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ARTICLES

A REVISIONIST VIEW OF CUSTOMARY INTERNATIONAL LAW

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In the popular view international law is a charade—governments obey it only if convenient to do so and disregard it whenever a contrary interest appears.[1] Thus the *New York Times* recently asserted that "observing [international] law is voluntary."[2] "[T]here being no world government, there's

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1. This judgment as to the common perception of international law is widely shared among international lawyers and across disciplines. *See* J. BRIERLY, THE LAW OF NATIONS 68, 71–72, 75–76 (H. Waldock ed. 1936); L. HENKIN, HOW NATIONS BEHAVE 25–26 (2d ed. 1979); J. JACKSON, WORLD TRADE AND THE LAW OF GATT 14 (1969); H. MORGENTHAU, POLITICS AMONG NATIONS 275 (3d ed. 1964); Fried, *How Efficient is International Law?*, in THE RELEVANCE OF INTERNATIONAL LAW 93–132 (K. Deutsch & S. Hoffman eds. 1968) [hereinafter cited as RELEVANCE OF INTERNATIONAL LAW]; Nimetz, *Respect World Law*, N.Y. Times, Apr. 19, 1984, at 19, col. 2.

In this Article I make a modest attempt to respond to Professor Levi's criticism that "international lawyers have treated their subject in sovereign independence from others." W. LEVI, LAW AND POLITICS IN THE INTERNATIONAL SOCIETY 7 (1976). His complaint is based on the tendency of many international lawyers to conceive of scholarship as the mechanical application of rules to abstractly drawn fact situations, without reference to the political, cultural, social, or economic environments that determine the meaning and relevance of those rules. *See* Boyle, *The Irrelevance of International Law: The Schism Between International Law and International Politics*, 10 CAL. W. INT'L L.J. 193 (1980). To bridge the disciplinary gap, or at least to look across it, I draw on the insights of political scientists, sociologists, historians, and diplomats who have reflected on the rule of law in the world of international politics.

2. *Scorning the World Court*, N.Y. Times, Jan. 20, 1985, at E22, col. 1 (editorial).

no such thing as world law."[3] More knowledgeable and sophisticated observers, including some of America's most distinguished diplomats, have expressed similar sentiments. John Foster Dulles observed that "a stable world order depends most of all upon the existence of an adequate body of international law," and he lamented that "there is no such body of law today."[4] Dean Acheson disparaged international law generally, viewing it as an "academic" program about which working diplomats were "understandably and wisely reticent."[5] With reference to major crises like the Cuban missile crisis in which he was consulted, he testified that international law had no place.[6] George Kennan broadly condemned the American penchant for a "legalist-moralist approach to world problems" because of its unrealistic assumptions about the real world of international relations.[7]

3. *Id.*

4. J. DULLES, WAR OR PEACE 198 (1950) (comments made in a discussion of the potential of the United Nations). Secretary of State Dulles sounded the same theme. *See* Dulles, U.S. Constitution and U.N. Charter: An Appraisal, Speech before the American Bar Association, Aug. 26, 1953, U.S. Dep't of State Pub. No. 5194, *reprinted in* 29 DEP'T ST. BULL. 307 (1953).

5. D. ACHESON, FRAGMENTS OF MY FLEECE 156 (1971).

6. Acheson, *Remarks, Panel: Cuban Quarantine—Implications for the Future*, 57 AM. SOC'Y INT'L L. PROC. 13, 14 (1963). *But see* A. CHAYES, THE CUBAN MISSILE CRISIS (1974). For a critique of Chayes' positions, see Shalom, *International Lawyers & Other Apologists*, 12 POLITY 83 (1979).

7. Kennan, *Morality and Foreign Policy*, 64 FOREIGN AFF. 205 (1985). Mr. Kennan first proposed this theory in AMERICAN DIPLOMACY 1900–1950, at 95–101 (1951). Woodrow Wilson is often identified with the "legalist-moralist approach" condemned by Kennan, but Wilson too was distrustful of lawyers and particularly of the idea of a world court. President Wilson preferred instead to realize his internationalist ideals through an international political organization. *See* Patterson, *The United States and the Origins of the World Court*, 91 POL. SCI. Q. 279 (1976).

For an endorsement of the opposite approach by another experienced diplomat, see D. MOYNIHAN, LOYALTIES 61–96 (1984) (criticizing a diminished commitment to the "rule of law"). Acheson and Kennan were reacting to a movement in the wake of World War II to establish the "rule of law" (generally in an American image) throughout the world. *See, e.g.*, G. CLARK & L. SOHN, WORLD PEACE THROUGH WORLD LAW (3d ed. 1966); C.W. JENCKS, THE COMMON LAW OF MANKIND (1958); O. LISSITZYN, THE INTERNATIONAL COURT OF JUSTICE (1951); Meeker, *The Role of Law in the Political Aspects of World Affairs*, 27 ALB. L. REV. 194 (1963) (Meeker later became Acting Legal Advisor to the Department of State and Ambassador to Romania). Proposals to advance the rule of law—and the negative reactions—persist. *Cf., e.g.*, A. BOZEMAN, THE FUTURE OF LAW IN A MULTICULTURAL WORLD (1971); H. COMMAGER, THE AMERICAN MIND 363 (1950) (American respect for law "was transferred, somewhat naively, to international law."); E. DEUTSCH, AN INTERNATIONAL RULE OF LAW (1977); J. JACKSON, J. LOUIS & M. MATSUSHITA, IMPLEMENTING THE TOKYO ROUND (1984); J. PERKINS, THE PRUDENT PEACE (1981); Rubin, *Order and Chaos: The Role of International Law in Foreign Policy* (Book Review), 77 MICH. L. REV. 336 (1979); Trimble, *International Trade and The "Rule of Law"* (Book Review), 83 MICH. L. REV. 1016 (1985); Watson, *A Realistic Jurisprudence of International Law*, 1980 Y.B. WORLD AFF. 265; *see also* T. FRANCK & E. WEISBAND, FOREIGN POLICY BY CONGRESS 155–62 (1979) (discussing inappropriateness of subjecting national foreign policy to uniform rules); Trimble, *Foreign Policy Frustrated*, 84 COLUM. L. REV. 317, 364–66, 373–77 (1984).

Political scientists of the "realist school" have expressed similar conclusions: power and national interest, not law, determine government conduct.[8] For the most part, the writings of recent Secretaries of State, as well as international relations theorists and political scientists, ignore the subject altogether.[9] International law is thus relegated to the dustbin of idealism.

