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The Conflict of Laws in Armed Conflicts and Wars

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Abstract

*After over thirteen years of continuous armed conflict, neither courts nor scholars are closer to a common understanding of whether, or how, international and U.S. law interact to regulate acts of belligerency by the United States. This Article articulates the first normative theory regarding the relationship of customary international law to U.S. domestic law that fully harmonizes Supreme Court precedent. It then applies this theory to customary international laws of war to better 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” sovereign powers. In cases involving matters external to the sovereignty of the United States, including the exercise of external sovereign powers of war, the Supreme Court traditionally treated customary international law as a form of external, positive law, and applied it as an exogenous, non-federal rule of decision in accordance with conflict-of-laws principles. The Court articulated its “external” choice-of-law framework in *Paquete Habana*: “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.” The Article then analyzes the Court’s wartime jurisprudence to more thoroughly explicate the *Paquete Habana* framework in the nation’s armed conflicts, explaining 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 implications of the Court’s use of international law as an exogenous rule of decision, particularly, that such rules need not be entirely consistent with the Bill of Rights. Given the range of issues this Article clarifies, it should significantly influence academic and judicial discourse regarding the relationship of customary international to U.S. law generally, and especially 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),¹ circumstances have changed, and armed conflict with radical Islamist armed groups in foreign lands continue indefinitely.² Yet, after over thirteen years of armed conflict with such groups, neither courts nor commentators have a common understanding of whether, or how, international and U.S. law interact to regulate acts of war by the United States. The central issues are: (1) whether or when U.S. courts may apply customary or conventional international laws of war to constrain acts undertaken by the Executive Branch in the course of armed conflict; and if so, (2) whether international law provides only interpretive guidance for any applicable legislation or has independent effect as a rule of decision in U.S. courts.

For example, in the 2004 case of *Hamdi v. Rumsfeld*, a plurality of the Supreme Court interpreted the post-9/11 Authorization for the Use of Military Force³ (AUMF) to encompass the power to detain a putative enemy belligerent indefinitely—even a U.S. citizen despite a general statutory prohibition of such detentions.⁴ The plurality found this power to be a fundamental aspect of war permitted by the international laws of war and therefore clearly, though impliedly, authorized by the AUMF.⁵ In 2010, however, two members of a three-judge panel of the District of Columbia Circuit Court of Appeals (D.C. Circuit) concluded that international law is irrelevant to interpreting the proper scope of AUMF detention authority unless Congress affirmatively indicates otherwise.⁶ When denying *en banc* rehearing of this decision, several judges concurred

¹ President Barack Obama, Remarks by the President at National Defense University (May 23, 2013) (transcript available at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>).

² President Barack Obama, Statement by the President on ISIL (Sep. 10, 2014) (transcript available at <http://www.whitehouse.gov/the-press-office/2014/09/10/statement-president-isil-1>).

³ Authorization for the Use of Military Force, Pub. L. No. 107-40, §§ 1-2, 115 stat. 224 (Sep. 18, 2001) [hereinafter “AUMF”].

⁴ 18 U.S.C. § 4001 (2000); *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004).

⁵ *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.”).

⁶ *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 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

that the panel's opinion regarding the irrelevance of international law was not essential to its decision on the merits.⁷ In response, an author of the panel decision sharply contested that view.⁸ Another argued at length against the propriety of a U.S. court's reliance upon international law as either a rule of decision or an interpretive tool without clear legislative intent to observe or incorporate it.⁹ He asserted that neither the Geneva Conventions of 1949—to which the United States and most nations are party¹⁰—nor customary international laws of war are inherently enforceable in the courts of the United States.¹¹

The Supreme Court has not squarely addressed the independent effect of customary or conventional international laws of war in the nation's courts for more than a century.¹² In *Hamdi*, international law provided only interpretive guidance for the post-9/11 AUMF. In *Hamdan v. Rumsfeld*, the Court invalidated President Bush's military commissions order,¹³ in part due to perceived conflict with a provision of what is known as "Common Article 3" of the Geneva Conventions of 1949.¹⁴ The Court found that the federal statute permitting the use of military commissions required

of war as a whole have not been implemented domestically by Congress and are therefore not a source of authority for U.S. courts.") (citations omitted).

⁷ *Al-Bihani v. Obama*, 619 F.3d 1 (D.C. Cir. 2010) (Sentelle, C.J., concurring in denial of rehearing)("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.").

⁸ *Id.* at 1-9 (D.C. Cir. 2010) (Brown, J., concurring)

⁹ *Id.* at 9-53 (D.C. Cir. 2010) (Brown, J., concurring)

¹⁰ Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter GC III]; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter GC IV]. There are 196 states party to these conventions. For a complete account, *see* International Committee of the Red Cross, State Parties to the Following International Humanitarian Law and Other Related Treaties 6 (Oct. 23, 2014) *available at* <https://www.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp>.

¹¹ *Al-Bihani*, 619 F.3d at 20 (Brown, J., concurring) ("the 1949 Geneva Conventions are not self-executing treaties and thus are not domestic U.S. law"); *id.* at 23 ("absent 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").

¹² After a review of the relevant case law, I believe the case was *Herrera v. U.S.*, 22 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), discussed *infra* Part _____. However, each noted that Congress had authorized these commissions by statute in the Articles of War.

¹³ Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001).

¹⁴ Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter GC III]; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter GC IV];

compliance with Common Article 3.¹⁵ Neither opinion addressed the inherent enforceability of the 1949 Geneva Conventions or related customary international law in U.S. courts.

The lack of a common judicial understanding of, or uniform approach to, 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.¹⁶ Some commentators have argued that Article VI of the Constitution, which declares treaties to be “supreme law of the land,”¹⁷ establishes a presumption that treaties are self-executing and preemptive federal law subject to limited exceptions.¹⁸ Conversely, the Supreme Court more recently held that unless a treaty “conveys an intention that it be self-executing,” it is not enforceable “federal law.”¹⁹ This appears to effectively establish a presumption against self-execution.²⁰ The lower courts have grappled with self-execution doctrine for almost two centuries without developing a uniform understanding of its exact content or proper application.²¹ Although there are a number of important treaties that comprise the international laws of war, their most important provisions are widely understood to be customary international law applicable to both international and non-international armed conflict.²² For brevity, therefore, this article will obliquely deal

¹⁵ Hamdan, 548 U.S. 557, 627-28 (2006) (“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) (citations omitted).

¹⁶ For a description of the doctrine, see Foster v. Neilson, 27 U.S. 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.”). This was later referred to as a “self-executing” treaty. Bartram v. Robertson, 122 U.S. 116, 120 (1887); Whitney v. Robertson, 124 U.S. 190, 194 (1888).

¹⁷ U.S. CONST. art. VI, § 2.

¹⁸ LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 201 (2d ed. 1996); Carlos Manuel Vazquez, *Treaties as the Law of the Land: The Supremacy Clause and Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 602 (2008) [hereinafter *Treaties as Law of the Land*].

¹⁹ Medellin v. Texas, 552 U.S. 491, 505 (2008) (internal quotations and citations omitted). See also David H. Moore, *Lawmakers of the Land: The Doctrine of Treaty Non-Self-Execution*, 122 HARV. L. REV. 32 (2009) (arguing presumption of treaty self-execution unnecessary and inconsistent with treaty making power); 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 treaty).

²⁰ See *id.* at 1380 (Breyer, J., dissenting) (asserting majority opinion “erects ‘clear statement’ presumptions” against self-execution); *id.* at 1372 (Stevens, J., concurring) (characterizing majority opinion as creating “a presumption against self-execution”).

²¹ See generally Carlos M. Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L L. 695 (1995) [hereinafter *Four Doctrines*] (reviewing varied approaches by U.S. courts to self-execution doctrine).

²² See generally Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect of the Rule of Law in Armed Conflict*, 87 INT’L REV. OF THE RED CROSS 175 (2005) (explaining 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 non-international armed conflict). But see Office of the General Counsel, Dep’t of Defense, 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

with treaties as an aspect of the choice-of-law framework and eschew a more exhaustive theoretical treatment for future examination.

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.²³ The “revisionist” view asserts that customary international law is “general law” that takes effect in the U.S. legal system only when federal statutes, or state courts or legislatures, affirmatively incorporate it.²⁴ This approach relies heavily on the Constitution’s assignment of domestic lawmaking powers and the Supreme Court’s decision in *Erie R.R. Co. v. Tompkins*.²⁵ *Erie* held that “[t]here is no general federal 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”²⁶ as required by the Rules of Decision Act.²⁷

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,”²⁸ commentators have developed other theories. Some have asserted 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 situations to which this approach applies.²⁹ Other scholarship argues that the federal courts may create federal common law from customary international law in order to preserve the

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”)

²³ See Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 (1997); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393 (1997); Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984).

²⁴ See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) [hereinafter *Critique of Modern Position*]; Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665 (1986).

²⁵ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

²⁶ *Id.* at 78.

²⁷ 28 U.S.C. § 1652 (“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 Curtis A. Bradley, *The States of International Law in U.S. Courts—Before and After Erie*, 26 DENV. J. INT’L L. & POL’Y 807, 810 (1998) (“customary international law’s purported status today is . . . in tension with Supreme Court’s decision in *Erie Railroad v. Tompkins*”).

²⁸ Anthony J. Bellia Jr. & Bradford R. Clark, *The Law of Nations as Constitutional Law*, 98 VA. L. REV. 729, 743 (2012) [hereinafter *International as Constitutional Law*].

²⁹ 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”); 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 if it “does not displace otherwise-constitutional state or federal law”).

foreign affairs powers of the elected branches.³⁰ More recent commentary has argued that customary international law should be considered “non-federal, non-preemptive” law applicable in federal, but not state, courts,³¹ and another that Articles I and II of the Constitution sometimes require the courts to apply international law, making it a form of constitutional law.³² Bringing matters full circle, a recent article provides a slightly qualified defense of the modern position and critiques the revisionist and several “intermediate” positions.³³

A significant problem with much of this scholarship is that it does not distinguish among several very different types of the “law of nations” or contemporary customary international law. The most prominent type, and the one central to this Article, is “traditional international law.”³⁴ Traditional international law creates primary rights and obligations *between* nation-states as well as their *respective* citizens.³⁵ It leaves matters of internal sovereignty and governance to the independent judgment of each nation-state. As will be later shown, this “inter-nation-state” law of nations or “traditional international law” was by far the most important type of international law at the time the Constitution was adopted and for over a century thereafter.³⁶

A second type of contemporary international law is what I will call *internal* human rights law—what others have called “modern sovereignty-limiting rules.”³⁷ Internal human rights law purports to create rights and obligations between a nation-state and its citizens or others subject to its jurisdiction and control.³⁸ To the extent that

³⁰ Anthony J. Bellia Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 9 (2009) [hereinafter *Federal Common Law of Nations*] (“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 distinct Article I and Article II powers....”); Daniel J. Meltzer, *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”).

³¹ 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).

³² See generally Bellia & Clark, *International as Constitutional Law*, supra note ____.

³³ See generally Carlos M. Vazquez, *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) [hereinafter *Defense of the Modern Position*].

³⁴ Jeremy Bentham coined the term “international law” in 1789 and defined it as the law applicable between states. See M.W. Janis, *Jeremy Bentham and the Fashioning of “International Law,”* 78 AM. J. INT’L L. 405, 408-9 (1984).

³⁵ 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 and enforced. See generally H.L.A. HART, *THE CONCEPT OF LAW* (Joseph Raz and Penelope Bullock eds., 2d ed. 1994).

³⁶ See *infra* part ____.

³⁷ Bellia & Clark, *International as Constitutional Law*, supra note ____ at 744.

³⁸ See, e.g., International Covenant on Civil and Political Rights, art. 2(1) G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (1966) [hereinafter ICCPR] (“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, *Human Welfare, not Human Rights*, 108 COLUM. L. REV. 1758, 1763 (2008); see also

international human rights norms or instruments create rights and obligations between nation-states and *foreign* nations or peoples, a contested issue,³⁹ they fall within the scope of traditional international law. Only international law that purports to create primary rights and obligations *between* a state and its population is properly called internal human rights law. The municipal or “internal” focus of this law makes it functionally distinct from traditional international law, and therefore deserving of separate theoretical treatment.

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 rather than states and their citizens. For example, the *lex mercatoria*, or law merchant, was a general commercial law once considered a branch of the law of nations.⁴⁰ As the concept of the law of nations developed post-Westphalia, however, commercial law came to be viewed by prominent jurists and the Supreme Court as “general”⁴¹ rather than “international” law.⁴² This Article demonstrates that a positivist view and a more narrow understanding of traditional international law developed in the works of jurists and the decisions of the Supreme Court much earlier than is generally acknowledged.⁴³ In short, commentary that conflates all historical branches or types of the law of nations, rather than separating them by their purpose and function, is fundamentally flawed.⁴⁴

This Article addresses the general relationship of traditional customary international law to the U.S. legal system, and then reviews its specific application in the context of armed conflicts with foreign entities. It first examines key developments in the Western understanding of “general” law and the “law of nations,” clear inferences from the Constitution’s text and the 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 understood customary international law to be entirely exogenous to the U.S. legal system but inherently applicable within the United States and its courts. It proposes a more nuanced and functional theory of law and rules of decision that distinguish cases involving the exercise of domestic lawmaking and other “internal” sovereign powers from those involving the exercise of “external” sovereign powers. It concludes that in cases involving matters external to

Chapter IV: Human Rights, UNITED NATIONS TREATY COLLECTION available at <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en>.

