker v. Montgomery*, 54 U.S. (13 How.) 498, 515 (1851). There are also cases in which the authority of military tribunals in conquered territories was upheld even after the establishment of peace, the acquisition of the land by treaty, and the establishment of an incomplete insular government. *See, e.g., Santiago v. Noguera*, 214 U.S. 260 (1909) (upholding the decision of the provisional court established by military authority in conquered territory with the approval of the President until legislatively changed).

³³³ *Hirota v. Gen. of the Army MacArthur*, 338 U.S. 197, 198 (1948) (per curiam).

³³⁴ *Johnson v. Eisentrager*, 339 U.S. 763, 768–77 (1950).

³³⁵ *Id.* at 769.

³³⁶ *Madsen v. Kinsella*, 343 U.S. 341, 361–62 (1952).

³³⁷ *Id.* at 351–55.

“[t]he authority for such commissions does not necessarily expire upon cessation of hostilities or even, for all purposes, with a treaty of peace. It may continue long enough to permit the occupying power to discharge its responsibilities fully.”³³⁸ Thus, this use of war powers was consistent with the law of nations and justified the use of a U.S. military tribunal to try a *civilian* U.S. citizen without providing Bill of Rights protections applicable in U.S. criminal prosecutions.

Contrast *Madsen* with *Reid v. Covert*, decided only a few years later, in which the Court held that the armed forces could not constitutionally exercise court-martial jurisdiction over civilian spouses accused of murder while residing abroad with their military spouses *in a time of peace*.³³⁹ Although agreements with the host nations and the text of the Uniform Code of Military Justice provided for U.S. military jurisdiction in both cases, the Court held “[i]t would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights . . . to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions.”³⁴⁰ However, it distinguished the convictions at issue in *Reid* from those in which civilians “performing services for the armed forces ‘in the field’ during time of war” were prosecuted by military tribunals, concluding, “they must rest on the Government’s ‘war powers.’”³⁴¹ *Reid* is therefore properly understood as a case involving an extraterritorial exercise of internal sovereign powers over U.S. citizens abroad. It does not undermine or overturn earlier decisions upholding the use of military tribunals to try civilian U.S. citizens pursuant to a proper exercise of the nation’s war powers against foreign entities or in foreign territory.

C. *The Law of War as an “External” Rule of Decision in U.S. Territories*

Given the fortuitous fact that most of the belligerent acts associated with our nation’s armed conflicts with foreign entities have not occurred within incorporated U.S. territory, there are few Supreme Court cases through which to examine the domestic application of the *Paquete Habana* choice-of-law framework. For theoretical clarity, except for the points raised earlier regarding controlling executive acts,

³³⁸ *Id.* at 360.

³³⁹ *Reid v. Covert*, 354 U.S. 1 (1957). This was a consolidated rehearing of two cases the Court originally found constitutionally sufficient. *See Reid v. Covert*, 351 U.S. 487 (1956).

³⁴⁰ *Reid*, 354 U.S. at 17.

³⁴¹ *Id.* at 33.

the Civil War case law must be analyzed separately even though the Supreme Court clearly held that the customary law of nations applied to that war.³⁴² The most salient non-Civil War examples are *Brown v. United States*³⁴³ and *Ex parte Quirin*,³⁴⁴ neither of which exemplify clear judicial reasoning.

Also potentially relevant is *In re Yamashita*,³⁴⁵ although it is not entirely clear from that decision whether the congressionally established territorial government of the Philippines had been fully restored after the ouster of Japanese forces. The case could potentially be equated to those in which the Court allowed the continued use of military tribunals in occupied territory until a territorial government exercised similar powers.³⁴⁶ In *Johnson v. Eisentrager*, however, the Court stated that “[b]y reason of our sovereignty at that time over these insular possessions, Yamashita stood much as did Quirin before American courts.”³⁴⁷ The Court continued, “Yamashita’s offenses were committed on our territory, he was tried within the jurisdiction of our insular courts and he was imprisoned within territory of the United States.”³⁴⁸ Although the Court was addressing access to U.S. courts to pursue a writ of habeas corpus, *Yamashita* seems an apt precedent since it arose in a U.S. territory with a congressionally established government. These cases establish that in cases involving only an exercise of war powers within U.S. territory against a foreign enemy the Court followed the *Paquete Habana* “external sovereignty” choice-of-law framework.