The international law community has responded to this "realist" attack with vigorous and persuasive rebuttal.[10] In fact, there is an abundance of international law, and it is regularly observed.[11] Like domestic law, it serves many functions in society beyond the "restraint" function emphasized by the realist critique.[12] International law embodies basic as-

8. H. MORGENTHAU, *supra* note 1, at 277–96; Hoffman, *International Law and the Control of Force*, in RELEVANCE OF INTERNATIONAL LAW, *supra* note 1, at 21–46. Both authors focus on the use of force. Although they seem to understand that the law dealing with force is a small part of international law, they do not pursue the implications of that understanding. Morgenthau generalizes: "Governments . . . are always anxious to shake off the restraining influence . . . that might be harmful to them." H. MORGENTHAU, *supra* note 1, at 281. And Hoffman states flatly that "calculations of power and commands of law . . . tend to live on separate planes." Hoffman, *supra*, at 26. *See generally* Boyle, *supra* note 1, at 194–98.

9. The memoirs of Secretaries Vance and Kissinger do not seem to refer to the subject at all. Current international relations theorists and political scientists are similarly indifferent. *See* Boyle, *supra* note 1, at 204–06.

10. *See, e.g.*, A. CHAYES, *supra* note 6; L. HENKIN, *supra* note 1; Fried, *supra* note 1. In this Article I sometimes refer to the positions of "international lawyers" or of "realists." Of course, there are many important differences among the commentators I have grouped into these two categories. The common features of the various positions on the points material for my discussion, however, are sufficiently broad to justify the references.

11. L. HENKIN, *supra* note 1, at 46–49, 320.

12. *See generally id.* at 13–22. The realists imagine law primarily as a system of restraint, an invisible force that stops an actor from doing something it is doing or wants to do, or at least influences its behavior independently of other causes. In this view, criminal law deters people from committing crimes; contract law deters people from breaching contracts; and tort law deters people from acting negligently. But international law, as these critics see it, does not (and should not) deter a government from doing anything.

Although international law commentators have pointed out that the concept of law can be much broader and more complex than suggested by the "badman" assumptions inherent in the realist view, *see, e.g., id.* at 13, they too incorporate the image of law as a restraint into their universe. "Most international lawyers are

sumptions inherent in the organization of international society, such as the formal equality of states.[13] It also allocates law-making authority among states, as through rules regarding territorial sovereignty and the law of the sea.[14] International law also provides a process through which international relations are conducted,[15] for example, through the work of international organizations, and it serves as a language of diplomatic conversation.[16]

I do not propose to revive the general debate over the existence, meaning, or relevance of international law, a well-ploughed field in the legal literature of this century.[17] Nevertheless, the radically different conclusions reached by observers of the same international political reality suggest a need for some further inquiry. One source of the general confusion may be found in the tendency of both realists and their critics to speak of "international law" as an undifferentiated whole. In my view both analyses are deficient because they fail to attribute fundamental significance to the differences

committed to the belief that law, rather than being a mere fig leaf for the raw thrust of national power, is an independent variable exerting . . . a certain pressure on national decision-makers." Farer, *International Law and Political Behavior: Toward a Conceptual Liason*, 25 WORLD POL. 430, 430 (1973). The restraint idea permeates all sorts of international law writing. *See, e.g.*, M. KATZ, THE RELEVANCE OF INTERNATIONAL ADJUDICATION 1, 2 (1968); R. KIRGIS, PRIOR CONSULTATION IN INTERNATIONAL LAW (1983); O. LISSITZYN, *supra* note 7, at 3–6; D'Amato, *The Relation of Theories of Jurisprudence to International Politics and Law*, 27 WASH. & LEE L. REV. 257 (1970); Falk, *The Relevance of Political Context to the Nature and Functionality of International Law: An Intermediate View*, in RELEVANCE OF INTERNATIONAL LAW, *supra* note 1, at 147; Friedman, *The Reality of International Law—A Reappraisal*, 10 COLUM. J. TRANSNAT'L L. 46 (1971).

Professor McDougal and his colleagues, on the other hand, seem to have downplayed the restraint function. *See, e.g.*, McDougal, Lasswell & Reisman, *Theories About International Law: Prologue to a Configurative Jurisprudence, reprinted in* INTERNATIONAL LAW ESSAYS 43–60 (M. McDougal & W. Reisman eds. 1981). But their virtual equation of law with what states actually do has been criticized as justifying any conduct as lawful. *See* Young, *International Law and Social Science: The Contributions of Myres S. McDougal*, 66 AM. J. INT'L L. 60 (1972).

13. L. HENKIN, *supra* note 1, at 15–16.

14. *Id.* at 17.

15. *See* A. CHAYES, *supra* note 6; W. COPLIN, THE FUNCTIONS OF INTERNATIONAL LAW 152–67 (1966); K. DAM, THE GATT—LAW AND INTERNATIONAL ECONOMIC ORGANIZATION 4–5 (1970) (Law should not be viewed primarily as rules; "law viewed as procedures and process serves to identify the common interest in complex situations.").

16. W. COPLIN, *supra* note 15, at 168–95; P. CORBETT, LAW AND SOCIETY IN THE RELATIONS OF STATES (1951); Falk, *supra* note 12, at 146–49.

17. For a recent review of the debates, see generally T. NARDIN, LAW, MORALITY AND THE RELATIONS OF STATES (1984).

between treaties and customary international law. This failure contributes significantly to the lack of understanding surrounding much discussion of international law.

International law is traditionally defined as the body of rules governing the relations of nation-states.[18] Those rules are divided into two major categories—treaty law and customary international law.[19] Treaty law consists of expressly accepted obligations spelled out in international agreements freely adhered to by states. Customary international law consists of obligations inferred from the general "practice of states"—what is habitually done by most members of the international community out of a sense of legal obligation. Customary international law is legally binding regardless of whether a state has expressly accepted it. Conventional doctrine regards both types of law as equally authoritative.[20]

In this Article, I argue that it is erroneous to think about the two types of international law in the same way. They rest on different political foundations and should not be regarded as equally authoritative. A key to understanding the difference, and to understanding the relevance and true role of international law in the world, lies in national political traditions and structures that support the domestic implementation of the two types of international law.

I focus on the American courts' application of customary international law in order to illustrate the basic difference be-

18. J. BRIERLY, *supra* note 1, at 1.

19. I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 3–4 (1966).

20. Akehurst, *The Hierarchy of the Sources of International Law*, 47 BRIT. Y.B. INT'L L. 273 (1974–75) (international lawyer); Gamble, *The Treaty/Custom Dichotomy: An Overview*, 16 TEX. INT'L L.J. 305 (1981) (political science view). Their equivalence is reiterated in the standard, modern casebooks and treatises. *See, e.g.*, L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, INTERNATIONAL LAW—CASES AND MATERIALS 36 (1980); J. BRIERLY, *supra* note 1, at 46–64; *see also* RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 comment j, reporters' note 4 (Tent. Draft No. 1, 1980) [hereinafter cited as 1980 DRAFT RESTATEMENT]. *But see* Scott & Carr, *The International Court of Justice and the Treaty/Custom Dichotomy*, 16 TEX. INT'L L.J. 347, 348 (1981). Those authors are political scientists of the realist school and seem fundamentally skeptical about international law. *See id.* at 357. Consequently, like Morgenthau and Hoffman, they may think the question of hierarchical rank is not important enough to deserve much attention.