³⁹ 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 range of possible ICCPR interpretations, including those that would create human rights obligations between signatories and foreign nationals under their “effective control”)

⁴⁰ 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 27-8 (David L. Sloss, Michael D. Ramsey, & William S. Dodge, eds. 2011)(noting law merchant part of general common law)

⁴¹ See *infra* Part III.

⁴² Sloss, Ramsey & Dodge, *supra* note __ at 27 (“many commercial and maritime laws identified as general law were also sometimes described as branches of the law of nations”).

⁴³ See *infra* Part II.

⁴⁴ See e.g. Sloss, Ramsey & Dodge, *supra* note __ at 27-8 (using Court’s approach to law merchant in *Swift v. Tyson* to argue general proposition that all law of nations branches are general law).

the sovereignty of the United States or the exercise of external sovereign powers, such as war powers, the Supreme Court applied international law as a non-federal rule of decision in accordance with conflict-of-laws principles. The Court articulated its constitutionally based choice-of-law framework in *Paquete Habana*: “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.”⁴⁵

The Article then analyzes the Court’s wartime jurisprudence adjudicating the lawfulness of belligerent acts by the United States in the course of an armed conflict with foreign nations or groups. This analysis more thoroughly explicates the *Paquete Habana* framework, the separation of war powers, and the relationship of international laws of war to the Constitution, federal statutes, and Bill of Rights. It distinguishes such cases from those that involve either the exercise of internal sovereign powers incident to war or the extraterritorial exercise of such powers over citizens abroad in times of peace. Unlike scholarship that suggests a conflict-of-laws approach to customary international law generally without clarifying its exact parameters or demonstrating its actual use by the Supreme Court,⁴⁶ this Article attempts to provide a more comprehensive approach, particularly in armed conflict context.

The Article has five parts. Part I briefly reviews contemporary commentary regarding the general relationship of customary international law to the U.S. legal system to identify the key assumption underlying the theories advanced: that customary international law is properly considered “general” rather than “positive” (or enacted) law. Part II retraces key jurisprudential developments regarding the concept of the “law of nations” in Western legal thought to demonstrate that by the time the Constitution was adopted, the term “law of nations” was understood to refer primarily to a body of enacted law applicable between states and binding upon a nation and its people rather than “general” law in the Roman “*jus gentium*” or Anglo-American “common law” sense of the term. 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 exogenous, positive law rather than general international or federal common law, and proposes the constitutional basis for the courts’ use of this exogenous law as a rule of decision. 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 a functional approach to 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 identifying rules of decision in cases involving acts of belligerency, showing the contours of the *Paquete Habana*. Part IV also differentiates separation of powers and Bill of Rights issues in this context from those related to matters of routine domestic or internal governance, including the exercise of internal powers during armed conflict or war. Finally, Part V briefly suggests how this more nuanced understanding of the relevant legal framework affects certain overarching doctrinal issues as well as specific contemporary legal issues.

⁴⁵ The *Paquete Habana*, 175 U.S. 677, 700 (1900).

⁴⁶ See *supra* note ____.

The implications of this analysis are important. By establishing that customary international law provides a non-domestic rule of decision for U.S. courts in the absence of a treaty or truly controlling legislative or executive act, this Article clarifies that the legal framework regulating the exercise of the nation's war powers includes customary international law. Any potential constitutional "gloss"⁴⁷ from recent practice of the elected branches involving expansive claims of presidential power unchecked by Congress should be eyed with suspicion.⁴⁸ This is particularly so in light of recent scholarship noting the Executive's self-serving approach to legal interpretation⁴⁹ and strong tendency to adhere to even constitutionally questionable internal executive branch legal "precedent."⁵⁰ In other words, neither courts nor scholars should understand politically-motivated congressional abdication of its constitutional responsibilities or exigency-driven Executive overreach⁵¹ to represent either branch's actual understanding of the Constitution's distribution of powers in the context of war.

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."⁵² In 1987, the Restatement (Third) of Foreign Relations Law adopted the position that customary international law and international agreements of the United States "are law of the United States and supreme over the law of the several States."⁵³ Proponents of this position often rely on the so-called "canonical" statement of the Supreme Court in *Paquete Habana* that "international law is part of our law. . . ."⁵⁴ Even a federal court has declared, "the 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 Constitution," and that "federal jurisdiction over cases involving international law is

⁴⁷ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952)(Frankfurter, J., concurring).

⁴⁸ Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 414 (2012)("It has become apparent from political science scholarship, however, that the Madisonian [inter-branch competition to preserve constitutional power] model does not accurately reflect the dynamics of modern congressional-executive relations.")

⁴⁹ See generally Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189 (2006) (arguing 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).

⁵⁰ 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).

⁵¹ See, e.g., Jack Goldsmith, *THE TERROR PRESIDENCY* 37 (2007)("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 power, 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.")

⁵² Restatement (Third) of Foreign Relations Law, § 102(1)(c)(2) (1987). See also Statute of the International Court of Justice, art. 38(1)(b), June 26, 1945, 33 U.N.T.S. 993 (defining "international custom" as "a general practice accepted as law").

⁵³ Id. at § 111(1) & cmt. d

⁵⁴ See, e.g., Vazquez, *Defense of the Modern Position*, supra note 33, 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.'")

clear.”⁵⁵ Such pronouncements appear to conveniently ignore earlier Supreme Court decisions stating or holding, for example, that cases arising under the customary law of nations “[do] not, in fact, arise under the Constitution or laws of the United States.”⁵⁶

Engaging the modern position on its terms, revisionist commentators, such as Professors Bradley and Goldsmith, initially argued that the modern position misreads pre-*Erie* case law and, in any event, did not survive the Court’s decision in *Erie* declaring that there is no general federal common law.⁵⁷ Bradley and Goldsmith claimed that for the majority of the nation’s history, customary international law was considered “general common law” rather than federal law.⁵⁸ As a constitutional matter, then, it could not be federal law unless incorporated as such by the elected branches.⁵⁹ Later, however, Bradley and Goldsmith, writing with Professor David Moore, bizarrely endorsed viewing some jurisdiction-granting statutes as authorizing judicial incorporation of customary international law as federal law.⁶⁰ In the context of post-9/11 war powers, however, Bradley and Goldsmith opined, “Although 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.”⁶¹ In other words, international laws of war enhance the President’s war powers but do not limit them.⁶² This position seems to flow from their belief that international law is best viewed as general, rather than positive, law and that “there is a strong argument that the President has the domestic constitutional authority to violate customary international law.”⁶³

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 best viewed as general rather than positive law.⁶⁴ This likely results from conflation of the various historical branches of the law of nations, from a narrow view of legal positivism, or from hyper-focus on the proper role or effect of

⁵⁵ *Filartiga v. Pena-Irala*, 630 F.2d 876, 886-87 (2d Cir. 1980).

⁵⁶ *American Insurance Co. v. Canter*, 26 U.S. 511, 545 (1828) (referring to admiralty law); *see also New York Life Ins. Co. v. Hendren*, 92 U.S. 286, 286-87 (1875) (holding that no issue of federal law existed 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).

⁵⁷ Bradley & Goldsmith, *Critique of Modern Position*, *supra* note __, at 863, 868, 870.

⁵⁸ *Id.* at 850.

⁵⁹ *Id.* at 868.

⁶⁰ 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).

⁶¹ Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2097 (2005) [hereinafter *Congressional Authorization*].

⁶² For a different view, *see generally* John C. Dehn, *The Commander-in-Chief and the Necessities of War: A Conceptual Framework*, 83 TEMPLE L. REV. 599 (2011) (distilling and explaining doctrines of military and public necessity from Supreme Court’s wartime jurisprudence, both of which are limited by specifically applicable international or domestic law).

⁶³ Bradley & Goldsmith, *Congressional Authorization*, *supra* note __, at 2099 (citations omitted).

⁶⁴ *See* Young, *Sorting Out*, *supra* note 29, at 370; *see also* William A. Fletcher, *International Human Rights in American Courts*, 93 VA. L. REV. 653, 672 (2007).

contemporary international human rights law within the United States.⁶⁵ International human rights law—which only began to develop after World War II⁶⁶ and purports to define rights and obligations between sovereign nations and individuals within their territory and jurisdiction⁶⁷—is fundamentally different than the concept of the inter-nation-state law of nations that prevailed at the time of the Constitution’s framing. It is this concept of traditional international law that should inform our understanding of the relationship of most contemporary customary international law to 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,”⁶⁸ it is important to first distinguish the inter-nation-state law of nations from longstanding notions of an ideal or theoretical “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 section differentiates jurisprudential notions of a natural-law-based universal or “general” law from post-Westphalian concepts of a positive, or enacted, inter-nation-state law of nations. It then demonstrates that the Constitution’s framers, the Supreme Court, and important early American judges and jurists adopted a positivist, post-Westphalian view of the inter-nation-state law of nations and understood it to be exogenous to the Constitution and laws of the United States but applicable—to the extent not superseded—within it. Finally, it posits a constitutional basis for the courts to apply international law as a rule of decision in appropriate cases.

A. Key Law of Nations Developments in Western Legal Thought

⁶⁵ See, e.g., Bradley, *Before and After Erie*, supra note __, 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, *International as Constitutional Law*, supra note __ at 744 (observing “modern 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”).

⁶⁶ The first international human rights instrument was the Universal Declaration of Human Rights, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948).

⁶⁷ See, e.g., International Covenant on Civil and Political Rights, art. 2(1) G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (1966) (“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 . . .”).

⁶⁸ Monaghan, supra note __ at 774 (“those 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.” (emphasis in original)); Bradley & Goldsmith, Critique, supra note __ at 849 (“statement in *The Paquete Habana* that CIL was part of our law” was “made under the rubric of general common law”); Bradford R. Clark, Federal Common Law: A Structural Reinterpretation, 144 U. Pa. L. Rev. 1245, 1279-81 & n.169 (1996) (before *Erie*, international law “acted as a set of background rules that courts applied in the absence of any binding sovereign command to the contrary”).

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 law of the Roman people.⁶⁹ Later, some parts of the European continent recognized a *jus commune*, or “common law,” a body of law that had developed from Roman and canon law.⁷⁰ Often, this “common” or “general” law applied directly in feudal Western European legal systems but could be superseded by local custom, statute or proclamation.⁷¹

Conversely, the Anglo-American concept of common law was “societal” or “internal” in orientation, informed in part by natural law principles, but established and developed by general customs of England and the reasoned decisions of judges in specific cases.⁷² Although generally applicable, the common law of England allowed for local alteration by custom.⁷³

Both civil - and common-law legal traditions, however, dealt almost exclusively with rights, relationships, and obligations existing between or among sub-national juridical persons, or between such persons and their sovereigns, rather than the law applicable between or among sovereign nations or peoples.⁷⁴ As the post-Westphalian 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.⁷⁵ Given the insular nature of English common law, England’s transformation into a post-Westphalian nation-state did not require altering the concept of common law that it had developed.⁷⁶ Clearly, however, both legal traditions distinguished the idea of a theoretical universal or general law common to all societies or peoples from a given sovereign’s internal laws, whether common or civil.

The advent of the nation-state brought about new concepts of the *jus gentium* and “law of nations.” Beginning with Hugo Grotius in 1625, commentators began applying natural law principles to nation-states in their mutual relations to identify the law that should govern them.⁷⁷ With respect to *jus gentium*, “[t]he famous Jesuit, Francesco Suarez (1548-1617), was the first to see clearly that [it] had come in post-

⁶⁹ HENRY WHEATON, HISTORY OF THE LAW OF NATIONS, IN EUROPE AND AMERICA: FROM THE EARLIEST TIMES TO THE TREATY OF WASHINGTON, 1842 26-27 (1845).

⁷⁰ JOHN HENRY MERRYMAN & ROGERLIO PEREZ-PERDOMO, THE CIVIL LAW TRADITION 12 (3d ed. 2007) [hereinafter CIVIL LAW].

⁷¹ *Id.*

⁷² I WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 39-44 (15th ed. 1809) (describing the relationship of natural law to the common law of England).

⁷³ *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”) (emphasis in original).

⁷⁴ See, e.g., I Blackstone, Commentaries 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).

⁷⁵ CIVIL LAW, *supra* note __, 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.

⁷⁶ *Id.* at 22.

⁷⁷ See generally Hugo Grotius, On the Law of War and Peace: Three Books (A.C. Campbell, tr. 1814).

Roman times to mean two different things: (1) universal law and (2) international law.”⁷⁸ The term “law of nations” also came to be used in two ways: as a general, theoretical, ideal law *within* nation-states or societies, and as the law applicable *between or among* societies or nations.⁷⁹ Although clearly owed an intellectual debt, neither Suarez nor Pufendorf were primary influences upon the United States.