Brown involved timber belonging to a British company seized by a district attorney on his own initiative shortly after Congress declared war on Great Britain in 1812.³⁴⁹ After the District Court dismissed the case, the Circuit Court reversed and condemned the timber as enemy property forfeited to the United States.³⁵⁰ The Supreme Court reversed

³⁴² The Supreme Court held that in a Civil War, “the belligerent party who claims to be sovereign, may exercise both belligerent and sovereign rights.” The Prize Cases, 67 U.S. (2 Black) 635, 673 (1862); see also 3 VATEL, *supra* note 83, at §§ 292–94 (stating applicability of law of war to parties in civil war). It might be more appropriate to characterize the Civil War as adopting the international law of war as domestic common law because it was internal armed conflict. See Dehn, *supra* note 274, at 73–79 (arguing that this was Winthrop’s approach in his 1886 and 1920 treatises).

³⁴³ 12 U.S. (8 Cranch) 110 (1814).

³⁴⁴ 317 U.S. 1 (1942).

³⁴⁵ 327 U.S. 1, 20 (1946).

³⁴⁶ *Santiago v. Noguera*, 214 U.S. 260 (1909) (upholding validity of military provisional courts in Puerto Rico pending creation of territorial government); see also *Leitensdorfer v. Webb*, 61 U.S. (20 How.) 176, 176–83 (1857).

³⁴⁷ *Johnson v. Eisentrager*, 339 U.S. 763, 780 (1950).

³⁴⁸ *Id.*

³⁴⁹ *Brown v. United States*, 12 U.S. (8 Cranch) 110, 121–22 (1814). Although the property had been sold to an American citizen, the Court assumed the sale did not change the status of the property for purposes of its analysis. *Id.* at 122.

³⁵⁰ *Id.* at 122.

the Circuit Court, relying on the law of nations. After a cursory review of contemporary treaty practice, Chief Justice Marshall stated that “[t]he modern rule then would seem to be, that tangible property belonging to an enemy and found in the country at the commencement of war, ought not to be *immediately* confiscated.”³⁵¹ Given this new international custom, and Congress’s yet unexercised power to make rules for captures,³⁵² Marshall found the condemnation improper without statutory authorization.³⁵³ In other words, without a “controlling legislative act,” the customary law of nations provided the relevant rule of decision.

Some claim that *Brown* establishes the quite different proposition that the President may not exercise war powers domestically without express congressional authorization.³⁵⁴ Marshall noted, however, that it did “not appear that this seizure was made under any instructions from the president of the United States; nor is there any evidence of its having his sanction, unless the libels being filed and prosecuted by the law officer who represents the government, must imply that sanction.”³⁵⁵ Thus, the question of whether express presidential authorization would have been a constitutionally controlling executive act was not addressed. Interestingly, the *Paquete Habana* Court noted these aspects of the *Brown* opinion in its discussion,³⁵⁶ not only confirming the analysis provided here,³⁵⁷ but also potentially indicating that express presidential

³⁵¹ *Id.* at 125 (emphasis added). Marshall equated the confiscation of property to the confiscation of debts, which he believed had become obsolete. *Id.* at 123–24.

³⁵² Marshall also believed that certain acts of Congress were contrary to implied executive authority to immediately seize commercial property. *Id.* at 126–27. In addition, Marshall was concerned that the case involved the divestment of private property rights rather than war measures against enemy forces. *Id.* 125–26.

³⁵³ *Id.* at 125–29.

³⁵⁴ See MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 242 (1990) (stating that the *Brown* Court held that the President lacked power to seize plaintiff’s property without congressional authorization); RAMSEY, *supra* note 32, at 249 (“Marshall concluded that the President could not seize an enemy alien’s property in the United States without Congress’s authorization, even in support of a formally declared war.”); Bellia & Clark, *supra* note 33, at 72 (asserting that *Brown* “reserved to Congress the power to create or escalate foreign conflict by engaging in an act that the law of nations *permitted*”).

³⁵⁵ *Brown*, 12 U.S. (8 Cranch) at 121–22.

³⁵⁶ The *Paquete Habana*, 175 U.S. 677, 710–11 (1900).