Some commentators have argued that customary law has become less important than treaties. *See* C. PARRY, THE SOURCES AND EVIDENCES OF INTERNATIONAL LAW (1965). Others say that the opposite is happening. *See* Gamble, *supra*, at 314; Waldock, *General Course on Public International Law*, 106 REC. DES COURS 1, 40–41 (1962). They do not, however, disagree as to the equal hierarchical status of the two bodies of law.

tween it and treaty law. In practice, customary international law is applied primarily by the political branches, not the judiciary. But the analysis of the American judicial experience illustrates the weak political foundation of customary international law that I believe also undercuts its effectiveness in the minds of political branch officials and in other societies.

In addition, I focus on the *domestic* law status of customary international law, which is theoretically different from its status on the *international* plane. For example, if a state's domestic law requires conduct that is prohibited by treaty, the state is responsible for the violation of international law despite the binding character for domestic purposes of its domestic law. Despite this traditional distinction, I believe that my analysis demonstrates important lessons about the relevance and meaning of international law at *both* the domestic and international level.

Judicial application of customary international law is also interesting because of the emphasis both realists and international lawyers place on adjudication as an element of an effective legal system. Realists are fond of pointing out the absence of effective international institutions for adjudication,[21] while some prominent international lawyers have pointed with pride to the application of international law by domestic courts.[22] In this respect American courts are an ideal subject for study because of their traditions of independence and judicial review. The application of international law by American courts lends support to the international lawyers' response to the realists' attack, and is adduced to show that international law is just like any other law.

The claim has superficial plausibility. Article VI of the Constitution declares treaties to be the "law of the land." They are applied with the same force as an act of Congress.[23] The Supreme Court has declared customary international law to be judicially applicable.[24] Some courts and commentators have suggested that customary international law is equivalent to "constitutional common law,"[25] applied by courts to directly restrain, or to limit the scope of, political branch conduct.[26]

21. H. MORGENTHAU, *supra* note 1, at 281.

22. *See, e.g.*, R. FALK, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER 64–76, 123, 137–38 (2d ed. 1964); Lillich, *The Proper Role of Domestic Courts in the International Legal Order*, 11 VA. J. INT'L L. 9, 12, 47 (1970) (courts are "unofficial agents of the international legal order").

23. *See generally* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 163–64 (1972).

24. The Paquete Habana, 175 U.S. 677, 700 (1900); *see infra* note 50 and accompanying text.

A closer look at the record, however, shows that the international lawyers' case is hollow. Unlike treaty law, customary international law has not traditionally been applied by American courts, nor should it be. There is no basis for the notion that it is a kind of constitutional common law, suitable as a doctrinal vehicle for restraining acts of the political branches. Although this Article is confined to examining the use of customary international law by American courts, my analysis suggests the need for a broader revision of the traditional status of customary international law.

In Part I, I explain the traditional doctrinal framework and why the application or nonapplication of customary international law by American courts is a significant issue. In Part II, I examine the cases in which American courts are said to have applied customary international law. I show that only a few of those cases actually involved application of customary international law, and those cases can better be understood as reflections of decisions taken by the political branches of government in accordance with their recognized law-making authority. Particularly, I attack the use of customary international law—based on the much-celebrated

25. By the analogy to "constitutional common law" I refer to judicial decisions derived from fundamental norms binding a government, but which nevertheless may be modified through the legislative or other political process of that government. *Cf.* Monaghan, *The Supreme Court, 1974 Term, Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

26. *See infra* notes 28–32 and accompanying text; *see also* Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1564–67, 1569 (1984) (customary law supersedes earlier act of Congress); Paust, *Federal Jurisdiction Over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law Under the FSIA and the Act of State Doctrine*, 23 VA. J. INT'L L. 191 (1983). According to Professor Paust, "the judiciary is bound to recognize limits on U.S. jurisdiction imposed by international law . . . . In this manner, international law, as incorporated in the Constitution, can aid in setting limits to what is constitutionally exercisable judicial authority." *Id.* at 200 n.31; *see also id.* at 217 ("international law restrains the Executive . . . through the Constitution"). Professor Paust is quite explicit on this point, but his reference to "international law, as incorporated in the Constitution" is perplexing. Treaties are assigned status in the Constitution, but customary international law is not. *See infra* notes 42–49 and accompanying text. Most commentators do not claim that international law should supersede the Constitution. *See infra* note 52.

Timberlane case and advanced by the American Law Institute's *Draft Restatement of Foreign Relations Law*—to curtail the extraterritorial application of United States law. The case for the reality of customary international law has an important empirical flaw: courts have regularly declined to use customary international law as an explanatory doctrine. I note that a different judicial attitude is evident in cases involving treaties. My analysis suggests that the traditional equivalence of the two bodies of law is mistaken and that conventional thinking should be revised to downgrade the status of customary international law.

In Part III, I point out a fundamental institutional weakness preventing judicial application of customary international law. Courts cannot develop customary international law in the same way that they develop common law. The judicial commitment to "principled" decision making[27] is incompatible with the need to accommodate wholly unprincipled change in the development of customary international law. American courts are institutionally unequipped to elaborate changes in the law because they lack the requisite background and training, they do not have access to the full range of information required, and they normally have deferred, for good reason, to the executive branch in matters significantly affecting foreign affairs. Their application of customary international law in a manner independent of the political branches can only stifle appropriate developments of the law. In my view, customary international law should be applied by the judiciary only when its application can be satisfactorily justified on the basis of an independent domestic source of authority.

Treaties, on the other hand, do not require "development," and the courts have regularly (if circumspectly) interpreted and applied their provisions. Treaties are more like ordinary laws, written and then promulgated in the Statutes at Large, with "legislative histories." Courts can apply their provisions more easily and more comfortably within the traditional confines of judicial competence.

In Part IV, I argue that customary international law lacks

27. The notion of "principled" decision making can of course mean many different things, or perhaps nothing at all. This question is taken up *infra* notes 156–60 and accompanying text.

"legitimacy" as a doctrine suitable for judicial application. The principal reason is that its formulation cannot be explained in a manner consistent with central features of traditionally accepted American political philosophy, and thus cannot be grounded in social values of the community subject to the law. In this regard, customary international law is fundamentally different from common law. It is also fundamentally different from the "law of nations" as understood when that law was incorporated into American law in the eighteenth century, and is fundamentally different from constitutional law as well. The analysis of the legitimacy of customary international law illuminates the qualitative differences between it and treaty law. The weak political foundation of customary international law explains why that law is not as effective as treaty law in restraining the political branches of government. It illustrates why customary international law should be regarded as less authoritative than treaty law.