Professor Janis has observed, “American lawyers of the Founding generation would have viewed William Blackstone, Hugo Grotius and Emmerich de Vattel as principle sources of the law of nations.”⁸⁰ Other commentators have noted that Vattel⁸¹ and Blackstone⁸² were particularly important to the Constitution’s framers, as well as to American judges and jurists. The commentary of each requires closer examination.

Although he applied natural law principles, Grotius viewed the law of nations in positivist terms. He explained that the rules of the law of nations proceed from the will of nations, not from the law of nature, and therefore may differ in different parts of the world.⁸³ This attitude clearly connotes a positivist view of traditional international law. Indeed, many scholars of the period, like Grotius, distinguished the concept of a theoretical natural or general law from the law of nations.⁸⁴ As Wheaton explained, Grotius “distinguished the law of nations from the natural law by the different nature of its origin and obligation, which he attributed to the general consent of nations as evidenced in their usage and practice.”⁸⁵ This is an important theoretical starting point.

⁷⁸ Arthur Nussbaum, *The Significance of Roman Law in the History of International Law*, 100 U. PA. L. REV. 678, 682 (1952) (citation omitted).

⁷⁹ See generally Samuel Pufendorf, *Of the Law of Nature and Nations* (Basil Kennet, tr. 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 the law of nations, but has everywhere blended it with the law of nature.” Vattel, *supra* note __ at Preface.

⁸⁰ MARK WESTON JANIS, *AMERICA AND THE LAW OF NATIONS 1776-1939* 11 (2010).

⁸¹ JOHN FABIAN WITT, *LINCOLN’S CODE: THE LAWS OF WAR IN AMERICAN HISTORY* 16 (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 & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 471 (2011) [hereinafter *ATS and Law of Nations*] (“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.” (citations omitted)); Douglas J. Sylvester, *International Law as Sword or Shield? Early American Foreign Policy and the Law of Nations*, 32 NYU J. INT’L L. & POLITICS 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”).

⁸² Sloss, Ramsey & Dodge, *supra* note __ 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*.”)

⁸³ I Grotius, *supra* note __ at § xiv (The “law of nations . . . [derives] its authority from the consent of all nations 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.”)

⁸⁴ Henry Wheaton documents several, from the well-known, such as Grotius, to the lesser known, such as an English professor named Zouch. WHEATON, *supra* note __ at 88-106.

⁸⁵ *Id.* at 91.

According to Grotius and many others, the law of nations is not synonymous with natural law.

Unlike Grotius, Blackstone stated that the “law of nations . . . depends entirely on the rules of natural law, or upon mutual compacts, treaties, leagues, and agreements between” states.⁸⁶ Additionally, Blackstone believed the law of nations regulated “the mutual intercourse of states”⁸⁷ and “the individuals belonging to each.”⁸⁸ Blackstone therefore appears to have accepted both general theoretical and positivist origins of the law of nations.

Blackstone further stated that the “law of nations . . . is adopted in it’s [sic] full extent by the common law [of England], and is held to be a part of the law of the land.”⁸⁹ But elsewhere, he distinguished England’s municipal common law from “the law of nature, the revealed law, and the law of nations.”⁹⁰ Perhaps to explain this inconsistency, Blackstone observed that “in mercantile questions, such as bills of exchange and the like; in all marine causes, relating to freight, average, demurrage, 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.”⁹¹ Note that he does not say it was perfectly adhered to. More importantly, 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 or allowed of.”⁹² Thus, Blackstone clearly understood that the *source* of the law of nations was distinct from and exogenous to the common law of England.

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,

[i]n arbitrary states this law, whenever 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, the law of nations . . . is here adopted⁹³

Thus, Blackstone’s theory regarding the “adoption” of the law of nations into the common law of England seems to have been result-oriented. It was calculated to establish the principle that the courts of England must follow the law of nations in appropriate cases, even if that law was not generally or specifically enacted by

⁸⁶ I BLACKSTONE, *supra* note 72 at 43.

⁸⁷ *Id.*

⁸⁸ IV WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 66 (15th ed. 1809).

⁸⁹ *Id.* at 67.

⁹⁰ I BLACKSTONE, *supra* note 72, at 43. (emphasis added) (“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 . . .”).

⁹¹ IV BLACKSTONE, *supra* note 88, at 67.

⁹² *Id.* (emphasis added).

⁹³ *Id.*

Parliament. He believed that this allowed England to be “a part of the civilized world.”⁹⁴

In other words, rather than suggest that English courts could simply apply an exogenous law of nations in appropriate cases, Blackstone, similar to many contemporary American commentators and judges, 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 English courts. Even if Blackstone is theoretically correct on this point as a matter of Eighteenth Century English law, England’s government and common law legal system was nothing like the republican, multifaceted U.S. government and legal system, consisting of a central government of limited powers and numerous sub-national sovereigns and legal systems. Therefore, the suggestion that the United States, as an Anglo-American common law legal system, must have similarly “adopted” the law of nations as *federal* common law seems entirely too simplistic.

In some 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 nature from those between individuals.⁹⁵ However, Vattel also differed from Blackstone in important respects.

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.”⁹⁶ 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.”⁹⁷ He then posited that the “right of embassies”⁹⁸ and “feacial law . . . [which related] to public treaties, and especially to war”⁹⁹ in Roman law were more akin to “the moderns [who] are generally agreed in restricting the appellation of the ‘law of nations’ to that system of right and justice which ought to prevail *between* nations or sovereign states.”¹⁰⁰

⁹⁴ *Id.* (positing that adoption of the law of nations in the common law enabled England to be “a part of the civilized world”).

⁹⁵ According to Vattel, a state is “a moral person...susceptible of *obligations* and *rights*,” I EMMERICH DE VATTEL, THE LAW OF NATIONS OR PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS, Preliminaries § 2 (Philadelphia: T. & J.W. Johnson & Co. 1883), 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.* at § 6; *see also id.* at Preface (“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.”).

⁹⁶ *Id.* at Preface.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* (emphasis added).

Vattel understood the obligatory law of nations to be enacted, positive 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.¹⁰¹ Based in natural law, the “necessary law of nations” was immutable, but binding only upon the conscience of the sovereign.¹⁰² Put differently, natural law was the edifice upon which the law of nations stood, but did not constitute a part of its 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.¹⁰³

To be sure, Vattel’s “voluntary law” category somewhat confusingly implies that states are unconditionally obligated to observe certain rules of international law.¹⁰⁴ This may suggest that a non-consensual, natural-law obligation was at work. Read in context, though, Vattel’s voluntary law category appears to adopt the idea that the exact content of such rules was to be settled by the general concurrence of civilized states and commentators: put otherwise, a general convergence in the practice and usages of states.¹⁰⁵ So understood, Vattel’s voluntary law category is a jurisprudential antecedent of contemporary customary international law, defined earlier,¹⁰⁶ which merges Vattel’s voluntary and customary law categories. So, understood both are a form of positive or enacted law rather than a theoretical, general law.¹⁰⁷

If there is any room for using the word “general” with regard to Vattel’s account of the law of nations, it lies in the notion of voluntary law as a *universal* body of law. In this context, however, the term “general” is used in contrast to specific 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.”¹⁰⁸ Thus, in Vattel’s account of the law of nations, “general” law is not some theoretical, universal, natural-law based body of obligatory rules. It is law positively defined by the agreements, practices, and usages of states.

Vattel and Blackstone concurred in the idea that the law of nations was binding between and among nation-states in their sovereign capacities, as well as their respective nationals. As noted earlier, Blackstone stated that the law of nations regulated “the mutual intercourse of states” and “the individuals belonging to each.”¹⁰⁹ Vattel also understood the law of nations to be binding upon the whole of a nation,

¹⁰¹ *Id.* at Preliminaries §§ 7, 23, 25, 26.

¹⁰² *Id.* at § 28.

¹⁰³ *Id.* at Preliminaries § 27.

¹⁰⁴ *Id.* at Preliminaries §§ 6-7.

¹⁰⁵ 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.” Vattel, *supra* note __ at Preliminaries § 21 n.7 (emphasis in original).

¹⁰⁶ See *supra* note __.

¹⁰⁷ 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 __, at 189.

¹⁰⁸ Vattel, *supra* note __ at Preliminaries § 24 (emphasis added).

¹⁰⁹ I Blackstone, *supra* note __, at 43.

meaning not only its government, but also its institutions and citizens.¹¹⁰ In other words, under the law of nations, individual citizens were obliged to respect—and could potentially violate—the rights of a foreign state vested in its citizens or representatives.¹¹¹ 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.¹¹² Such violations affected individuals but created state responsibility for a law of nations violation.¹¹³

The preceding discussion raises an important question 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.¹¹⁴ 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 than positive law.¹¹⁵ Vattel’s approach, like Grotius, adopts the view that sovereigns create or “enact” positive law by mutual consent or agreement.¹¹⁶ It is in this sense that their view of traditional international law is positivist.

To the extent that international law creates legal obligations not only between nation-states but also between their institutions and citizens, it appears to satisfy Austin’s concept of positivism in that superior sovereigns create law binding upon and capable of enforcement against their own citizens. Nevertheless, international law fails Austin’s definition in its purely state-to-state application. Although further discussion is beyond the scope of this Article, I nevertheless adopt Vattel’s and Grotius’ view of the law of nations as positive law because it is enacted by sovereigns by express or implied consent. I next argue that the Constitution’s framers, the First Congress, and the Supreme Court must have viewed it similarly.¹¹⁷

¹¹⁰ Vattel, *supra* note __, at Preliminaries § 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”).

¹¹¹ Bellia & Clark, *ATS and Law of Nations*, *supra* note __, at 456 (“the First Congress enacted the ATS as part of a broader framework to redress offenses against other nations by US citizens”); Lee, *supra* note __, at 836-37 (listing three categories of individual violations of the law of nations within scope of ATS).

¹¹² IV BLACKSTONE, *supra* note __ at 68.

¹¹³ See Bellia & Clark, *ATS and Law of Nations*, *supra* note __ at __; Lee, *supra* note __, at __.

¹¹⁴ See generally JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (2d ed. London, J. Murray 1861–1863).

¹¹⁵ *Id.* at 177 (“it 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 Henry Monaghan, *Supremacy Clause Textualism*, 110 Colum. L. Rev. 731, 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.”)

¹¹⁶ But see Austin, *supra* note __ at 177 (“the law obtaining between nations is law (improperly so called) set by general opinion.”)

¹¹⁷ But see Monaghan, *supra* note 105, at 774 (“[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 Hobbesian sovereign as necessary to the creation of a primary rule of law. See Anthony D’Amato, *The Neo-Positivist Concept of International Law*, 59 Am. J. Int’l L. 321 (1965) (explaining and critiquing Hart’s approach).

B. The Law of Nations in the Early United States

Much evidence indicates that the Constitution's Framers, the First Congress, and, very quickly, 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, positive law rather than an incorporated, theoretical, "general" law. It then briefly shows that American commentators, including Kent, Story, and others, shared this understanding of the law of nations and its relationship to the Constitution and laws of the United States. Finally, it posits a constitutional basis for courts to apply the law of nations as a rule of decision.

1. Inferences from the Constitution's Text and the First Judiciary Act. We can infer a great deal from aspects of the Constitution's text coupled with the First Judiciary Act. For example, the Framers' decision to vest Congress with the power to "define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations"¹¹⁸ 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 federal legislation to enable federal courts to punish them, just as Blackstone stated was the case regarding such offenses in England.¹¹⁹

Contrary to some claims, the Offenses Clause was not necessary to clarify the content of the law of nations, but rather to identify the precise law-of-nations violations to be punished under U.S. law, as well as the precise categorization of those violations.¹²⁰ Discussions at the constitutional convention suggest that the power to define and punish the law of nations was needed only to identify the law of nations to be made punishable, not to clarify the content of the law of nations in general. For example, Gouverneur Morris asserted, "The word *define* is proper *when applied to offenses* in this case; the law of nations being often too vague and deficient to be a rule."¹²¹ Conversely, 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.¹²² The obvious sentiment here is that as law created by the consent of some or many nations, the United States had no independent authority to define it.

Later commentary clarifies that the purpose of including the power to "define" was not to refine the content of the law of nations, but rather to identify and categorize a municipal offense enforcing it. In *The Federalist*, James Madison observed regarding the Offenses Clause

A definition of felonies on the high seas, is evidently requisite. Felony

¹¹⁸ U.S. CONST. art. I, § 8, cl. 10.

¹¹⁹ IV BLACKSTONE, *supra* note __ at 67-68.

¹²⁰ But see e.g. Al-Bihani, 619 F.3d at 13-14 (claiming Offenses Clause needed to refine law of nations).

¹²¹ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 615 (Max Farrand ed., 1937) (emphasis added) [hereinafter Farrand]. 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.

¹²² 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.").

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.¹²³

Supreme Court Justice Joseph Story similarly noted, “whatever the true import of the word felony at common law, with reference to municipal offences, in relation to offences on the high seas, its meaning is somewhat indeterminate.”¹²⁴ Story said the same was true of other offenses against the law of nations.¹²⁵ In other words, because the law of nations did not classify the criminal nature of its various violations, the Offenses Clause was necessary to allow Congress to do so.