³⁵⁷ Justice Story’s dissent also supports this interpretation of Justice Marshall’s opinion. According to Story, the declaration of war authorized the President to wage war permitted by the laws of war, in the absence of congressional indication to the contrary, “against the vessels, goods and effects of the British government and its subjects; and to use the whole land and naval force of the United States to carry the war into effect.” *Brown*, 12 U.S. at 135–47. Story had no doubt regarding the ability to seize enemy commercial property immediately upon the outbreak of hostilities. *Id.* at 143 (“In respect to the *goods* of an enemy found within the dominions of a belligerent power, the right of confiscation is most amply admitted by Grotius, and Pufendorf, and Bynkershoek, and Burlamaqui, and Rutherford and Vattel.” (emphasis added)). He agreed with Marshall that debts could no longer be confiscated without specific

authorization might have qualified as a controlling executive act. Nevertheless, the Court observed an emergent customary international norm established by state practice as a rule of decision.

Ex parte Quirin upheld convictions of enemy soldiers by a presidentially ordered military commission even though, unlike all other cases involving military tribunals discussed to this point, the tribunals were convened in peaceful, fully incorporated U.S. territory where nonmilitary courts were available. In reaching its decision, the Court relied upon customary international law, specific congressional authorization for the use of military commissions, and the President's commander-in-chief powers.

Regarding the content of customary international law, the Court stated, “[a]n important incident to the conduct of war is the adoption of measures by the military command . . . to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war.”³⁵⁸ Additionally, the Court found that by the reference to “offenders or offenses that . . . by the law of war may be triable by such military commissions” in the Fifteenth Article of War, Congress had expressly authorized military tribunals and incorporated all law of war violations which were included within their jurisdiction.³⁵⁹ Curiously, however, the Court found this statute to be an exercise of the Offenses Clause power rather than only an exercise of Congress's war powers, or a congressional preservation of war powers that the Executive may independently exercise when consistent with the laws of war.³⁶⁰ By the Court's reasoning, the only essential question remaining was whether the defendants had been charged with, and convicted of, offenses against the laws of war.³⁶¹ Finding that they had been, the Court denied relief, even for a U.S. citizen, Herman Haupt.³⁶²

Quirin has been criticized, and in some respects this is proper, but not for the reasons often cited.³⁶³ The proper criticisms are twofold.

statutory authority. *Id.* at 145–46 (noting that debt confiscation “so justly deemed odious in modern times, and is so generally discountenanced, that nothing but an express act of congress would satisfy my mind that it ought to be included among the fair objects of warfare”). Thus, even Story held a positivist view regarding how the law of war might change.

³⁵⁸ *Ex parte Quirin*, 317 U.S. 1, 28–29 (1942).

³⁵⁹ *Id.* at 30 (quoting Articles of War, 10 U.S.C. § 1486 (1940) (Article 15) (alteration in original)).

³⁶⁰ *Id.* at 28 (“Congress . . . has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals.”).

³⁶¹ *Id.*

³⁶² *Id.* at 45–48.

³⁶³ “Justices who decided the case have not spoken kindly about *Quirin*. Frankfurter called it ‘not a happy precedent.’ Douglas wrote that ‘it was unfortunate the Court took the case.’ Chief

First, reading the Fifteenth Article of War as *affirmative* statutory authorization for military commissions is pure sophism. In full, that article provided that

[t]he provisions of these articles conferring jurisdiction upon courts martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions, provost courts, or other military tribunals.³⁶⁴

This language quite clearly exempts and preserves jurisdiction that Congress believes already exists. Preserving jurisdiction and affirmatively “providing for the trial of such offenses”³⁶⁵ are obviously two very different things. The source of that jurisdiction cannot be the statute. It must lie in the Executive’s war powers and international law.

This leads to the second criticism, the Court’s invocation of the Offenses Clause. If punishing law-of-war violations by the enemy is a fundamental incident of war, as the Court said, then the Offenses Clause added nothing to it. As the earlier discussions of *Jecker* and *Madsen* indicate, the Executive may establish law of war military commissions and occupation tribunals using war powers.³⁶⁶ These commissions are therefore properly considered a war measure, an act of belligerency based in the war powers of government and regulated only by the law of war and any specifically relevant acts of Congress or the Executive. As the Court recognized, Congress has “the choice of crystallizing in permanent form and in minute detail every offense against the law of war.”³⁶⁷ It also held that the Constitution does not require a jury trial for