Finally, in Part V, I outline an alternative approach to understanding international law. I suggest that the search for an adequate general theory of international law should focus on the processes through which law is made in national political systems rather than on universal principles or the misleading concept of an international society.

I. Contemporary Significance of Customary International Law

The doctrinal status of customary international law is of more than theoretical interest. Commentators, from human rights activists to counsel for multinational corporations, have sought to use this doctrine as a justification for restraining or limiting government conduct and authority.[28] A district court enjoined federal government officials from holding a Cuban refugee in violation of customary interna-

28. *See, e.g.*, Burke, Coliver, de la Vega & Rosenbaum, *Application of International Human Rights Law in State and Federal Courts*, 18 Tex. Int'l L.J. 291 (1983); Paust, *supra* note 26; Schneebaum, *The Enforceability of Customary Norms of Public International Law*, 8 Brooklyn J. Int'l L. 289 (1982); Discussion, *Perspectives on Enforcement of Human Rights*, 74 Am. Soc. Int'l L. Proc. 26, 29, 30 (1980); *Symposium on International Human Rights Law in State Courts*, 18 Int'l Law. 59 (1984); Note, *Limiting The Scope of Federal Jurisdiction Under the Alien Tort Statute*, 24 Va. J. Int'l L. 941, 941–45, 956–65 (1984); *see also id.* at 945 n.23 (citing authorities).

tional human rights law.[29] Other courts declined to apply federal antitrust and commodities laws to transactions largely conducted outside the United States, on the grounds that such an assertion of governmental authority can be understood as violating international law.[30] Still other tribunals have used customary international law to create causes of action against foreign governments and government officials,[31] thereby presumably indirectly deterring, if not directly restraining, illegal conduct by those governments. Finally, in its proposed revision of the *Restatement of Foreign Relations Law,* the American Law Institute (ALI) equates customary international law with treaties, endorses its applicability in American courts, and even elevates its status as domestic law.[32]

As domestic law, customary international law has two distinguishable roles. First, it may create a cause of action,

29. Fernandez v. Wilkinson, 505 F. Supp. 787 (D. Kan. 1980), *aff'd on other grounds,* 654 F.2d 1382 (10th Cir. 1981).

30. Timberlane Lumber Co. v. Bank of Am., 749 F.2d 1378 (9th Cir. 1984) (antitrust), *cert. denied,* 105 S. Ct. 3514 (1985); Montreal Trading Ltd. v. Amax Inc., 661 F.2d 864 (10th Cir. 1981) (commodities), *cert. denied,* 455 U.S. 1001 (1982). Both cases applied the test articulated in an earlier *Timberlane* case, Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597 (9th Cir. 1976), under which the court balanced the various national interests involved. Although the Ninth Circuit did not speak squarely in terms of international law, subsequent commentators have interpreted the decision as an application of an emerging rule of customary international law. *See infra* note 121.

31. Filartiga v. Pena-Irala, 577 F. Supp. 860 (E.D.N.Y. 1984); Letelier v. Chile, 502 F. Supp. 259 (D.D.C. 1980); *see also Argentina Torture Victim Wins Redress in U.S. Court,* L.A. Times, Oct. 20, 1984, at 1, col. 1, *reprinted in part in* 28 INT'L PRAC. NOTEBOOK 4 (Oct. 1984) (discussing Siderman v. Argentina, No. CV 82-1772-RMT (C.D. Cal. Mar. 12, 1984)). However, after intercession by the State Department, the district court reversed itself and held that the court had no jurisdiction over a foreign government under the Alien Tort Claims Act. *See* Bazyle, *Litigating the International Law of Human Rights in United States Courts:* Siderman v. Argentina, 31 INT'L PRAC. NOTEBOOK 1 (July 1985).

32. 1980 DRAFT RESTATEMENT, *supra* note 20, § 102 comment j, § 131, § 135 reporter's notes 1, 6. Since this Article was written, the ALI reporters have produced a new tentative draft, revising or rewording in some respects the positions criticized herein. In the 1985 *Draft Restatement* the reporters retreated from expressly arguing that customary international law superceded an earlier inconsistent statute. Now the reporters merely state that the question has not been adjudicated. *See* RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 135 comment d (Tent. Draft No. 6, 1985) [hereinafter cited as 1985 DRAFT RESTATEMENT]. They nevertheless immediately point out, apparently with approval, that the United States has accepted certain customary international law of the sea "that modifies earlier treaties as well as U.S. statutes." *Id.* § 135 comment d.

just as a treaty may provide the basis for an action. Examples include the cases in which human rights law prohibits torture[33] or the law of state responsibility prohibits confiscation of alien property without compensation.[34] Second, customary international law may create a defense against an otherwise valid cause of action—for example, when the United States government attempts to apply antitrust law to conduct abroad, and the target of the regulation argues that the application of United States law violates customary international law.[35] Although the government clearly has the power to violate international law,[36] the courts have nevertheless sometimes imposed limitations on the extraterritorial application of United States law.[37] Although the decisions were frequently couched in terms of congressional intent or comity, the authors of the *Draft Restatement* have argued that these limitations should be understood as limitations imposed by customary international law.[38] Moreover, the argument goes, in the absence of a contrary indication, Congress should be *presumed* to have intended *not* to violate international law.[39] When actual congressional intent is ambiguous or absent, the creation of such a presumption is the same as creating a rule that the government regulatory scheme cannot violate international law.[40]

33. *See* cases cited *infra* notes 106–07.

34. *See* cases cited *infra* note 111.

35. *See, e.g.,* cases cited *infra* note 128.

36. United States v. Howard-Arias, 679 F.2d 363, 371–72 (4th Cir. 1982), *cert. denied,* 459 U.S. 874 (1982) (United States may violate international law if necessary to carry out national policy). *See generally* Henkin, *Viet-Nam in the Courts of the United States: "Political Questions,"* 63 AM. J. INT'L L. 284, 286–88 (1969); 1985 DRAFT RESTATEMENT, *supra* note 32, § 135 reporter's note 3.

37. *See* cases cited *infra* notes 125–27 and 129.

38. RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW § 403 comment a (Tent. Draft No. 2, 1981) [hereinafter cited as 1981 DRAFT RESTATEMENT]. This position is reaffirmed in the 1985 Draft. *See* 1985 DRAFT RESTATEMENT, *supra* note 32, § 443 comment a.

39. 1985 DRAFT RESTATEMENT, *supra* note 32, § 134.