For example, Story stated that “piracy is perfectly well known and understood in the law of nations” and “[t]he common law, too, recognizes, and punishes piracy as an offence, not against its own municipal code, but as an offence against the universal law of nations.”¹²⁶ He also noted that piracy “was no felony, whereof the common law took any notice,” but was only punishable under the civil law.¹²⁷ Thus, the classification of an appropriate penal sanction for piracy within the U.S. legal system would require federal legislation.

Congress obliged in 1790¹²⁸ and again in 1819.¹²⁹ The latter provided

that if any person or persons whatsoever, shall, upon 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.¹³⁰

Note Congress did not find it necessary to clarify what conduct constitutes the crime of piracy. It merely prescribed who may be punished and the punishment to be adjudged in the United States. Other situations might require a precise definition of a law-of-nations violation subject to punishment. Such clarifications would not, however, alter the substantive law of nations. They merely specify the precise conduct subject to punishment in the United States. In any event, the adoption of such legislation to incorporate well-established offenses against the law of nations into federal law pursuant to the Offenses Clause suggests that neither the Framers nor First Congress understood the law of nations to be federal common law. If it were, such legislation

¹²³ The Federalist No. 42 (J. Madison).

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

¹²⁵ *Id.* at § 1158.

¹²⁶ *Id.* at § 1154 (emphasis added).

¹²⁷ *Id.* at § 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 121, at 315.

¹²⁸ Crimes Act of 1790, 1 Stat. 112, 114 (1790).

¹²⁹ Act of March 3, 1819, ch. 77, § 5, 3 Stat. 510, 513-14 (1819).

¹³⁰ *Id.*

would be unnecessary, as in England.

Congress's use of the Offenses Clause to allow civil remedies for law of nations violations provides additional evidence that the Offenses Clause was not necessary to refine the law of nations for the courts, but rather to give this exogenous law effect.¹³¹ 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."¹³² This general grant of jurisdiction strongly suggests that the substance of the law of nations was sufficiently determinate for general judicial implementation.¹³³ Using the Offenses Clause in this way therefore supports viewing the law of nations as an exogenous body of law, one external to the Constitution and laws of the United States. By recognizing the existence of concurrent jurisdiction in state courts, the First Congress showed its understanding that the law of nations is inherently applicable in state courts and legal systems as well. This does not mean, however, that it viewed the law of nations as supreme *federal* law.

The text of Article III of the Constitution indicates that the Constitution's framers 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 controversies "arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."¹³⁴ 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."¹³⁵ These specific grants of jurisdiction would have been

¹³¹ See Beth Stevens, *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 Andrew Kent, *Congress's Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 TEX. L. REV. 843, 552-3 (arguing 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).

¹³² Judiciary Act of 1789, ch. 20, 1 Stat. 73, 77, § 9 (codified as 28 U.S.C. § 1350).

¹³³ Although the Supreme Court would later narrow the nature of law of nations violations sufficiently determinate to justify a judicial remedy, see *Sosa v. Alvarez-Machain*, 542 U. S. 692 (2004), it did so with reference to law of nations violations that were well settled at the time of the Constitution's framing and First Judiciary Act. *Id.* at 731 ("we 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").

¹³⁴ U.S. CONST. art. III, § 2.

¹³⁵ U.S. CONST. art. III, § 2. See also *The Federalist* No. 80 (A. Hamilton) ("As the denial or perversion of justice by the sentences of courts, is with reason classed among the just causes of war, it will follow, that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned."); Bellia & Clark, *ATS and the Law of Nations*, *supra* note __ at 510-12 (2011) ("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 __ at 835-36 (explaining constitutional grants of jurisdiction necessary to adjudicate ATS cases arising under the customary law of nations).

redundant to “arising under” jurisdiction and therefore wholly unnecessary if the “Laws of the United States” necessarily included the law of nations as federal common law. In order to assign meaning to the entire text of Article III, the law of nations should 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 understood to be federal law. The Act provided:

the laws of the several states, except where the constitution, treaties or statutes of the United States 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.”¹³⁶

If the law of nations were federal common law, this section of the Act would have been nonsensical. 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 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 rejected the notion that the customary law of nations had been incorporated in federal common law, it nonetheless applied the customary law of nations as a rule of decision in appropriate cases. This approach further demonstrates its status as exogenous, but nevertheless applicable, law.

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

As early as 1793, the Supreme Court observed that even prior to the Constitution, “the United States had, by taking its place among the nations of the earth, become amenable to the law of nations.”¹³⁷ In 1795, the Supreme Court stated that questions of prize in U.S. courts were “guided by the law of nations.”¹³⁸ This phrasing indicates that the Court viewed the law of nations as exogenous, a preexisting law to which the United States had become subject. Views regarding its precise domestic status varied. While it may be true that in the Eighteenth Century, “American lawyers and judges repeated [Blackstone’s adoption] principle constantly, often in language nearly identical to Blackstone’s,”¹³⁹ 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 Marshall opined, “congress may authorize general hostilities, in which case the general laws of war apply to our situation; or partial hostilities, in which case

¹³⁶ Judiciary Act of 1789, ch. 20, 1 Stat. 73, 92, § 34 (codified as 28 U.S.C. § 1350).

¹³⁷ See *Chisholm v. Georgia*, 2 U.S. 419, 474 (1793).

¹³⁸ *Penhallow v. Doane’s Administrator’s*, 3 U.S. 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”).

¹³⁹ 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 (Pieter H.F. Bekker, Rudolf Dolzer & Michael Waibel eds., Cambridge University Press, 2010).

the laws of war, so far as they actually apply to our situation, must be noticed.”¹⁴⁰ It is clear from this that Marshall thought the Court was obliged to 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 a form of domestic law. This choice of terms with reference to the law of nations, not unique to this case,¹⁴¹ indicates that the law of nations was not observed or applied as an adopted, theoretical, general law. Rather, it indicates that the law of nations was understood to be an exogenous body of law that may govern certain aspects of a case before the Court. The use of the term “general” also clearly meant only to refer to generally applicable rules rather than any specific (treaty-based) laws of war, not to suggest that the laws of war were general law.¹⁴²

In *New York Life Insurance Company v. Hendren*, the Supreme Court squarely held that the laws of war, a branch of the law of nations, are not federal law.¹⁴³ It held, “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.”¹⁴⁴ For this reason, the Court found that the case involved no issue of federal law and that the Court lacked jurisdiction to review a state court’s judgment regarding the effect of the law of war on an insurance policy.¹⁴⁵ The court’s conclusion in this case is incomprehensible without recognizing that it did not view the law of nations as federal common law. And the Court again clearly used the term “general” to denote “universal” rather than a “particular” law of nations rule, rather than as a reference to some theoretical “universal” law.¹⁴⁶

Similarly, the Court considered admiralty law to be independent from, rather than part of, domestic law in both the U.S. and in England.¹⁴⁷ 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”¹⁴⁸ 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.”¹⁴⁹ 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

¹⁴⁰ Talbot v. Seeman, 5 U.S. 1, 28 (1801).

¹⁴¹ 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. 170, 188 (1871) (finding that “by common consent of mankind, these rules have been acquiesced in as of general obligation. Of that fact we think we may take *judicial notice*.”).

¹⁴² See also The Federalist No. 80 (A. Hamilton) (distinguishing “general law of nations” from “treaties”).

¹⁴³ New York Life Ins. Co. v. Hendren, 92 U.S. 286 (1875).

¹⁴⁴ *Id.* at 286-87 (emphasis added).

¹⁴⁵ *Id.*

¹⁴⁶ But see Bradley, *Before and After Erie*, *supra* note ___, at 812 (“Prior to *Erie*, customary international law . . . had the status of general common law.”).

¹⁴⁷ Bellia & Clark, *Federal Common Law of Nations*, *supra* note ___, at 11.

¹⁴⁸ American Insurance Co. v. Canter, 26 U.S. 511, 545 (1828).

¹⁴⁹ *Id.* at 546.

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 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 . . . nations¹⁵⁰

These statements articulate the view that the law of nations is law external to the U.S. legal system but applicable in our courts—that it applies, not as domestic law, but as the law governing aspects of some cases properly before the Court. Importantly, the Court also indicated that this law is applied in the absence of a relevant treaty, in its words, a “concurrent regulation of the two governments,”¹⁵¹ without suggesting that any such bilateral treaty would need to become federal law. Thus, had an enforceable treaty governed the matter before the Court, the Court would have applied the rule established by the treaty rather than the general rule applicable to all nations.

The Supreme Court’s prize law jurisprudence strongly reinforces the view that customary international law was 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.¹⁵² Under prize law, war powers and property rights were coupled with judicial review, and therefore provide a body of case law 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 nations¹⁵³ and permitted a nation to wage war against the commercial interests of an enemy state and its nationals.¹⁵⁴ The practice of seizing commercial ships and their cargo as prizes of war was 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.¹⁵⁵

¹⁵⁰ *The Scotia*, 81 U.S. 170, 187 (1872) (emphasis added).

¹⁵¹ *Id.*

¹⁵² *The Amiable Nancy*, 16 U.S. 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.”).

¹⁵³ WILLIAM WINTHROP, 2 *MILITARY LAW* 4-5 (1886) (collecting sources); FRANCIS H. UPTON, *THE LAW OF NATIONS AFFECTING COMMERCE DURING WAR: WITH A REVIEW OF THE JURISDICTION, PRACTICE AND PROCEEDINGS OF PRIZE COURTS* 16 (1863).

¹⁵⁴ UPTON, *supra* note 153, at 37 (citing sources).

¹⁵⁵ 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. 388 (1815) in which the Court exempted the goods of a Spanish national (neutral) on an enemy (English) vessel from condemnation.

Those belonging or imputed to the enemy were condemned, and the proceeds vested in the capturing sovereign, usually minus remuneration for the capturing vessel and crew.¹⁵⁶ The vast expanses of the high seas provided ample opportunity for individuals to attempt to avoid or exploit the constraints on trade imposed by war. Some engaged in trade through third party nationals whose countries were neutral as to a given conflict.¹⁵⁷ Others engaged in acts of piracy, either independently or under the cover of national commissions, to engage in acts of war as privateers.¹⁵⁸ Courts exercising prize jurisdiction determined the amenability of various ships and their cargo to capture and condemnation.¹⁵⁹

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

No 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.¹⁶⁰

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.¹⁶¹

The Court then provided a heavily-referenced treatise of the *international* rules governing prize practice, including not only substantive law, but also evidentiary burdens and permissible methods of proof.¹⁶² Thus, not only were the substantive rules of prize law controlling in U.S. courts, so too were its rules of evidence and procedure. This is likely because the Rules Enabling Act,¹⁶³ allowing the judiciary to promulgate rules of procedure and evidence, would not arrive for over a century after this decision. Prior to that time, federal courts adhered to the “conformity principle” in actions at law, conforming their rules of procedure to those of the jurisdiction in which they sat, typically state courts.¹⁶⁴ Thus, the Court’s conformity to both substantive *and*

¹⁵⁶ PETRIE, *supra* note __, 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.

¹⁵⁷ *Murray v. The Schooner Charming Betsy*, 6 U.S. 64 (1804) [hereinafter *Charming Betsy*] involved perhaps one of the most interesting examples of this type of trade. See *infra* part __.

¹⁵⁸ *C.f.* PETRIE, *supra* note 155, at 69.

¹⁵⁹ *Id.* at 9.

¹⁶⁰ *The Schooner Adeline and Cargo*, 13 U.S. 244, 284 (1815).

¹⁶¹ *The London Packet*, 15 U.S. 371, 371 (1817).

¹⁶² *Id.*

¹⁶³ 48 Stat. 1064 (June 19, 1934).

¹⁶⁴ Charles E. Clark, *The Influence of Federal Procedural Reform*, 13 L. AND CONTEMPORARY PROBLEMS 144, 145-6 (1948).

procedural prize law strongly confirms the view that the Court understood this aspect of inter-nation-state law of nations to be exogenous, positive law.¹⁶⁵

3. Early American Legal Commentary also adopted Vattel's differentiation of the inter-nation-state law of nations from the notion of natural or general law. James Kent, author of "the first great American law treatise,"¹⁶⁶ clarified that the law of nations encompassed "the external rights and duties of nations."¹⁶⁷ Henry Halleck observed that there are two bodies of public law: "internal" (*droit public interne*) and "external" (*droit public externe*).¹⁶⁸ He equated the former to constitutional law¹⁶⁹ and the latter to international law.¹⁷⁰ 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."¹⁷¹ As Professor Weisburd later explained, and is evident in Vattel's and Grotius's commentary and the language of 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."¹⁷² Weisburd's statement would have been more precise if he had appended "and source." Human agency in the form of express or implied consent by two or more sovereign nation-states creates positive international law, not "general" law in the Anglo-American common law sense of the term. Human agency in the form of the government of a sovereign nation-state promulgates internal or municipal law.

C. Why the Law of Nations as a Non-Federal 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 Marshall say the laws of war "*must* be noticed,"¹⁷³ and that admiralty law is applied in appropriate cases?¹⁷⁴ Why did Justice Story believe that both substantive and procedural international prize law applied in federal courts?