Justice Stone described the process of drafting the final opinion as a ‘mortification of the flesh.’” Andrew Kent, *Judicial Review for Enemy Fighters: The Court’s Fateful Turn in Ex parte Quirin, the Nazi Saboteur Case*, 66 VAND. L. REV. 153, 156 (2013) (footnotes omitted); see Chad DeVeaux, *Rationalizing the Constitution: The Military Commissions Act and the Dubious Legacy of Ex Parte Quirin*, 42 AKRON L. REV. 13, 17–18 (2009) (arguing that the Court’s opinion in *Quirin* is in “plain tension with [the] *Ex parte Milligan*” case and that the *Quirin* case “radically extended military-commission jurisdiction to include certain offenses that violate the ‘law of war’”); see also Sarah Erickson-Muschko, Note, *Beyond Individual Status: The Clear Statement Rule and the Scope of the AUMF Detention Authority in the United States*, 101 GEO. L.J. 1399, 1416–18 (2013) (arguing that *Quirin* has limited application as a result of its fact-based analysis and the short period of time in which the opinion was written).

³⁶⁴ 10 U.S.C. § 1486 (1940).

³⁶⁵ *Ex parte Quirin*, 317 U.S. at 29.

³⁶⁶ WINTHROP, *supra* note 309, at 831–33 (tracing origins and practice of military commissions punishing law-of-war violations); John M. Bickers, *Military Commissions Are Constitutionally Sound: A Response to Professors Katyal and Tribe*, 34 TEX. TECH L. REV. 899, 908–10 (2003) (identifying “law of war military commissions” as one of three types of military commissions); Glazier, *supra* note 324, at 9 (listing “trying law of war violations” as one of four historical purposes of military commissions).

³⁶⁷ *Ex parte Quirin*, 317 U.S. at 30.

war crimes,³⁶⁸ although it may require that only actual law-of-war violations be punished, at least within U.S. territory where Article III courts necessarily have jurisdiction over other offenses.³⁶⁹ In extraterritorial matters unrelated to internal governance, the Mexican War and postwar Germany examples clarify that the jurisdiction of military commissions is not limited to law-of-war violations identified as such by international law.³⁷⁰

*In re Yamashita*³⁷¹ is similar in many respects. Relying heavily on its analysis in *Quirin*, the court found a military commission convened in the Philippines had lawfully tried and convicted General Yamashita of war crimes.³⁷² Additionally, however, the Court specifically addressed the temporal jurisdiction of military commissions, concluding that, under the law of nations, such commissions could be conducted after hostilities end but before formal peace is established.³⁷³ The Court then suggested, as it had in *Madsen*, that military commission jurisdiction could even extend beyond a treaty of armistice or peace.³⁷⁴ On this issue, then, the Court identified the general customary law of nations or a specific treaty as a potential rule of decision regarding the temporal jurisdiction of military commissions, just as the *Paquete Habana* framework would require. This rationale also reaffirms that military commissions are an exercise of external sovereign powers, although extending their use beyond a formal peace arrangement might require viewing them as an exercise of general foreign affairs rather than war powers.

Contrast these cases with those involving the adoption of domestic measures applicable to American citizens and resident aliens. In *Korematsu v. United States*, the Court upheld the conviction of a Japanese-American citizen for violating an exclusion order.³⁷⁵ The Court did not refer to the law of war to support the order, but rather

³⁶⁸ *Id.* at 29 (“These petitioners were charged with an offense against the law of war which the Constitution does not require to be tried by jury.”).

³⁶⁹ *But see* Stephen I. Vladeck, *The Laws of War as a Constitutional Limit on Military Jurisdiction*, 4 J. NAT’L SECURITY L. & POL’Y 295 (2010) (arguing several constitutional constraints apply to military commissions and therefore require jurisdiction to be limited to law-of-war violations).

³⁷⁰ *See supra* Section IV.B.2–3.

³⁷¹ *In re Yamashita*, 327 U.S. 1 (1946).

³⁷² *Id.* at 7–9, 20.

³⁷³ *Id.* at 12 (“No writer on international law appears to have regarded the power of military tribunals, otherwise competent to try violations of the law of war, as terminating before the formal state of war has ended.”).