40. The ALI drafters concede that Congress can exercise jurisdiction beyond the limits permitted by international law if it makes its intention clear. *See* 1981 RESTATEMENT, *supra* note 38, § 403(4) & comment f; 1985 RESTATEMENT, *supra* note 32, § 403 comment g. The case law is clear on this point. *See* Tag v. Rogers, 267 F.2d 664 (D.C. Cir. 1959), *cert. denied,* 362 U.S. 904 (1960); *id.* at 666 n.8 (citing cases). *Cf.* 1980 DRAFT RESTATEMENT, *supra* note 20, § 135 reporter's note 5. This proposition seems somewhat at odds with the notion, suggested by § 135 reporter's notes 1 and 6 of the 1980 Draft and weakly perpetuated in § 135 comment d of the 1985 Draft, that customary international law may supercede a prior act of Congress. Presumably, the ALI drafters are assuming that the intent of Congress

Although the two types of case normally are not analyzed together, they should be.[41] Both entail restraint or limitation of political branch action and authority by the judiciary, using the explanatory doctrine of customary international law.

A. *Background*

The roots of the doctrine of customary international law are deeply embedded in the lore of the legal profession. One of the first lessons for the beginning student is that international law is also law of the United States,[42] and therefore must be applied by courts just like any other law.

The supremacy clause provides a constitutional basis for this doctrine in the case of treaties.[43] The courts have treated treaties as equivalent to acts of Congress.[44] Thus, a treaty can create a cause of action permitting an individual to enjoin government action.[45] Similarly, a treaty can be raised as a defense to preclude the application of a regulatory scheme to a foreign national.[46]

may not be clear, so that the "normal" presumption of consistency between acts of Congress and international law would come into play. *See* 1985 DRAFT RESTATEMENT, *supra* note 32, § 134. Frequently, the intent of Congress will be unclear (especially if one would like to find it unclear) so that the effect of the presumption is to elevate the status of customary international law.

41. Of course, a distinction could be drawn between personal rights and property rights, as some commentators have urged in the area of constitutional law. *See* L. HENKIN, *supra* note 23, at 256–57, 493 n.31. However, the Supreme Court seems to have rejected this notion. *See* Lynch v. Household Finance Corp., 405 U.S. 538 (1972) (rejecting the distinction for purposes of Civil Rights Act enforcement); *see also* Van Alstyne, *The Recrudescence of Property Rights as the Foremost Principle of Civil Liberties: The First Decade of the Burger Court*, 43 LAW & CONTEMP. PROBS. 66 (Summer 1980). In any event, it seems inappropriate to impute American constitutional doctrine to international law without evidence of support in the practice of states. That support does not seem to exist.

42. L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *supra* note 20, at 117–37; J. SWEENEY, C. OLIVER & N. LEECH, THE INTERNATIONAL LEGAL SYSTEM—CASES AND MATERIALS 4–18 (2d ed. 1981).

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

44. *See* L. HENKIN, *supra* note 23, at 163–64.

45. Asakura v. City of Seattle, 265 U.S. 332 (1924); *see also* Saipan v. United States Dep't of Interior, 502 F.2d 90, 96–97 (9th Cir. 1974) (United Nations Charter and Trusteeship Agreement create judicially enforceable rights to stop government nonmilitary construction), *cert. denied*, 420 U.S. 1003 (1975).

46. Cook v. United States, 288 U.S. 102 (1933) (the treaty limit was expressed in terms of one hour's sailing distance; the vessel in question could travel no more than 10 miles per hour); *see also* United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974) (indictment dismissed because defendant was kidnapped in violation of

There are, however, limitations to the authority of treaties. A treaty does not prevail over a subsequent inconsistent act of Congress.[47] The courts have been reluctant to enjoin federal executive officials from a treaty violation, holding the treaty to be "non-self-executing," or using the political question doctrine or another of the "passive virtues."[48] These limitations, together with the absence of explicit constitutional reference to the supremacy of customary international law,[49] suggest caution in attributing greater or even comparable legal significance to customary international law.

Nevertheless, the conventional wisdom is clear. As stated by the Supreme Court in *The Paquete Habana* case: "International law is part of our law, and must be administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."[50] Moreover, customary international law is considered to be federal common law, so that it would supercede an inconsistent state rule.[51] The tentative draft

O.A.S. Charter); Treasure Salvors, Inc. v. Unidentified Wreck and Abandoned Sailing Vessel, 569 F.2d 330 (5th Cir. 1978). For the subsequent, unrelated history of the *Treasure Salvors* saga, see Florida Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670 (1982). *But see* United States v. Lira, 515 F.2d 68 (2d Cir.) (*Toscanino* limited to outrageous conduct by United States government agents), *cert. denied*, 423 U.S. 847 (1975); United States v. Gengler, 510 F.2d 62 (2d Cir.) (*Toscanino* not applied when foreign government did not protest violation of international law), *cert. denied*, 421 U.S. 1001 (1975).

47. *See, e.g.*, The Chinese Exclusion Case, 130 U.S. 581 (1889); Whitney v. Robertson, 124 U.S. 190 (1888).

48. *See, e.g.*, Skiriotes v. Florida, 313 U.S. 69 (1941) (American national cannot invoke treaty rights of other countries); Terlinden v. Ames, 184 U.S. 270 (1902) (political question); Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829) (political question; non-self-executing); Dickens v. Lewis, 750 F.2d 1251 (5th Cir. 1984) (individual did not have standing to raise claim under U.N. Charter); United States v. Postal, 589 F.2d 862 (5th Cir.) (non-self-executing), *cert. denied*, 444 U.S. 832 (1979); Diggs v. Richardson, 555 F.2d 848 (D.C. Cir. 1976) (U.N. Security Council Resolution on Rhodesia non-self-executing); Holmes v. Laird, 459 F.2d 1211 (D.C. Cir.) (courts will not compel United States to perform treaty or determine if foreign government is in breach), *cert. denied*, 409 U.S. 869 (1972); Sei Fujii v. State, 38 Cal. 2d 718, 242 P.2d 617 (1952) (non-self-executing). On the "passive virtues" as applied in this area, see generally A. BICKEL, THE LEAST DANGEROUS BRANCH 111-33, 183–98 (1962).

49. The only reference to the "law of nations" in the Constitution is in art. I, § 8, giving Congress the power to "define and punish . . . offenses against the Law of Nations."

50. 175 U.S. 677, 700 (1900).

51. L. HENKIN, *supra* note 23, at 222–23. *Cf.* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (act of state doctrine is federal common law; Court said rules of international law should not be matters of divergent and perhaps parochial

Restatement of Foreign Relations Law (Revised) proposes to take this doctrine one step further: customary law not only is entitled to supremacy over state law, but also may supercede an earlier inconsistent act of Congress. This approach would make customary law fully equivalent to a treaty.[52] There is virtually no support in case law for the "rules" set forth in the proposed *Revised Restatement.*[53] Nevertheless, its statements could well be taken as authoritative[54] and become self-fulfilling prophecies. This already seems to have happened.[55] The potential impact of the *Draft Restatement* position is thus quite significant.