The answers to these questions derive from an understanding that the law of nations is positive law rather than general law and applicable to the entire nation. It is "part of our law" not because it is federal common law, but because of the United States' membership in the community of "civilized nations" to whom the Western

¹⁶⁵ See also WHEATON, *supra* note 69, at 108 ("The rule, by which 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.").

¹⁶⁶ JANIS, *supra* note 80, at 50.

¹⁶⁷ I JAMES KENT, COMMENTARIES ON AMERICAN LAW 21 (1826).

¹⁶⁸ I HENRY HALLECK, ELEMENTS OF INTERNATIONAL LAW 36-7 (William B. Lawrence ed., 2d ed. 1863).

¹⁶⁹ *Id.* at 36.

¹⁷⁰ *Id.* at 37.

¹⁷¹ GEORGE B. DAVIS, ELEMENTS OF INTERNATIONAL LAW 1 (1908).

¹⁷² See A. M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT'L L. 1, 51 (1995).

¹⁷³ See *supra* note ___ and accompanying text.

¹⁷⁴ See *supra* note ___ and accompanying text.

concept of the law of nations applied.¹⁷⁵ A proper exercise of “the judicial power of the United States”¹⁷⁶ would therefore require courts and judges to observe the customary law of nations, like other sources of law, when applicable.¹⁷⁷ In 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 a part.”¹⁷⁸ 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.”¹⁷⁹

But 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 exercises external sovereign powers, or 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 can be no other rule of decision but [the law of nations].”¹⁸⁰ Recognizing this fundamental limitation on the external competence of federal and state law, whether common law or statute, helps to explain why *Erie* does not affect the use of 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* precludes the resort to customary international law as a rule of decision without express or fairly implied incorporation by the elected branches, 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 provide, shall be regarded as rules of decision in trials at common law . . . in cases where they apply.”¹⁸¹ Now known as the Rules of Decision Act, the section is codified as amended at 28 U.S.C. § 1652.¹⁸² Until the Court’s 1938 decision in *Erie*,

¹⁷⁵ *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“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* . . .” (emphasis added)).

¹⁷⁶ U.S. CONST. art. III sec. 1

¹⁷⁷ The Restatement (Third) of Foreign Relations Law provides “[i]nternational law . . . [is] law of the United States and supreme over the law of the several States” and that “[c]ourts in the United States are bound to give effect to international law.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 reporter’s note 1 (1987). 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 U.S. 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* note ___, in its application to the facts of a given case.

¹⁷⁸ *The Antelope*, 23 U.S. 66, 121 (1825).

¹⁷⁹ *Paquete Habana*, 175 U.S. at 700.

¹⁸⁰ *See supra* note _ and related text.

¹⁸¹ Judiciary Act of 1789, ch. 20, 1 Stat. 73, 92 § 34.

¹⁸² For the current text, *see supra* note 27.

the federal courts followed the doctrine of *Swift v. Tyson*.¹⁸³ In common law cases involving parties with diversity of 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.”¹⁸⁴ 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.”¹⁸⁵ This section 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 external sovereign powers of the United States. It also distinguishes such cases from those in which the Court has 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.¹⁸⁶ He sued in a federal court in New York because the railroad was incorporated there, invoking diversity of state citizenship jurisdiction.¹⁸⁷ 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.¹⁸⁸ On appeal, Erie Railroad claimed the federal court should have applied Pennsylvania law in accordance with the clear language of the Rules of Decision Act.¹⁸⁹

In an opinion authored by Justice Brandeis, 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 person resident or property located there . . . and the right to exemplary or punitive damages.”¹⁹⁰ The Court also noted federal courts had disregarded “state decisions construing local deeds, mineral conveyances, and even devises of real estate . . .”¹⁹¹ 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.”¹⁹² 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.”¹⁹³

¹⁸³ *Swift v. Tyson*, 41 U.S. 1 (1842).

¹⁸⁴ *Id.* at 18.

¹⁸⁵ *Id.* at 19.

¹⁸⁶ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

¹⁸⁷ *Id.* at 69.

¹⁸⁸ *Id.* at 70.

¹⁸⁹ *Id.* at 71.

¹⁹⁰ *Id.* at 75-6.

¹⁹¹ *Id.* at 76.

¹⁹² *Id.* at

¹⁹³ *Id.* at 78.

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 the law of the State."¹⁹⁴ That statement overlooks the qualifying language in the original Rules of Decision Act: "in trials at common law . . . *in cases where they apply*,"¹⁹⁵ 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.¹⁹⁶ For example, another diversity of state citizenship case decided shortly after *Erie*, *Klaxon Co. v. Stentor Elec. Mfg. Co.*, held that federal courts must apply the conflict of laws rules of the state in which they sit.¹⁹⁷ This, too, was a decision about the relationship of federal courts to domestic law, not about the relationship of public international to domestic 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 discussed earlier, the Anglo-American concept of common law is inherently internal and therefore territorial.¹⁹⁸ *Erie*'s logic strongly reinforces this view. Similarly, the presumption against extraterritorial application of statutory U.S. law recognizes traditional limits on the power of state sovereignty in the international system, providing that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none."¹⁹⁹ This reflects the "presumption that United States law governs domestically but does not rule the world."²⁰⁰ This presumption therefore reinforces the distinction between domestic and foreign law, as well as the distinction between municipal and international law. Moreover, Nineteenth Century commentators recognized only limited permissible bases for the extraterritorial application of municipal laws.²⁰¹ Thus, to argue that *Erie* entirely precludes the resort to international law as a rule of decision, particularly in matters involving the exercise of external sovereign powers, is to ignore not only the context and reasoning of that case but also long-held understandings of the extraterritorial competence of domestic law, both common and statutory.

¹⁹⁴ *Id.* (emphasis added).

¹⁹⁵ 28 U.S.C. § 1652 (emphasis added).

¹⁹⁶ See, e.g., *Day & Zimmerman, 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).

¹⁹⁷ *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))

¹⁹⁸ See IV BLACKSTONE, *supra* note ___, 66-68.

¹⁹⁹ *Morrison v. National Australia Bank Ltd.*, 561 U. S. 247, 255 (2010).

²⁰⁰ *Microsoft Corp. v. AT&T Corp.*, 550 U. S. 437, 454 (2007).

²⁰¹ See, e.g., I HENRY W. HALLECK, *ELEMENTS OF INTERNATIONAL LAW* 231 (2d ed., William B. Lawrence ed., 1863) (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 "offences against the law of nations, by whomsoever and wheresoever committed" as potential bases of extraterritorial jurisdiction).

Some might suggest that in overruling *Swift* and not just its various outgrowths, the Court rejected the application of international law in the form of the law merchant.²⁰² 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.²⁰³ Vattel did not include the law merchant in his explication of the law of nations. In fact, Vattel's averred that individual nation-states "are obliged to support [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."²⁰⁴ In short, Vattel had already relegated commercial law to the realm of municipal rather than international law,²⁰⁵ where it remains today as so-called "private" international law.²⁰⁶

To the extent the law merchant remained relevant to the Supreme Court, it was as general common law, rather than a positive 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.²⁰⁷ Otherwise, between *Swift* and *Erie*, the Court only twice referred to treatises with "Lex Mercatoria" in the title,²⁰⁸ and twice referenced the "law merchant" when interpreting a federal statute containing that term.²⁰⁹ 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 creating arising under appellate jurisdiction.²¹⁰ All of this strongly indicates that the Court no longer, if it ever had, viewed the law merchant as part of an external, positive law of nations. Indeed, English courts had also long permitted local deviations from the law merchant in its municipal law.²¹¹

B. Federal Rules of Decision for External Affairs

Only two years prior to *Erie*, in *United States v. Curtiss-Wright Export Corporation*, the Supreme Court clearly endorsed the proposition that the constitutional

²⁰² 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* 225-56, 244 ("Swift itself was in some sense an international law case (arising from the *lex mercatoria*).").

²⁰³ See *supra* note __ and related text.

²⁰⁴ I VATTEL, *supra* note 95, at § 109 (emphasis added).

²⁰⁵ The author was unable to locate a single use of either "lex mercatoria" or "law merchant" in Vattel's treatise.

²⁰⁶ See, e.g., Trimble, *supra* note 24 at 273-74.

²⁰⁷ Smith v. Alabama, 124 U.S. 465, 478 (1888); Bank of United States v. United States, 43 U.S. 711 (1844).

²⁰⁸ National Bank of the Republic v. Millard, 77 U.S. 152 (1869); United States v. Carr, 49 U.S. 1, 7 (1850).

²⁰⁹ Ackley School Dist. v. Hall, 113 U.S. 135, 140 (1885); Thompson v. Perrine, 106 U.S. 589, 592 (1883).

²¹⁰ See *supra* note __ and related text.

²¹¹ Bellia & Clark, *Federal Common Law of Nations*, *supra* note __ 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")

separation of powers analysis and selection of rules of decision differ in cases involving matters of external sovereignty.²¹² Holding that Congress could delegate its powers to the executive in matters of foreign affairs (when such delegations were still not permitted in domestic matters), 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.”²¹³ Putting aside the Court’s discussion of the source of the federal government’s external sovereign powers, which has been heavily debated,²¹⁴ the Court clearly signaled that rules of decision differ in matters of “external sovereignty.”²¹⁵ It 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.”²¹⁶ Thus, the Court clarified that the Constitution and laws of the United States primarily apply to internal matters. Treaties and international customs have a different function and nature, and may 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.”²¹⁷ Indeed, if customary international law is positive law that the United States has participated in making, it would be inappropriate for U.S. courts to refuse to recognize and apply it in appropriate cases.

It is for all of these 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....”²¹⁸ This statement clarifies potential sources of rules of decision in matters of external sovereignty. Because *Paquete Habana* involved the capture of, and rights to, foreign flagged coastal fishing vessels and cargo seized in the coastal waters of Cuba, the law of nations would necessarily apply 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.²¹⁹ In this context, then, a controlling judicial decision would seem to 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) the content of relevant customary international law. 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

²¹² United States v. Curtiss-Wright Export Corporation, 299 U.S. 304 (1936).

²¹³ *Id.* at 315-6.

²¹⁴ 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, CONSTITUTION’S TEXT, *supra* note ___, at 13-48.

²¹⁵ *Curtiss-Wright*, 299 U.S. at 318.

²¹⁶ *Id.* (citing *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909)).

²¹⁷ *Paquete Habana*, 175 U.S. at 700.

²¹⁸ *Id.*

²¹⁹ See *infra* Part __.

particular international rule for subsequent cases in lower 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, judicial precedent in any such case might settle certain aspects of the conflict of laws analysis, including the content of relevant international law, without adopting 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 federal common law, in the form of binding decisional law,²²⁰ based in the Constitution's separation of powers. A paradigmatic example is *The Schooner Exchange v. M'Faddon*, in which the Court observed the principle of sovereign immunity in a suit concerning a foreign public vessel in a U.S. port.²²¹ 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.²²²

A similar case is *Banco Nazionale de Cuba v. Sabbatino*, in which the Court observed the “act of state” doctrine.²²³ The court relied heavily on the constitutional separation of foreign affairs powers in deciding that it could not review the lawfulness of the acts of a recognized foreign government in its own territory.²²⁴ This doctrine, however, stems in large part from general international legal principles regarding sovereign equality, territorial integrity, and political independence.

This fact is more obvious in *Sabbatino*'s predecessor, *Underhill v. Hernandez*.²²⁵ In *Underhill* the Court stated, “[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 of the acts of the government of another done within its own territory.”²²⁶ 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.” In other words, such cases involved matters to be resolved through external sovereign powers 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 foreign affairs

²²⁰ See generally, Henry P. Monaghan, *The Supreme Court, 1974 Term – Forward: Constitutional Common Law*, 89 HARV. L. REV. 1, 2-3 (1975).

²²¹ 11 U.S. 116 (1812).

²²² The Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1332, 1391(f), 1441(d), and 1602-1611 (2006).

²²³ *Banco Nazionale de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

²²⁴ *Id.* at 401.

²²⁵ *Underhill v. Hernandez*, 168 U.S. 250 (1897).

²²⁶ *Id.* at 252.

powers,²²⁷ a municipal rule of decision regarding the availability of redress in federal courts.²²⁸

That *Sabbatino* and *Underhill* should be understood to create federal common law is further demonstrated by several cases in which the Court adopted what might loosely be termed corollaries to these doctrines 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...”²²⁹ In *The Nueva Anna & Hiebre*,²³⁰ the Court refused to give effect to the judgment of a Mexican admiralty court, finding that the 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.²³¹ In *United States v. Palmer*,²³² 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.²³³ “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.”²³⁴

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.”²³⁵ The court did not

²²⁷ See generally Bellia & Clark, *International as Constitutional Law*, supra note ____.

²²⁸ See 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”); Bellia & Clark, *Federal Common Law*, supra note ___, at 9 (arguing that *Sabbatino* applied a “constitutionally derived” rule of decision to preserve federal political branch control over the conduct of foreign affairs). While it is true that Court made this claim, *Sabbatino*, 376 U.S. at ___, 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. 3, sec. 1, rather than international law.

²²⁹ *United States v. Peters*, 3 U.S. 121, 130-31 (1795).