³⁷⁴ *Id.* at 13 (“The extent to which the power to prosecute violations of the law of war shall be exercised before peace is declared rests, not with the courts, but with the political branch of the Government, and may itself be governed by the terms of an armistice or the treaty of peace.”).

³⁷⁵ *Korematsu v. United States*, 323 U.S. 214, 219–20 (1944).

treated it as a case of extreme public necessity justifying a temporary abridgement of the rights of those affected by it.³⁷⁶ For identical reasons, the Court upheld the conviction of a Japanese-American citizen for violation of a curfew order in *Hirabayashi v. United States*.³⁷⁷ Conversely, in *Ex parte Kawato*, the Court allowed a Japanese-born resident alien to bring an admiralty suit in U.S. courts despite the defendant's claim that he was an enemy national who should be denied access to the court.³⁷⁸ In these and similar cases involving *purely* internal or domestic matters incident to war, the Court did not find international law or the *Paquete Habana* framework to be relevant.

This Part has demonstrated that in cases arising from wars with foreign nations or entities, international law has been an exogenous rule of decision in our courts when applicable. How, then, does one distinguish between cases involving internal sovereignty and those involving external sovereignty? How does one determine whether customary international law is used to create federal common law (and therefore subject to greater constitutional constraints) or whether it is an independent rule of decision related only to the exercise of external sovereign powers and specific constitutional provisions applicable thereto?

The answer seems to lie in the role of a rule of decision in governance. The case law is clear that the particular location where a case arises has been a factor in determining whether a rule of decision is properly considered domestic or international. It is not dispositive. Thus, if a case involves domestic or "internal" powers of governance, including the government's relationship with its citizens in times of peace, then it is a matter domestic or internal governance, and any rule of decision must conform to the Bill of Rights. If the rule of decision pertains to a clear exercise of external sovereignty involving a foreign entity, including an exercise of the war powers, then international law serves as an exogenous rule of decision, similar to foreign law. The Part has demonstrated that international laws regulating the exercise of acts of belligerency during wars with foreign entities are of the latter type, even in cases arising within U.S. territory.

³⁷⁶ *Id.* ("Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.").

³⁷⁷ *Hirabayashi v. United States*, 320 U.S. 81, 101 (1943) ("The adoption by Government, in the crisis of war and of threatened invasion, of measures for the public safety, based upon the recognition of facts and circumstances which indicate that a group of one national extraction may menace that safety more than others, is not wholly beyond the limits of the Constitution and is not to be condemned merely because in other and in most circumstances racial distinctions are irrelevant.").

³⁷⁸ *Ex parte Kawato*, 317 U.S. 69 (1942).

V. THE IMPLICATIONS OF THE *PAQUETE HABANA* FRAMEWORK

The implications of the preceding analysis are potentially both significant and far-reaching. This Part briefly surveys a few of the potential contributions of this Article's normative claims and descriptive analysis to various issues surrounding the use of the law of war as a rule of decision in federal courts.

A. *Implications of the Normative Claim*

Recall that the normative claim is that customary international law is positivist and exogenous to the Constitution and laws of the United States. It is neither an adopted or inherent part of federal law, nor is it necessarily incorporated into federal law by its use as a rule of decision. As law in part made by and binding upon the United States, a proper exercise of the "judicial power of the United States" requires U.S. courts to follow international law to which the U.S. clearly consents in cases where it applies. These conclusions, if accepted, clarify the role of *Paquete Habana* and *Charming Betsy*.

Recognizing that international law is exogenous but nevertheless applicable law in appropriate cases clarifies the doctrinal role of the general principles announced in *Paquete Habana* and *Charming Betsy*. In matters of external sovereignty, the *Charming Betsy* doctrine is not merely a canon of statutory interpretation; it is an aid in the choice of law framework articulated in *Paquete Habana*. If a federal statute can be interpreted to be consistent with applicable international law, it will be. International law will then provide the rule of decision, as occurred in *Charming Betsy*. If an applicable federal statute is inconsistent with international law, any statute that is later in time than an applicable treaty or general rule of customary international law provides the rule of decision³⁷⁹ and is therefore a controlling legislative act under the *Paquete Habana* framework.