B. *Effects of Elevating Customary International Law Status*

Elevating customary international law to the status of treaties entails a significant redistribution of political power and law-making authority, both domestically and internationally. This new status could significantly undermine the stability of established legal regimes because of the unusual way in which customary international law might emerge.

Customary international law "results from a general and consistent practice of states followed by them from a sense of legal obligation."[56] The state practice involved need only be general, not universal.[57] Moreover, a state's "practice" is not limited to its own acts; practice can consist of acquiescence to the acts of other states.[58] In theory, a rule might emerge when a state acquiesced, for whatever reasons, in the practices of other states, so long as there were a sufficient number of other states involved to qualify the practices as "general practice." While this may be unlikely because the scope of treaty law has expanded so much in the last twenty-five years, plausible hypotheticals can be imagined—states might be bound by customary law of the sea growing out of the United

state law). *See generally* Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024 (1967); Note, *Federal Common Law and Article III: A Jurisdictional Approach to Erie*, 74 YALE L.J. 325 (1964).

52. 1980 DRAFT RESTATEMENT, *supra* note 20, § 135 reporter's notes 1, 6. Although the 1985 Draft retreats on this point, it still maintains that the issue has not been "authoritatively determined" and offers an example, presumably with approval, when customary international law "modifies" earlier statutes and treaties. While there is considerable ambiguity about the scope of this principle, *see supra* note 40, it seems clear that the drafters envision some situations in which a norm of customary international law would supercede an act of Congress. *See* Henkin, *supra* note 26, at 1561–66. Another commentator has even suggested that some international law should supercede constitutional law. *See* Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071 (1985). *But see* Reid v. Covert, 354 U.S. 1 (1957).

53. *See infra* notes 71–155 and accompanying text; *see also* Goldklang, *Back on Board the* Paquete Habana: *Resolving the Conflict Between Statutes and Customary International Law*, 25 VA. J. INT'L L. 143 (1984). Apparently, no case has presented a clear conflict between an old act of Congress and a new customary rule. L. ERADES & W. GOULD, THE RELATION BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW IN THE NETHERLANDS AND THE UNITED STATES 364 (1961).

54. The courts frequently rely on the ALI for authoritative statements of the law. For cases applying § 17 and § 18 of the 1965 *Restatement of Foreign Relations Law*, see Travis v. Anthes Imperial Ltd., 473 F.2d 515 (8th Cir. 1973) and Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972) (Friendly, J.); and for application of § 40, see United States v. Field, 532 F.2d 404 (5th Cir.), *cert. denied*, 429 U.S. 940 (1976), and United States v. First Nat'l City Bank, 396 F.2d 897 (2d Cir. 1968). *See generally* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1965) §§ 17, 18, 40 [hereinafter cited as 1965 RESTATEMENT].

55. Courts have relied on the 1981 *Draft Restatement*; *see* Vespa of Am. Corp. v. Bajaj Auto Ltd., 550 F. Supp. 224 (N.D. Cal. 1982).

56. 1985 DRAFT RESTATEMENT, *supra* note 32, § 102(2). The traditional statement of the sources of international law is found in Article 38 of the Statute of the International Court of Justice, which refers to "international custom, as evidence of a general practice accepted as law." 59 Stat. 1055, 1060, T.S. No. 993 (1945). "[T]he order of the words makes little difference. What is clear is that the definition of custom comprises two distinct elements: (1) 'general practice' and (2) 'its acceptance as law.'" L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *supra* note 20, at 36; *see also* L. OPPENHEIM, INTERNATIONAL LAW 25–26 (8th ed. 1955); G. SCHWARTZENBERGER, A MANUAL OF INTERNATIONAL LAW 27 (4th ed. 1960); Kuntz, *The Nature of Customary International Law*, 47 AM. J. INT'L L. 662 (1953). For background of the drafting of Article 38 and a general discussion of the problems of customary international law, see K. WOLFKE, CUSTOM IN PRESENT INTERNATIONAL LAW (1964). There is a separate category of customary international law known as *jus cogens*—norms that are so fundamental that no practice or even explicit agreement can change them. 1985 DRAFT RESTATEMENT, *supra* note 32, § 102 comment f. However, the concept is fuzzy and the norms are so vague that separate discussion is not warranted. For a discussion of some of the implications of this vagueness, see Hazard, *Jus Cogens and Socialist International Law*, 72 S. ATL. Q. 351 (1973).

57. J. BRIERLY, *supra* note 1, at 61.

58. Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L L. 1, 10, 23–24, 38–42 (1974–75); D'Amato, *What Counts As Law?*, in LAW-MAKING IN THE GLOBAL COMMUNITY (N. Onuf. ed. 1982); MacGibbon, *The Scope of Acquiescence in International Law*, 31 BRIT. Y.B. INT'L L. 143, 145, 150–51, 182–83 (1954); Meijers, *How Is International Law Made?—The Stages of Growth of International Law and the Use of Its Customary Rules*, 9 NETH. Y.B. INT'L L. 3, 15–16, 18–20 (1978); Sohn, *The Law of the Sea: Customary International Law Developments*, 34 AM. U.L. REV. 271 (1985) (speech); Sohn, *Thoughts on Customary International Law*, RUSK CENTER NEWSLETTER 1 (Jan. 1984); Wright, *Custom as a Basis for International Law in the Post-War World*, 2 TEX. INT'L L. F. 147, 153 (1966); *see also* 1985 DRAFT RESTATEMENT, *supra* note 32, § 102 comments b, d; K. WOLFKE, *supra* note 56, at 50. Sometimes a distinction is made between general custom and special custom (e.g., within the western hemisphere); for the latter, a more rigorous standard requiring "consent" of all the relevant states is said to be required. *See* D'Amato, *The Concept of Special Custom in International Law*, 63 AM. J. INT'L L. 211 (1969).

Nations Law of the Sea negotiations, and they might be bound by "emerging" human rights law. Although the *Draft Restatement* concedes that a state cannot be bound by a rule if the state indicates its disagreement when that rule is "still in the process of development,"[59] a state might still be bound by a rule it had no direct part in making.

Some commentators have stretched the limits of customary international law even further. They would have votes in the General Assembly qualify as practice.[60] Others would include treaties made by other states.[61] Conceivably, a state could be bound by the norms contained in General Assembly resolutions and in treaties concluded by other states unless that state were able to conclude treaties embodying a different rule. In this way, the President and Congress might become bound by rules of law created wholly outside the domestic political process, and United States courts, following the *Draft Restatement* approach, might apply these rules.[62] This might be true even without the novel processes of law formation advanced by aggressive commentators, although the problem, as a practical matter, would be much less extensive if the General Assembly were not treated as a law-making body.