²³⁰ *The Nueva Anna & Hiebre*, 19 U.S. 193 (1821).

²³¹ *Id.* at 193-4. See also *Rose v. Himely*, 8 U.S. 241 (1808) (reaching a similar result with regard to a prize judgment by Santo Domingo while at war with France).

²³² *United States v. Palmer*, 16 U.S. 610 (1818). Specifically, the Court held “It 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. 52, 63-4 (1819) (holding that the government of a neutral country (in this case the U.S.) cannot adjudge the legality of captures *jure belli* made by a revolutionary colonial government against its enemy (in this case Spain)).

²³³ *Palmer*, 16 U.S. at 635.

²³⁴ *Id.*

²³⁵ *Samatar v. Yousef*, 560 U.S. 305, 324 (2010).

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.²³⁶ Given the logic of the *M’Fadden* and *Sabbitino* cases, this must be a constitutionally-based issue of federal common law delimiting the power of the federal courts.²³⁷

Of course, any municipal U.S. rule of decision incorporating, or derived in part from, international law must logically conform to all *relevant* constitutional requirements, including the Bill of Rights.²³⁸ 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 law of war branch of the law of nations.²³⁹ This fact reinforces the theory that the mere use of international law as a rule of decision should not be understood to adopt it as municipal law. It also reinforces the notion that the separation of powers and other constitutional analyses differ when external sovereign powers are exercised.

* * * * *

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 postulate ‘one size fits all’ theories²⁴⁰ or offer more nuanced approaches without fully addressing their historical antecedents.²⁴¹ As demonstrated above, the Court has frequently observed or applied 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,²⁴² and as seems to be the case with the Alien Tort Statute²⁴³ and its federal common law cause of action.²⁴⁴ But the fact that municipal law may also be

²³⁶ *Id.* at 20.

²³⁷ See Vazquez, *Defense of the Modern Position*, *supra* note 33, at 1538 (“Although the Court did not specify the nature of this common law, the Court’s discussion of the pre-FISA regime leaves no doubt that it regarded the relevant law as federal, not State, law.”).

²³⁸ *The Cherokee Tobacco*, 78 U.S. 616, 621 (1871) (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”); *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). See also HENKIN, *FOREIGN AFFAIRS*, *supra* note 18, at 237 (noting that all forms of international law are subordinate to “constitutional prohibitions, such as the Bill of Rights” without distinguishing between internal and external rules of decision).

²³⁹ See *infra* Part III.

²⁴⁰ See the sources cited *supra* at notes ___ - ___.

²⁴¹ See Young, *Sorting Out*, *supra* note ___, 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 the customary rule under the circumstances at issue.”); Weisburd, *supra* note 172, at 49 (concluding that “[i]n the same way that courts will, when required by some 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).

²⁴² *The Scotia*, 81 U.S. at 546 (“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” (emphasis added)).

²⁴³ 28 U.S.C. § 1350 (2000).

²⁴⁴ In *Sosa v. Alvarez-Machain*, the Supreme Court concluded that the ATS “is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest

relevant to some aspect of a case does not change the international nature of an applicable conduct-regulating rule “when questions of right” are affected by it.²⁴⁵ 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 Constitution allocates war powers to both the executive and legislative branches. The President is designated Commander-in-Chief,²⁴⁶ while Congress is vested with the powers to declare war, to grant letters of marque and reprisal, and to make rules for captures on land and water;²⁴⁷ to raise, maintain, and make rules for the government and regulation of the armed forces;²⁴⁸ and “to 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.”²⁴⁹ Questions regarding which branch, if any, is supreme to the other in matters of war are certainly not new.²⁵⁰ 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 or decisions.²⁵¹ 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.²⁵² The previous analysis explains why this is generally the case. This section further analyzes the *Paquete Habana* conflict of laws framework in armed conflicts and wars.

The contemporary international law of war, known as international humanitarian law or the law of armed conflict, largely consists of conventional and customary

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. *C.f.* Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 *FORDHAM L. REV.* 319, 330 (1997).

²⁴⁵ *The Paquete Habana*, 175 U.S. 677, 700 (1900).

²⁴⁶ U.S. CONST. art. II, § 2.

²⁴⁷ U.S. CONST. art. I, § 8, cl. 11.

²⁴⁸ U.S. CONST. art. I, § 8, cl. 12-14.

²⁴⁹ U.S. CONST. art. I, § 8, cl. 18.

²⁵⁰ See 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); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 *HARV. L. REV.* 941 (2008); Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 *HARV. L. REV.* 2047, 2094 (2005); Ryan Goodman & Derek Jinks, *International Law, U.S. War Powers, and the Global War on Terrorism*, 118 *HARV. L. REV.* 2653 (2005).

²⁵¹ See generally John C. Dehn, *The Commander-in-Chief and the Necessities of War: A Conceptual Framework*, 83 *TEMPLE L. REV.* 599 (2011) (describing Court’s approach towards congressional action that conflicts with that of the executive branch).

²⁵² *Id.* at 605.

constraints on the permissible means and methods of warfare. International humanitarian law often prohibits conduct that was once permitted by the law of war. Before the Second World War, for example, wars between nations or peoples included their economies and citizenry.²⁵³ 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.²⁵⁴ In other words, war completely altered the legal relationship of a state and its citizens to enemy nation(s) and citizens. This section demonstrates that as the law of war evolved, and constraints on war increased, the Supreme Court consistently observed and applied the most current customary international laws of war. The Court also clarified the Constitution's separation of war powers and other constitutional questions informing the proper implementation of the *Paquete Habana* framework.

This section more fully explicates the *Paquete Habana* framework and further demonstrates that the Supreme Court traditionally used customary international law applicable to armed conflict with foreign nations, powers, or peoples as rules of decision. It also clarifies that these rules of decision and the matters to which they pertain were not understood to be qualified by the Constitution's assignment of *internal* sovereign powers or the Bill of Rights, but rather its allocation of external sovereign powers.²⁵⁵

A. Prize Law

Prize law's importance was earlier discussed.²⁵⁶ However, some might suggest 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.²⁵⁷ If admiralty law is "law of the place" as indicated in *The Scotia*, 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 waters. Thus,

²⁵³ UPTON, *supra* note 153, at 6-7 (citing sources); *see also id.* at 16 ("The condition of war places each individual citizen of the respective belligerent nations in a common condition of hostility.").

²⁵⁴ *Id.* at 36-37 (discussing confiscation of property), 40-41 (discussing confiscation of debts).

²⁵⁵ 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 codified, as amended, at 18 U.S.C. § 2441 (establishing federal offenses incorporating customary and conventional law of war treaty violations); John C. Dehn, *The Hamdan Case and the Application of a Municipal Offence: 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 internal U.S. common law war crimes). *See also* United States v. Smith, 18 U.S. 153, 158-59 (1820) (clarifying *federal* crime of piracy made punishable by Congress incorporates law of nations by reference).

²⁵⁶ *See supra* notes 113 - 148.

²⁵⁷ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1667 (2013) (citing *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155-174 (1993) (declining to apply a provision of the Immigration and Nationality Act to conduct occurring on the high seas)); *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 440 (1989) (declining to apply a provision of the Foreign Sovereign Immunities Act of 1976 in case arising on high seas)).

the true value of the Court's prize cases is more nuanced given that prize cases involved the use of war powers and invoked a special body of international rules based upon national decisions to engage in that specific form of war. The Court's prize decisions, therefore, contain important insights about the separation of powers that impact the rule of decision applicable to acts of belligerency. Indeed, some of the most oft-referenced Supreme Court decisions involving international law are prize cases.

Three prize cases speak volumes about the relationship of international law to the Constitution and its separation of war and other powers. First, consider *Murray v. Schooner Charming Betsy*,²⁵⁸ 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.²⁵⁹

The main issue in the case was the status of the ship-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.²⁶⁰ A French privateer captured the ship, which was then 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.²⁶¹

The Court found that the burgher was the true owner of the vessel, and that he was properly considered a subject of Denmark, a neutral party to the limited conflict between France and the United States.²⁶² 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."²⁶³ The Court then noted "that 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"²⁶⁴ 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 Frenchmen and "any person or persons resident within the United States or under their protection."²⁶⁵ Therefore, the ship was not subject to forfeiture.²⁶⁶

²⁵⁸ *Charming Betsy*, 6 U.S. 64 (1804).

²⁵⁹ *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 153, at 259–77 (providing overview of prize law).

²⁶⁰ *Charming Betsy*, 6 U.S. at 115–16.

²⁶¹ *Id.* at 116.

²⁶² *Id.* at 120–21.

²⁶³ *Id.* at 118.

²⁶⁴ *Id.*

²⁶⁵ *Id.* 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 U.S. *Id.* at 119–21.

²⁶⁶ *Id.* at 121.

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 statute encompassed the seizure, and the case is generally cited for providing a canon of statutory interpretation.²⁶⁷ 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 international neutrality law.²⁶⁸ Federal legislation established a state of limited war, thereby displacing admiralty law and substituting prize law between the warring nations and neutrality law as to others. The legislation was therefore "controlling" in this sense. The Executive's reasonable, but erroneous, identification of the ship as subject to seizure and forfeiture,²⁶⁹ however, was not controlling upon the Court. Ultimately, in the terms of the *Paquete Habana* framework, it could be said that because there was no treaty, and no controlling legislative or executive act, the Court applied the customs and usages of civilized nations regarding the rights of neutrals as a rule of decision.

Moreover, concerning the constitutional analysis, Congress's power to provide for the forfeiture of American vessels and cargo engaged in prohibited commerce was not questioned. Through the exercise of its war powers, Congress could divest U.S. residents and citizens of their commercial property for public use,²⁷⁰ free from the constraints of the Compensation Clause.²⁷¹ As will be shown, the inapplicability of the Bill of Rights to constitutionally adopted war measures is a recurring theme in the Court's jurisprudence.

In *Little v. Berreme*, 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 separation of powers between the President and Congress.²⁷² To implement a general policy prohibiting commercial intercourse with France, Congress

²⁶⁷ See e.g. Roger P. Alford, *Foreign Relations as a Matter of Interpretation: The Use and Abuse of Charming Betsy*, 67 OHIO ST. L. REV. 1339 (2006); Ingrid Brunk Wuerth, *Authorizations for the Use of Force, International Law, and the Charming Betsy Canon*, 46 B.C. L. REV. 293 (2005); 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 *Charming Betsy* canon has been used to avoid construing statutes as violating or permitting violation of various treaty and customary international law obligations).

²⁶⁸ *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 . . .").

²⁶⁹ The Court went to great lengths to find that Captain Murray ought not 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.")

²⁷⁰ Recall the earlier discussion of prize law and that proceeds from the sale of captured property vested in the capturing state and were also used to compensate ship owners and crew. See *supra* notes ____–____.

²⁷¹ 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.")

²⁷² *Little v. Berreme*, 6 U.S. 170 (1804).

authorized only the seizure of *American* ships traveling *to* French ports.²⁷³ Pursuant to presidential orders authorizing a much broader range of seizures, a naval commander seized and sought condemnation of a Danish ship, suspected of being American, traveling *from* a French to a Danish port.²⁷⁴ Although Captain Little's actions complied with the President's orders, they clearly violated the statute.²⁷⁵ For that reason alone, the Court found the seizure unlawful.²⁷⁶ In the *Little* opinion, the Court did not review the constitutional power of Congress to enact either the substance or limited implementing measures of its non-intercourse policy, despite the conflicting presidential order. Also absent is any hint of impropriety surrounding Congress's decision to limit this war measure to American ships and cargo. Using its war powers, Congress's preferred policy and extraordinarily narrow means of implementation were controlling on both the Court and the Executive Branch, and were 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.²⁷⁷ The trial court ruled that they were not exempt from seizure as prize.²⁷⁸ 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."²⁷⁹ 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."²⁸⁰ The Court indicated, however, that an act of government authorizing capture might be "an act of Congress or order of the President."²⁸¹ *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, the Court was not clear regarding the circumstances under which an order from the President or any lower Executive Branch official might lawfully authorize conduct prohibited by the law of nations.

Charming Betsy and *Paquete Habana* clarify that the law of nations provides a rule of decision in cases where it applies, unless Congress or 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 congressional legislation prevails in the event of plain and unavoidable conflict between a duly enacted statute and an order of the President. But these decisions simply do not clarify the full range of potentially controlling executive acts.

²⁷³ *Id.* at 177-78.

²⁷⁴ *Id.* at 178.

²⁷⁵ *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.*

²⁷⁶ *Id.*

²⁷⁷ *The Paquete Habana*, 175 U.S. 677, 678-9 (1900).

²⁷⁸ *Id.* at 679.

²⁷⁹ *Id.* at 686.

²⁸⁰ *Id.* at 711.

²⁸¹ *Id.*

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.²⁸² The main question before the Supreme Court was whether the President had authority impose a blockade without a declaration of war from Congress.²⁸³ Finding that he could,²⁸⁴ that the law of nations applies to a Civil War,²⁸⁵ and that the blockade conformed to international law,²⁸⁶ the Court applied international law to adjudicate the disposition of captured ships and cargo.²⁸⁷ Thus, these executive acts were controlling, but only to the extent consistent with international law.