Cases involving internal governance are more complicated. It is not clear whether customary international law can provide an independent rule of decision in any matters of true domestic governance. The

³⁷⁹ See *Whitney v. Robertson*, 124 U.S. 190, 193–94 (1888) (finding that an act of Congress prevails over a prior treaty if the two are in conflict); *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 621 (1870); see also Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1091–99 (1985) (citing federalist literature and other historical events in the nation's founding in support of an argument against the later-in-time rule). But see Julian G. Ku, *Treaties as Laws: A Defense of the Last-in-Time Rule for Treaties and Federal Statutes*, 80 IND. L.J. 319 (2005) (providing a defense of the last-in-time rule on historical, constitutional, and functional grounds).

original Alien Tort Statute implicitly assumes that both treaties and customary international law provide a conduct-regulating rule of decision for which federal or state courts may provide a domestic, common law cause of action and remedy.³⁸⁰ This could imply customary international law is intrinsically applicable throughout the territory of the United States without being federal common law.

However, the Rules of Decision Act also becomes relevant when discussing internal U.S. sovereignty. As previously shown, there are certainly times when federal courts create federal common law by observing the separation of powers and related international law.³⁸¹ Federal courts must also observe and preserve federalism principles in foreign affairs.³⁸² Given that foreign affairs powers are reserved to the federal government and in most respects denied to the states,³⁸³ federal courts must independently determine the content and proper interpretation of traditional international law when a case implicates foreign affairs.³⁸⁴ This is particularly true in matters involving war with foreign nations or entities, over which the Constitution denies power to the states.³⁸⁵ For example, in *Hendren*, the Court concluded that that no federal question was raised when a New York life insurance company refused payment for the death of a policyholder in Virginia during the *Civil War*.³⁸⁶ Should a case involve a similar claim by a foreign plaintiff related to an international or noninternational armed conflict with a foreign entity, it would likely fall within the scope of foreign diversity jurisdiction and the result should likely be different.³⁸⁷ In cases where the Constitution's assignment of foreign affairs powers to the federal government are truly implicated, or in which there is a relevant congressional or executive act, the courts might also find a federal

³⁸⁰ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004).

³⁸¹ See *supra* Section III.C.

³⁸² *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 420 (2003) (“[T]he likelihood that state legislation will produce something more than incidental effect in conflict with express foreign policy of the National Government would require preemption of the state law.”); *Zschernig v. Miller*, 389 U.S. 429, 440 (1968) (“[R]egulations must give way if they impair the effective exercise of the Nation’s foreign policy”); see also Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1620–21 (1997) (“Federal courts charged with enforcing structural constitutional guarantees must invalidate state laws or acts that impermissibly impinge upon the unique federal foreign relations interest and, when necessary, replace them with judge-made rules. Otherwise, parochial state acts could threaten the foreign relations interests, and perhaps the national security, of the entire nation—a situation the Constitution is plainly designed to avoid.”).

³⁸³ U.S. CONST. art. I, § 10.

³⁸⁴ *Miller*, 389 U.S. at 441 (noting state laws that “conflict with a treaty . . . must bow to the superior federal policy”). A similar argument could be made for state laws that conflict with customary international norms with which the United States clearly agrees.

³⁸⁵ *Id.*

³⁸⁶ *N.Y. Life Ins. Co. v. Hendren*, 92 U.S. 286, 286–87 (1875).

³⁸⁷ See U.S. CONST. art. III, § 2.

question, which might be based upon a declaration of war or other authorization for the use of military force.³⁸⁸ In other words, even though traditional international law is not federal law, this does not defeat federal jurisdiction in many—if not most—cases in which it must be interpreted and applied.

B. *Implications of the Descriptive Analysis*

A proper understanding and application of the *Paquete Habana* framework will also aid federal courts in properly resolving matters currently pending before them. One question percolating in the D.C. Circuit, and likely on its way to the Supreme Court, involves the subject matter jurisdiction of military commissions convened at Guantanamo Bay, Cuba.³⁸⁹ The central issue is whether Congress properly placed certain offenses in the Military Commissions Act (MCA) within the jurisdiction of law of war military commissions rather than Article III courts. No court has yet considered the *Paquete Habana* framework, nor have they thoroughly examined the origins and precise nature of the constitutional powers at issue.