The consequences of according legal significance to customary international law are considerable. At the international level, the *Draft Restatement* view would hold that emerging customary norms could supercede an earlier treaty.[63] The result might create uncertainty about whether any specific treaty remains binding.[64] In any case, it would transfer the authority to modify a treaty from its signatories

59. 1985 DRAFT RESTATEMENT, *supra* note 32, § 102 comment d.

60. R. KIRGIS, *supra* note 12, at 7–8 ("widely acknowledged to be potential indicators of states practice if not actual embodiments of it") [(citing O. ASAMOAH, THE LEGAL SIGNIFICANCE OF THE DECLARATIONS OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS (1966); J. CASTANEDA, LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS (1969); R. HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS (1963)]; D'Amato, *On Consensus*, 8 CAN. Y.B. INT'L L. 104, 113–15 (1970); Wilner, Filartega v. Pena-Irala: *Comments on Sources of Human Rights Law and Means of Redress for Violations of Human Rights*, 11 GA. J. INT'L & COMP. L. 317 (1981); *see also* D'Amato, *What Counts as Law*, *supra* note 58, at 99–100 ("clarificatory [sic] rules and those which progressively develop the content of international law" can become law through groups like the International Law Commission); Joyner, *U.N. General Assembly Resolutions and International Law: Rethinking the Contemporary Dynamics of Norm-Creation*, 11 CAL. W. INT'L L.J. 445 (1981) (although votes do not necessarily represent state practice, they may "crystalize . . . customary behavior and general principles into law;" citing a number of implausible examples such as resolutions dealing with the status of women and children). For an even more extreme view, see Akehurst, *supra* note 58, at 8 (statements alone should be authoritative).

This elevation of General Assembly rhetoric seems to enjoy widespread approbation among many commentators, although to me it seems incredible. General Assembly votes are taken without reference to actual home government positions by officials who, in any event, are frequently not authorized to make the declarations that they make on the subject matter involved. It is true that laws must be made in political bodies of which the General Assembly is a good example, but that institution is indulging in a different kind of politics. Former Secretary of State Rusk has pointed out that votes in the General Assembly take into account that they are not intended to make law. Rusk, *A Comment on* Filartiga v. Pena-Irala, 11 GA. J. INT'L & COMP. L. 311 (1981); *see also* Haitian Refugee Center, Inc. v. Gracey, 600 F. Supp. 1396 (D.D.C. 1985) (Universal Declaration of Human Rights not intended to be legally binding); *accord In re* Alien Children Educ. Litig., 501 F. Supp. 544 (S.D. Tex. 1980); Joyner, *supra*, at 460–61 (votes do not necessarily represent "genuine opinions" of the state); Rohlik, *Filartiga v. Pena-Irala: International Justice in an Modern American Court?*, 11 GA. J. INT'L & COMP. L. 325 (1981); Schwebel, *The Effects of Resolutions of the U.N. General Assembly on Customary International Law*, 73 AM. SOC'Y INT'L L. PROC. 301 (1979).

For an excellent critique of the tendency by some courts to look to declarations as "practice," see Note, *Custom and General Principles as Sources of International Law in American Federal Courts*, 82 COLUM. L. REV. 751 (1982) [hereinafter cited as Columbia Note]; *see also* Note, *The Role of United Nations General Assembly Resolutions in Determining Principles of International Law in United States Courts*, 83 DUKE L.J. 876 (1983); *cf.* Rubin, *The International Legal Effects of Unilateral Declarations*, 71 AM. J. INT'L L. 1 (1977) (criticizing the International Court of Justice's finding that unilateral declarations were binding; arguing that this holding will make states even more reluctant to accept ICJ jurisdiction).

For specific critiques of international human rights law, see Murphy, *Objections to Western Conceptions of Human Rights*, 9 HOFSTRA L. REV. 433 (1981); Lane, *Mass Killing By Governments: Lawful in the World Legal Order?*, 12 N.Y.U.J. INT'L L. & POL. 239 (1979); and Lane, *Demanding Human Rights: A Change in the World Legal Order*, 6 HOFSTRA L. REV. 269 (1978). *See also* Bilder, *Rethinking International Human Rights: Some Basic Questions*, 1969 WIS. L. REV. 171 (1969) (exposition of the substantial limitations on the effectiveness, as opposed to the existence, of human rights law).

61. This is a major theme for Professor D'Amato. See especially D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110 (1982), and A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW (1971). *See also* R. KIRGIS, *supra* note 12, at 8; K. WOLFKE, *supra* note 56, at 96–114; Akehurst, *supra* note 58, at 44–52 (generally arguing for an even looser process of law formulation); Gamble, *supra* note 20, at 313; Wright, *Custom as a Basis for International Law in the Post-War World*, 2 TEX. INT'L L.F. 147 (1966).

62. On the diverse sources of customary international law, see Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BRIT. Y.B. INT'L L. 275 (1965–66).

63. 1980 DRAFT RESTATEMENT, *supra* note 20, § 102 comment j, § 135. There is also support for this view in the traditional commentary. *See, e.g.*, Kuntz, *supra* note 56, at 666.

64. The 1980 *Draft Restatement* is consistent with the position expressed in L. ERADES & W. GOULD, *supra* note 53, at 366. For a criticism of this aspect of the *Draft Restatement*, see Chessman, *On Treaties and Custom*, 18 INT'L LAW. 421 (1984).

to an amorphous group of states whose practice could prescribe customary international law.

According legal significance to customary international law might produce a similar redistribution of effective power, with similar uncertainties, in the domestic sphere. The lawmaking power of Congress might shift to the President, in light of the Executive's primacy in foreign affairs,[65] or to the judiciary, armed with the power to declare customary international law.[66] Legislative power could even pass completely out of the government structure. The United States could be bound by a rule formed by the general practice of other states.[67] For example, assume that in 1970 Congress passed a law criminalizing possession of certain drugs on board foreign-flag, but United States-owned, vessels on the high seas. In the next ten years a number of international conferences are held on the subject of national jurisdiction on the high seas. On the basis of positions expressed at those conferences, municipal laws adopted by a large number of other states, and a draft treaty approved by consensus, a rule of customary law emerges that only the flag state can exercise jurisdiction over its vessels on the high seas. The President issues a proclamation declaring that the United States accepts the relevant provisions as customary international law but declines to sign the treaty for unrelated reasons.[68]

65. *See* Gottlieb, *Global Bargaining: The Legal and Diplomatic Framework*, in LAW-MAKING IN THE GLOBAL COMMUNITY 109, 121 (N. Onuf ed. 1982) (noting that informal agreements and a fortiori customary law result in the loss of congressional control); Sohn, *Thoughts On Customary International Law*, *supra* note 58 (the President can accept important obligations "by the stroke of a pen"; citing law of treaties and law of the sea). Although it may seem anomalous to speak of the "law-making" authority of the President, it is clear that the President does in fact "make" law with domestic effect pursuant to his foreign affairs powers conferred by the Constitution. *See* L. HENKIN, *supra* note 23, at 56–65. Presidential proclamations of customary international law form one part of this law-making authority. *Id.* at 56–60.