Other examples of controlling executive acts are mentioned by Justice Bradley in his dissent in *Hendren*, wherein 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, [etc.]"²⁸⁸ In other words, some executive war measures are placed within the President's discretion by acts of Congress and require the courts to apply international law. Other executive war measures might implement international law in specific ways, as indicated by Justice Bradley. Either could be a controlling executive act for purposes of the *Paquete Habana* framework. Neither case would necessarily permit the President to violate applicable international law.²⁸⁹

²⁸² *The Prize Cases*, 67 U.S. (2 Black) 635, 640-42 (1862).

²⁸³ *Id.*

²⁸⁴ *Id.* at 668

²⁸⁵ *Id.* at 667-68 (concluding, "[w]hen 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. 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 *Prize Cases*, 67 U.S. at 666, 687-88 (Nelson, J., dissenting))).

²⁸⁶ *Prize Cases*, 67 U.S. at 671.

²⁸⁷ *Id.* at 674-82.

²⁸⁸ *New York 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." *Id.* While this might be read to support the view that international law is federal law, it is clear Justice Bradley is trying to express 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.

²⁸⁹ 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 U.S., prominent scholars called this "retaliation." See WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENT* 796-98 (2d ed. 1920). Because not addressed by the Court, the topic will require separate analysis. Examples date to the Revolutionary War. See LOGAN BEIRNE, *BLOOD OF TYRANTS: GEORGE WASHINGTON AND THE FORGING OF THE PRESIDENCY* - (Encounter Books, 2013) (discussing retaliation by Washington against British prisoners in response to British mistreatment of prisoners of war).

Indeed, the Court's review in the *Prize Cases* of both the imposition and specific implementation of the blockade for conformity with international law suggests the opposite.

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 conflict of laws in armed conflict for cases arising within foreign territory, let us 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*.²⁹⁰ *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 war declared by Congress.²⁹¹ The issue was whether Tampico was still properly considered a foreign port, and whether the goods were therefore “foreign goods” subject to the duty.²⁹² 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 subjugating the enemy's country.”²⁹³ It continued, “this can only be done by the treaty making power or the legislative authority, and is not part of the power conferred upon the President” by a declaration of war.²⁹⁴ 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.*”²⁹⁵ 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 remained consistent in later cases involving the temporary military occupation of Cuba²⁹⁶ as well as the military occupations of Puerto Rico and the Philippines.²⁹⁷

2. War with Mexico and Beyond. In *Jecker v. Montgomery* the Court addressed another way in which the Constitution limits the belligerent acts of the Executive in foreign territory.²⁹⁸ *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,²⁹⁹ in occupied Mexico. The Court first clarified that prize captures “are for the benefit of the sovereign under whose authority

²⁹⁰ *Fleming v. Page*, 50 U.S. 603 (1850).

²⁹¹ *Id.* at 614.

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.* at 615.

²⁹⁵ *Id.*

²⁹⁶ *See Neely v. Henkel*, 180 U.S. 109 (1901)

²⁹⁷ *See Fourteen Diamond Rings v. U.S.*, 183 U.S. 176 (1901) (holding Philippines no longer foreign territory after being ceded to U.S. by treaty); *DeLima v. Bidwell*, 182 U.S. 1 (1901) (reaching same result as to Porto Rico).

²⁹⁸ *Jecker v. Montgomery*, 54 U.S. 498 (1852).

²⁹⁹ WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENT* 831-3 (2 ed. 1920) (tracing origins and practice of punishing law of war violations, including military commissions and councils of war in Mexico). The prize court at issue was established at Monterey, in California, by the commander of American forces acting as governor of the territory. *Jecker*, 54 U.S. at 512.

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.”³⁰⁰ After the Court held that jurisdiction over prize cases was vested by the Constitution and laws of the United States in Article III courts,³⁰¹ it distinguished the prize courts from other military tribunals in Mexico.

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. These courts were not courts of the United States, and had no right to adjudicate upon a question of prize or no prize.³⁰²

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.³⁰³ The Court, albeit in dictum, appears to have distinguished and approved of these tribunals as an exercise of the nations war powers when consistent with the 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,³⁰⁴ military tribunals imposed punishment without observing a range of constitutional protections applicable in Article III federal courts. Although this may seem unobjectionable on the ground

³⁰⁰ *Jecker*, 54 U.S. at 515.

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ For example, under Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 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.” GC IV, *supra* note 14, at art. 64. 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 U.S., military commissions, to adjudicate violations. *Id.* at art. 65 - 66. Individual civilians may be similarly punished for violations of the laws and customs of war committed before occupation by a hostile army. *Id.* at art. 70.

³⁰⁴ Because applied by analogy, violations of these rules did not necessarily invalidate a conviction. WINTHROP, MILITARY LAW AND PRECEDENT, *supra* note 299, 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. . . .” (emphasis in original)(citations omitted)); *but see* Glazier, *infra* note 346, at 41-2 (noting a “practice of close conformance to court-martial procedures”).

that those punished were foreigners,³⁰⁵ the tribunal punished crimes both by and against U.S. persons.³⁰⁶ The Supreme Court later expressly held military commissions are exempt from any jury trial requirement, even when punishing U.S. citizens.³⁰⁷

The Court's approach to international law and the Constitution remained consistent when adjudicating various aspects of the military occupation and temporary military governance 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.³⁰⁸ 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."³⁰⁹ Similarly, in *Leitensdorfer v. Webb*, the Court upheld the establishment of 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," because doing so was consistent with the law of nations.³¹⁰

Many insights regarding the *Paquete Habana* framework and potentially relevant aspects of the Constitution are evident in these cases. First, in each of these cases, a limiting rule affecting the decision was either an applicable legislative act or constitutional provision (*Fleming & Jecker*) or the customary laws of war (all others). The various Executive acts were not upheld as "controlling executive acts" that might *supersede* applicable customs and usages of civilized nations as suggested in *Paquete Habana*. They were upheld in each case because they were consistent with those customs and usages. Furthermore, the Court upheld these Executive acts without affirmative and specific legislative authority or delegation and notwithstanding their constitutional commitment to other branches of the government in internal matters. And finally, permissible military measures adopted in war or occupation were not constrained by aspects of the Bill of Rights otherwise applicable to routine matters of domestic governance. This was even true of military tribunals imposing punishment because "[t]hey were not courts of the United States."³¹¹

3. The Second World War. In its scant opportunities to review cases arising in foreign territory during the Second World War, the Supreme Court maintained this conflict of laws approach. One case worth noting, however, fell entirely outside this framework. In *Hirota v. MacArthur*, 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

³⁰⁵ Erika Myers, *Conquering Peace: Military Commissions as a Lawfare Strategy in the Mexican War*, 35 AM. J. CRIM. L. 201 (2008).

³⁰⁶ Glazier, *infra* note 346, at ____.

³⁰⁷ *Ex parte Vallandigham*, 68 U.S. 243 (1863).

³⁰⁸ *Cross v. Harrison*, 57 U.S. 164, 189-90 (1853). □

³⁰⁹ *Id.*

³¹⁰ *Leitensdorfer v. Webb*, 61 U.S. 176, 177-78 (1857).

³¹¹ *Jecker*, 54 U.S. at 515. 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 *Santiago v. Nogueras*, 214 U.S. 260 (1909).

General MacArthur pursuant to international agreements.³¹² Without jurisdiction, the Court had no occasion to determine the proper rule of decision. Had it done so, however, *Hirota* may have provided an example in which a (potentially non-self-executing) treaty provided a rule of decision.

With regard to enemy nationals in occupied territory, 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.³¹³ 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.”³¹⁴ 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 constitutional separation of powers.

Regarding civilian U.S. citizens in occupied territory, *Madsen v. Kinsella* upheld the murder conviction of a civilian military spouse by a U.S. military commission applying German penal law in occupied Germany.³¹⁵ After finding that Congress had preserved the jurisdiction of such tribunals in the Articles of War,³¹⁶ the Court noted, “[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.”³¹⁷ Thus, the use of war powers consistent with the law of nations justified the use of a U.S. military tribunal to try even 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 armed service member spouses *in a time of peace*.³¹⁸ 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 “it 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.”³¹⁹ However, it distinguished the convictions at issue in *Reid* from those in which civilians “performing services for the armed forces in the field in times of war” were prosecuted by military tribunals, concluding, “they must rest on the

³¹² *Hirota v. MacArthur*, 338 U.S. 197, 198 (1948).

³¹³ *Johnson v. Eisentrager*, 339 U.S. 763, 768-77 (1950).

³¹⁴ *Id.* at 769.

³¹⁵ *Madsen v. Kinsella*, 343 U.S. 341, 361-62 (1952).

³¹⁶ *Id.* at 351-55.

³¹⁷ *Id.* at 360.

³¹⁸ *Reid v. Covert*, 354 U.S. 1 (1956). This was a consolidated rehearing of two cases the court originally found constitutionally sufficient. *Reid v. Covert*, 351 U.S. 487 (1956).

³¹⁹ *Reid*, 354 U.S. at 17.

Government's war powers."³²⁰ *Reid* is therefore properly understood as a case involving an extraterritorial exercise of internal sovereign powers of adjudication and punishment over U.S. citizens abroad. It does not address or overturn earlier decisions upholding the use of military tribunals, even for U.S. citizens, pursuant to an exercise of the nation's war powers.

C. The Law of War as an "External" Rule of Decision in U.S. Territory

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, the Civil War case law must be treated separately even though the Supreme Court clearly determined that the law of nations applied to certain matters that came before it during that war.³²¹ The most salient non-Civil War examples are *Brown v. U.S.*³²² and *Ex parte Quirin*,³²³ neither of which provide clear judicial reasoning.

*In re Yamashita*³²⁴ is also potentially relevant, 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.³²⁵ In *Johnson v. Eisentrager*, however, the court stated, "[b]y reason of our sovereignty at that time over these insular possessions, Yamashita stood much as did Quirin before American courts."³²⁶ It 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."³²⁷ Although in context the Court is addressing access to the courts to pursue a writ of habeas corpus, *Yamashita* seems an apt precedent for a case arising within U.S. territory in light of the Court's view of the situation expressed in *Eisentrager*. 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.

³²⁰ *Id.* at 33.

³²¹ The Supreme Court held that in a Civil War, "the belligerent who claims to be sovereign may exercise both belligerent and sovereign rights." The Prize Cases, 67 U.S. 635, 673 (1862).; see also 3 Vattel, *supra* note __, at __. (regarding applicability of law of war to civil war). Additionally, 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 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, 73-79 (2009).

³²² *Brown v. U.S.*, 12 U.S. 110 (1814).

³²³ *Ex parte Quirin*, 317 U.S. 1 (1942).

³²⁴ *In re Yamashita*, 327 U.S. 1, 20 (1946).

³²⁵ *Santiago v. Nogueras*, 214 U.S. 260 (1909) (upholding validity of military provisional courts in Porto Rico pending creation of territorial government); see also *Leitensdorfer v. Webb*, 61 U.S. 176, __ (1857).

³²⁶ *Johnson v. Eisentrager*, 339 U.S. 763, 780 (1950).

³²⁷ *Id.*

Brown involved timber belonging to a British company seized by a district attorney acting on his own initiative shortly after Congress declared war on Great Britain in 1812.³²⁸ After the district court dismissed the case, the circuit court reversed, and condemned the timber as enemy property forfeited to the United States.³²⁹ The Supreme Court reversed, relying on the law of nations. After a cursory review of contemporary state practice, Justice Marshall stated “[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.”³³⁰ Given this emergent international custom, and Congress’s unexercised power to make rules for captures,³³¹ Marshall found the condemnation improper without statutory authorization.³³² Without such authorization, the substance of the customary law of nations provided the 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.³³³ 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.”³³⁴ Thus, the question of whether or not express presidential authorization would have been a constitutionally controlling executive act was not addressed. Notably, the *Paquete Habana* Court relied on the above-mentioned aspects of *Brown* to support its decision,³³⁵ not only confirming the analysis provided here,³³⁶ but also potentially

³²⁸ *Brown v. U.S.*, 12 U.S. 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.

³²⁹ *Id.* at 122.

³³⁰ *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.

³³¹ 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.

³³² *Id.* at 125-29.

³³³ See MICHAEL GLENNON, CONSTITUTIONAL DIPLOMACY 242 (1990) (stating *Brown* Court held President lacked power to seize plaintiff’s property without congressional authorization); RAMSEY, TEXT IN FOREIGN AFFAIRS, *supra* note __, 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, *Federal Common Law of Nations*, *supra* note __, 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*.”).

³³⁴ *Brown*, 12 U.S. at 121-22.

³³⁵ *Paquete Habana*, 175 U.S. at 710-11.

³³⁶ Justice Story’s dissent also supports this reading 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

indicating that express presidential authorization might have qualified as a controlling executive act.