Most recently, a D.C. Circuit panel held that giving military commissions jurisdiction over inchoate conspiracy impermissibly encroached upon the jurisdiction of Article III courts.³⁹⁰ This conclusion is suspect. Because most of the conduct being tried by MCA military commissions occurred overseas, and, at least arguably within the context of an armed conflict with a foreign entity, *Fleming*, *Quirin*, *Madsen*, and *Yamashita* all indicate that the jurisdiction of Article III courts do not necessarily have constitutional primacy.³⁹¹ They also strongly indicate the use of military commissions is an exercise of the war powers. This suggests that a different constitutional analysis, one based in the *Paquete Habana* framework, is appropriate.

The panel began its constitutional analysis emphasizing that Article III vests the judicial power, including the power of criminal punishment, in federal courts. It cited *Ex parte Milligan*³⁹² and *Quirin*, and several cases not involving a war or armed conflict, for the

³⁸⁸ See, e.g., *Hendren*, 92 U.S. at 287 (Bradley, J., dissenting) (“When a citizen of the United States claims exemption from the ordinary obligations of a contract by reason of the existence of a war between his government and that of the other parties to it, the claim is made under the laws of the United States by which trade and intercourse with the enemy are forbidden.”).

³⁸⁹ *Al-Bahlul v. United States*, 792 F.3d 1 (D.C. Cir. 2015), *vacated*, No. 11-1324 (D.C. Cir. Sept. 25, 2015) (order granting petition for rehearing en banc).

³⁹⁰ *Id.* at 22.

³⁹¹ See *supra* Sections IV.B.2–C.

³⁹² *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121 (1866).

proposition that military commissions are narrow exceptions to the jurisdiction of Article III courts.³⁹³ While this claim is likely true in peaceful U.S. territory, where the conduct punished in *Milligan* and *Quirin* occurred, it is a more doubtful proposition when the conduct being prosecuted and punished was engaged in by a member of a foreign armed group and occurred extraterritorially in the course of an armed conflict, such as in occupied Mexico.

The panel then focused on whether conspiracy was an offense under international laws of war or otherwise triable by military commission.³⁹⁴ It claimed that *Quirin* limited Congress to punishing only actual international law-of-war violations.³⁹⁵ The *Quirin* Court, however, decided whether the *President* had properly exercised what it found to be congressionally delegated power to punish law-of-war violations within U.S. territory.³⁹⁶ Its focus on whether the Executive had properly tried actual law-of-war violations was therefore appropriate. The military commissions convened pursuant to the MCA, however, are adjudicating offenses prescribed by Congress and applied to extraterritorial conduct. Under the *Paquete Habana* framework, if an offense Congress defines in the MCA is inconsistent with an earlier-in-time treaty or customary law of war norm, then the MCA is potentially a controlling legislative act. As the court said in *Brown*, a rule of customary international law is “not . . . immutable . . . but depends on political considerations which may continually vary.”³⁹⁷ It “is addressed to the judgment of the sovereign; and although it cannot be disregarded by him without obloquy, yet it may be disregarded.”³⁹⁸ Thus, the appropriate inquiry is the scope of Congress’s constitutional power to adopt war measures punishing the enemy, an inquiry that should respect the different role of Article III courts in extraterritorial and foreign affairs.³⁹⁹

At bottom, determining the proper rule of decision for any given case requires careful constitutional analysis of the particular sovereign powers being exercised and their allocation among the branches of the federal government. As the descriptive analysis demonstrated, the Court intuitively followed the *Paquete Habana* framework in its wartime jurisprudence even prior to its articulation in that case. If that framework were revived to its proper place of importance, many

³⁹³ *Al-Bahlul*, 792 F.3d at 7–10.

³⁹⁴ *Id.* at 10–11.

³⁹⁵ *Id.* at 14–17.

³⁹⁶ *Ex parte Quirin*, 317 U.S. 1, 45–48 (1942).

³⁹⁷ *Brown v. United States*, 12 U.S. (8 Cranch) 110, 128 (1814).

³⁹⁸ *Id.*

³⁹⁹ See *Baker v. Carr*, 369 U.S. 186 (1962) (discussing the political question doctrine and its application to matters of foreign affairs).

lingering questions over the separation of war powers would be addressed by the courts instead of by the Office of Legal Counsel in unpublished advice to the President. Judicial abstinence from the process of enforcing the separation of war and other foreign affairs powers has long favored executive overreach.⁴⁰⁰

C. *The Relationship of Customary to Treaty-Based Laws of War*

The *Paquete Habana* framework also clarifies the relationship between customary international and treaty-based laws of war. Assuming for the sake of argument that only self-executing law of war treaties are enforceable in the federal courts,⁴⁰¹ treaties are only one possible rule of decision under the *Paquete Habana* framework. In the absence of an enforceable treaty, or a controlling executive or legislative act, the courts must look to customary international law for potential rules of decision. The courts might then squarely engage questions regarding the proper methodology for determining the content of contemporary customary international law, the Executive's role in creating (or preventing the creation of) customary law binding upon the United States, and other important questions that would benefit from objective judicial analysis.