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 non-military courts were available. In reaching its decision, the Court relied upon the law of nations, alleged specific congressional authorization for the use of military commissions, and the President's commander-in-chief powers.³³⁷

Regarding the law of nations, 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.”³³⁸ 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 incorporated all offenses which are defined as such by the law of war and which may constitutionally be included within the jurisdiction of military commissions.³³⁹ Curiously, the Court found this article to be an exercise of the Offenses Clause power, rather than an exercise of Congress’s war powers or a congressional recognition of war powers that the Executive may independently exercise when consistent with the laws of war.³⁴⁰ 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.³⁴¹ Finding that they had been, the Court denied relief, even for a U.S. citizen, Herman Haupt.³⁴²

Quirin has been criticized, and in some respects this is proper, but not for the reasons often cited.³⁴³ The proper criticisms are twofold. First, reading the Fifteenth

admitted by Grotius, and Puffendorf, and Bynkershock, and Burlamaqui, and Rutherford and Vattel.”). He agreed with Marshall that debts could no longer be confiscated without specific statutory authority. *Id.* at 145-46 (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 had a somewhat positivist view of the law of war.

³³⁷ *Id.* at 26.

³³⁸ *Ex parte Quirin*, 317 U.S. 1, 28-29 (1942).

³³⁹ *Id.* at 30.

³⁴⁰ *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.”).

³⁴¹ *Id.*

³⁴² *Id.* at 45-48.

³⁴³ “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 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). See Chad DeVeaux, *Rationalizing the Constitution: The Military Commissions Act and the Dubious Legacy of Ex Parte Quirin*, 42 AKRON L. REV. 13, 17-8 (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

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

The 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.³⁴⁴

This language quite clearly preserves jurisdiction that Congress believes already exists. Preserving jurisdiction and affirmatively “providing for the trial of such offenses”³⁴⁵ are obviously two very different things. The source of that jurisdiction cannot be the statute. It must lie elsewhere.

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 Court did not need to invoke the Offenses Clause. As the earlier discussions of *Jecker* and *Madsen* indicate, the Executive established law of war military commissions and occupation tribunals through the exercise of its war powers.³⁴⁶ 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.”³⁴⁷ It also held that the Constitution does not require a jury trial for war crimes,³⁴⁸ although it may require that actual law of war offenses be punished, at least within U.S. territory where Article III courts necessarily have jurisdiction over other offenses.³⁴⁹ In extraterritorial matters unrelated to internal governance, the Mexican War and post-war Germany examples clarify that the jurisdiction of military commissions is not limited to law of war violations identified as such by international law.³⁵⁰

violate the ‘law of war’”); see also Sarah Erickson-Muschko, *Beyond Individual Status: the Clear Statement Rule and the Scope of the AUMF Detention Authority in the United States*, 101 Geo. L.J. 1399, 1416-19 (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).

³⁴⁴ 10 U.S.C. § 1485 (year?)

³⁴⁵ *Quirin*, 317 U.S. at 29.

³⁴⁶ WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENT* 831-3 (2 ed. 1920) (tracing origins and practice of military commissions punishing law of war violations); David Glazier, *Precedent’s Lost: The Neglected History of the Military Commission*, 45 VA. J. INT’L L. 5, 9 (2005) (listing “trying law of war violations” as one of four historical purposes of military commissions); 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).

³⁴⁷ *Quirin*, 317 U.S. at 30.

³⁴⁸ *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.”).

³⁴⁹ But see Steven Vladeck, *The Laws of War as 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).

³⁵⁰ See *supra* part ____.

*In re Yamashita*³⁵¹ is similar in many respects. Relying heavily on its analysis in *Quirin*, the court found Yamashita was lawfully tried by military commission in the Philippines.³⁵² 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 ended but before formal peace is established.³⁵³ The Court then suggested, as it had in *Madsen*, that jurisdiction could extend beyond a treaty of armistice or peace.³⁵⁴ Regarding 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, in that extending them beyond the formal establishment of peace could be considered an exercise of general foreign affairs, rather than war powers.

Contrast these cases with those involving the adoption of domestic war measures applicable to American citizens and residents. In *Korematsu v. U.S.*, the Court upheld the conviction of a Japanese-American for violating an exclusion order.³⁵⁵ The Court did not refer to the law of war to support the order, but rather treated it as a case of extreme public necessity justifying infringement of the rights of those affected by it.³⁵⁶ For identical reasons, the Court also upheld the conviction of a Japanese-American for violation of a curfew order in *Hirabayashi v. U.S.*³⁵⁷ 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.³⁵⁸ In these and similar cases involving solely internal or domestic matters incident to war, the Court did not find international law or the *Paquete Habana* framework to be relevant.

* * * * *

This section has demonstrated that in matters of war against foreign nations or entities, international law been applied as an exogenous rule of decision. How, then,

³⁵¹ *In re Yamashita*, 327 U.S. 1 (1946).

³⁵² *Id.* at 7-9, 20.

³⁵³ *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.”).

³⁵⁴ *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.”).

³⁵⁵ 323 U.S. 214, 219-20 (1944).

³⁵⁶ *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.”).

³⁵⁷ *Hirabayashi v. U.S.*, 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.”).

³⁵⁸ *Ex parte Kawato*, 317 U.S. 69 (1942).

does one distinguish between cases involving internal sovereignty from those involving external sovereignty, or internal from external rules of decision? How does one tell whether international law is relevant to either the creation of 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 be that the proper approach would look to the function played by a rule of decision in governance. The particular location where a case arises has often been a factor in determining whether a rule of decision is domestic or international. The case law demonstrates that location is not dispositive. Thus, If a rule of decision would regulate the domestic or internal powers of the government, including its relationship with its citizens in times of peace wherever located, then one should generally understand it to involve a domestic or municipal rule of decision. If the rule of decision would define powers or regulate matters of external sovereignty, including the exercise of war powers regardless of location, then international law serves as an independent, external rule of decision, similar to foreign law. The section has demonstrated that international law regulating the exercise of belligerent powers during wars with foreign entities are of the latter type, even in cases arising within U.S. territory.

V. The Implications of the *Paquete Habana* Framework

The implications of the preceding analysis are both significant and far-reaching. This section briefly surveys some of the potential contributions of this Article's normative and descriptive claims 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 positive law that is 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 binding upon and applicable to the whole of the United States, a proper exercise of the “judicial power of the United States” requires U.S. courts to follow it in cases where it applies. These conclusions clarify the effect of the *Charming Betsy*.

Recognizing that international law is external but applicable law in appropriate cases clarifies *Paquete Habana* and *Charming Betsy*'s purpose. In matters of external sovereignty, *Charming Betsy* is not merely a canon of statutory interpretation; it is also aids in a choice of law determination per *Paquete Habana*. If a federal statute can be interpreted to be consistent with applicable international law, it will be, and international law will provide the rule of decision, as was ultimately the case in *Charming Betsy*. If not, any statute that is later in time to an applicable treaty or general

rule of customary international law provides the rule of decision³⁵⁹ and is therefore a controlling legislative act under the *Paquete Habana* framework.

Cases involving internal governance and rules of decision are more complicated. It is not clear whether customary international law can provide an independent rule of decision in internal matters of domestic governance. The 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 common law remedy.³⁶⁰ This would seem to imply an independent existence of customary international law and its intrinsic applicability throughout the territory of the United States, even without being U.S. law.

However, the Rules of Decision Act also becomes relevant when discussing internal U.S. sovereignty. As previously noted, there are certainly times when federal courts create federal common law by observing the separation of powers and related international law. Federal courts must also observe and preserve federalism principles in foreign affairs. Given that foreign affairs powers are reserved to the federal government and in most respects denied to the states,³⁶¹ courts must reserve the power to independently determine the content and proper interpretation of international law when a case clearly implicates foreign affairs. This is particularly true in matters involving wars with foreign nations or entities, over which the Constitution denies power to the states.³⁶² 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*.³⁶³ Should a case involve a similar claim by a foreign plaintiff related to an international or non-international armed conflict with a foreign entity, it would fall within the scope of foreign diversity jurisdiction and the result would likely be different.³⁶⁴ 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, federal courts might also find a constitutionally based federal question. A federal question might also be based in part on a declaration of war or other authorization for the use of military force.³⁶⁵ In other words, even though international law is not federal law, this

³⁵⁹ 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. 616, 621-22 (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) Compare 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).

³⁶⁰ *Sosa*, 542 U.S. at 724.

³⁶¹ U.S. CONST. art. I, § 10.

³⁶² *Id.*

³⁶³ *New York Life Ins. Co. v. Hendren*, 92 U.S. 286, __ (1875).

³⁶⁴ U.S. CONST. art. II § 2

³⁶⁵ 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.")

does not defeat federal jurisdiction in many 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. 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.³⁶⁶ The central issue is whether Congress properly placed certain offenses it prescribed in the Military Commissions Act (MCA) within the jurisdiction of law of war military commissions rather than Article III courts. No court has considered the *Paquete Habana* framework, nor have they thoroughly examined the nature of the constitutional powers at issue.

Most recently, a D.C. Circuit panel held that giving military commissions with jurisdiction over inchoate conspiracy impermissibly encroached upon the jurisdiction of Article III courts.³⁶⁷ This conclusion is constitutionally suspect. Because most of the conduct being tried by military commission occurred overseas, and, at least arguably within the context of an armed conflict against a foreign entity, *Fleming*, *Quirin*, *Madsen*, and *Yamashita* indicate that Article III court jurisdiction does not necessarily have constitutional primacy. They also strongly indicate the use of military commissions is an exercise of the war powers and, perhaps in some cases, of foreign affairs powers. This suggests that a different 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*³⁶⁸ and *Quirin*, along with several cases not involving a war or armed conflict, for the proposition that military commissions are narrow exceptions to the jurisdiction of Article III courts.³⁶⁹ While this claim is likely true in peaceful domestic territory, where the conduct at issue in *Milligan* and *Quirin* occurred, it is questionable when the conduct being punished was perpetrated by a member of a foreign armed force and occurred extraterritorially in the course of an armed conflict.

The panel then focused on whether conspiracy was an offense under international laws of war—the Supreme Court’s inquiry in *Quirin*.³⁷⁰ The *Quirin* Court, however, decided whether the *Executive* had properly exercised what it found to be congressionally delegated power to punish law of war violations. Its focus on whether the Executive had properly punished only actual law of war violations was therefore appropriate. The military commissions convened pursuant to the MCA, however, are adjudicating offenses prescribed by Congress. Under the *Paquete Habana* framework, if a crime Congress prescribed 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.

³⁶⁶ *Al-Bahlul v. U.S.*, Case # 11-1324, slip. op. at __ (D.C. Cir. 2015), petition for rehear’g en banc filed.

³⁶⁷ *Id.* at 11.

³⁶⁸ *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121 (1866)

³⁶⁹ *Al-Bahlul*, slip. op. at 9-15.

³⁷⁰ *Quirin*, 317 U.S. at 45-48.

As the court said in *Brown*, a rule of customary international law is “not immutable . . . but depends on political considerations which may continually vary.”³⁷¹ It “is addressed to the judgment of the sovereign; and although it cannot be disregarded by him without obloquy, yet it may be disregarded.”³⁷²

At bottom, determining the proper rule of decision for any given case requires careful analysis of the 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 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.³⁷³

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,³⁷⁴ treaties are only one possible rule of decision under the *Paquete Habana* framework. In the absence of an enforceable treaty, or 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 role of the Executive in creating or preventing the creation of customary law binding upon the United States, and other important questions that could benefit from objective judicial analysis.

³⁷¹ *Brown*, 12 U.S. at 128.

³⁷² *Id.*

³⁷³ 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).

³⁷⁴ See e.g. *Al-Bihani*, 619 F.3d at 12 (Kavanaugh, J. concurring) (“it 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 decision “not to incorporate international-law norms into domestic U.S. law”); *id.* at 16 (“international 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 customary international law generally, and customary international laws of war specifically, to the U.S. Constitution and legal system. 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.³⁷⁵ Theories are then constructed and applied both forward and backward to other data in an attempt to demonstrate their validity and 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 approach and descriptive analysis provides coherence to an area of the law that is cluttered with incomplete and inconsistent theories.

Whatever one thinks of the jurisprudential legitimacy of considering customary international law to be positive rather than general law, it was clearly understood to be positive, exogenous law by the Supreme Court, by the scholars most influential upon the founding generation, and by early American jurists. This knowledge, coupled with the understanding that 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"³⁷⁶ or "part of our law" does not change its fundamental nature as positive law exogenous to the Constitution and laws of the United States. Such phases merely express that customary international law is law *for* the United States and its citizens, not *of* the United States.

Difficult questions remain regarding the extent to which Executive participation in the making of customary international law through state practice permits it to prevent the ripening of a rule of customary international law for the United States. The process of resolving such questions would certainly be enhanced by the participation of courts. Raising the *Paquete Habana* framework from the depths of history to a prominent place in contemporary wartime jurisprudence could do much to clarify the law.

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 can start to regain what has been lost by elected officials, judges and government legal advisors who have increasingly made policy-laden decisions regarding the substance of customary international laws of war and the propriety of following them.

³⁷⁵ See Vazquez, *Defense of the Modern Position*, *supra* note 33, 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.").

³⁷⁶ An oft-cited reference to customary international law as "law of the land" is 1 Op. Gen. 27 (1792) ("The law of nations, although not specifically adopted by the Constitution or any municipal act, is essentially a part of the law of the land.")