⁴⁰⁰ As Professor Koh astutely observed:

The broader lesson that emerges from this study of executive initiative, congressional acquiescence, and judicial tolerance . . . is that under virtually every scenario the president wins. If the executive branch possesses statutory or constitutional authority to act and Congress acquiesces, the president wins. If Congress does not acquiesce in the president's act, but lacks the political will either to cut off appropriations or to pass an objecting statute and override a veto, the president again wins. If a member of Congress or a private individual sues to challenge the president's action, the judiciary will likely refuse to hear that challenge on the ground that the plaintiff lacks standing; the defendant is immune; the question is political, not ripe, or moot; or that relief is inappropriate.

HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 148 (1990).

⁴⁰¹ See, e.g., *Al-Bihani v. Obama*, 619 F.3d 1, 12 (D.C. Cir. 2010) (order denying petition for rehearing en banc) (Kavanaugh, J., concurring) (“[I]t is for Congress and the President—not the courts—to determine in the first instance whether and how the United States will meet its international obligations” and courts must respect a decision “not to incorporate international-law norms into domestic U.S. law.”); *id.* at 16 (“[I]nternational-law principles found in non-self-executing treaties and customary international law, but not incorporated into statutes or self-executing treaties, are not part of domestic U.S. law.”).

CONCLUSION

This Article has reexamined first principles to clarify the relationship of “traditional” customary international law generally, and of customary international laws of war specifically, to the U.S. Constitution, laws, and legal system. Much of the current debate lacks nuance. Mainstream points of view often refer to specific data points that are ambiguous in nature, and assert that they are certain, even canonical.⁴⁰² Theories are then constructed and applied both forward and backward in an attempt to demonstrate their validity and to account for inconsistent data. By returning to first principles in order to carefully distill the Framers’, First Congress’s, and Supreme Court’s fairly consistent understanding of this relationship, this Article’s normative claim and descriptive analysis potentially provide some coherence to an area of the law that is, at present, hopelessly cluttered with ambiguous and competing theories.

Whatever one thinks of the jurisprudential legitimacy of considering customary international law to be positivist, enacted law rather than a theoretical general law, it was clearly understood to be positivist, exogenous law by the Supreme Court (its approach to interstitial gap-filling notwithstanding), by the international jurists most influential upon the founding generation, and by early American commentators. This knowledge, coupled with the understanding that traditional customary international law binds an entire nation, including all of its institutions and citizens, clarifies that describing customary international law to be “law of the land”⁴⁰³ or “part of our law” does not transform its fundamental nature as law exogenous to the Constitution and laws of the United States. Such phrases merely express an understanding that customary international law is law *for* the United States and its citizens, not *of* the United States.

Difficult questions remain regarding the proper judicial approach to identifying binding customary norms and the extent to which the Executive participates in making or preventing the ripening of a rule of customary international law for the United States. Resolving such questions could be enhanced by the objective participation of courts. Raising the *Paquete Habana* framework from the depths of history to a

⁴⁰² See Vázquez, *supra* note 36, at 1516 (“The canonical expression of the modern position is the statement in *The Paquete Habana* that “[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.” (footnote omitted) (alteration in original)).

⁴⁰³ An oft-cited reference to customary international law as “law of the land” is *Who Privileged from Arrest*, 1 Op. Att’y Gen. 26 (1792) (“The law of nations, although not specially adopted by the Constitution or any municipal act, is essentially a part of the law of the land.”).

prominent place in contemporary wartime jurisprudence could do much to help clarify these issues.

America once had a leading role in establishing and maintaining the rule of international law. By again recognizing that international law provides a rule of decision to be applied by the courts of this country in appropriate cases, we might start to regain what has been lost by elected officials, judges, and government legal advisors making policy-oriented arguments regarding the substance of customary international laws of war and the constitutional propriety of observing them.