66. *See* O'Connell, *The Relation Between International Law and Municipal Law*, 48 GEO. L. REV. 431, 444–50 (1960) (arguing that courts apply international law, but have difficulty justifying application of alien systems; suggests that judges should "harmonize" municipal and international law by choosing whichever rule seems "appropriate").

67. For a skeptical reaction to those potential developments, see Linde, *Comments, Symposium on International Human Rights in State Courts*, 18 INT'L. LAW. 77, 79–80 (1984). On the other hand, another commentator counts the absence of political review and accountability as an advantage of the use of customary international law. Meijers, *The Stages of Growth of International Law and the Use of its Customary Rules*, 9 NETH. Y.B. INT'L L. 3 (1978).

68. The example is not entirely hypothetical. 18 U.S.C. § 7 (1982) defines the "special maritime and territorial jurisdiction of the United States" to include "any vessel belonging in whole or in part to the United States, or any citizen thereof . . . ." regardless of the vessel's flag when that vessel is on the high seas. Article 6 of the Convention on the High Seas of April 29, 1958, 13 U.S.T. 2312, provides that flag state jurisdiction is exclusive on the high seas. For crimes then covered by § 7, the 1958 Convention would arguably prevail because it was later in time. *See* Cook v. United States, 288 U.S. 102 (1933).

However, assume that in 1970 Congress adopted a new drug law, making possession of certain drugs a crime "when committed within the special maritime jurisdiction of the United States." That law, in turn, would probably supercede the treaty. Thereafter, in my hypothetical, when the rule of customary law (first embodied in the 1958 Convention) subsequently congealed in the draft U.N. Convention, and when President Reagan announced in 1984 that the United States would accept that norm, a new rule of customary international law arguably emerged, superceding the 1970 act of Congress. (On the process of congealing rules of customary law, see T. FRANCK & M. MUNANSANGU, THE NEW INTERNATIONAL ECONOMIC ORDER: INTERNATIONAL LAW IN THE MAKING? (1982)).

The actual events pose a slightly different question. In 1980, Congress made possession of certain drugs with intent to distribute (not necessarily in the United States) a crime when committed on board a "vessel subject to the jurisdiction of the United States." 21 U.S.C. § 955a, 94 Stat. 1159 (1982). If "jurisdiction of the United States" had referred to § 7, my hypothetical would be real. However, a special definition of "vessel subject to the jurisdiction of the United States" was adopted, referring in a *non*inclusive way to the 1958 Convention. 21 U.S.C. § 955(d), 94 Stat. 1160 (1982). The reported decisions have for the most part involved stateless vessels or foreign flag vessels for which the foreign state has consented to a United States search. A United States-owned, foreign flag vessel under the 1958 Convention could not be searched without consent. However, in view of the noninclusive language of § 955b(d), a court could still hold a United States-owned, foreign flag vessel to be within § 955b(d), and one court in fact came very close to doing so. *See* United States v. Marino-Garcia, 679 F.2d 1373 (11th Cir. 1982), *cert. denied*, 459 U.S. 1114 (1983). Such a result would violate the 1958 Convention, and would also violate the new United Nations Law of the Sea Convention that President Reagan has said the United States will observe. Query whether a rule of customary international law has now reemerged so as to invalidate that application of the 1980 act of Congress. For a discussion of the problem of asserting United States jurisdiction over United States-owned vessels, regardless of flag, on the high seas, see Sohn, *Interdiction of Vessels on the High Seas*, 18 INT'L. LAW. 411 (1984). On extraterritorial narcotics control, see generally Note, *Trends in U.S. Extraterritorial Narcotics Control: Slamming the Stable Door After the Horse Has Bolted*, 16 N.Y.U. J. INT'L L. & POL. 353 (1984).

69. The courts have been clear on this point. *E.g.*, Tag v. Rogers, 267 F.2d 664, 666 n.8 (D.C. Cir.) *cert. denied*, 362 U.S. 904 (1959). *Cf.* 1985 DRAFT RESTATEMENT § 135, *supra* note 32, reporters' note 5 (even if Presidential executive agreement supercedes an inconsistent act of Congress, "Congress could proceed to reenact the statute and thereby supercede the intervening executive agreement as

Under the *Draft Restatement* view, this hypothetical rule of customary international law could take precedence over the hypothetical act of Congress (particularly in view of the Presidential proclamation). Of course, Congress could repass the criminal law. The courts, and even the *Draft Restatement*, would then apply the repassed rule.[69] We may only be wor-

rying about where the burden of overcoming inertia should rest.

Suppose, however, that a number of years pass, all the other countries of the world join in the agreement, Congress pays no further attention to the question, and the Executive does not enforce the repassed law (for whatever reasons). Under the *Draft Restatement* approach, an activist court could find that the rule of customary law favoring exclusive flag state jurisdiction had reemerged, stronger than ever. Once again the act of Congress would be limited. This "bouncing ball" effect could go on indefinitely.

If the courts become capable of applying customary international law in this manner, the judiciary will acquire another tool with which to strike down or limit acts of Congress. Customary international law will become equivalent to constitutional common law, embodying a judicial function as novel as that recently advocated by Dean Calabresi, who suggests that courts applying common law should be free to modify statutes that are out of tune with the contemporary legal landscape.[70]

With these developments, the vengeance of the international lawyers is complete, and the realists are destroyed. Customary international law not only embodies the restraint function much emphasized in the realist view, but also is applied in courts, on the initiative of mere individuals. Even the Congress must bow (at least temporarily) to its force.

II. American Cases Dealing With Customary International Law

In fact, American courts have rarely applied customary international law, and have almost never applied it as a direct restraint against a government or a governmental interest.

domestic law"; presumably the same would apply to intervening rules of customary law).

70. G. Calabresi, A Common Law for the Age of Statutes (1982) (common law courts should modify statutes in same manner as they modify judicial precedents). In view of the wide scope of the Bill of Rights, it seems doubtful that the courts need additional tools to impose human rights limitations on the government. As for limiting the power of Congress to act extraterritorially, the courts have traditionally refused to impose constitutional limitations. Accordingly, the latter area, as a practical matter, seems potentially more affected by the Restatement's approach. The specific arguments against this approach are elaborated *infra* notes 145–55 and accompanying text.

Of more than 2000 "international law" cases decided between 1789 and 1984,[71] less than fifty involved the applica-

71. I should explain the methodology used to make the judgments reflected in the text and the scope of my research. My principal sources were American International Law Cases 1783–1968 (F. Deak ed. 1971) (20 vols.) and American International Law Cases 1968–1978 (F. Ruddy ed. 1981) (8 vols.). For the recent period I relied on the "Judicial Decisions" section of the *American Journal of International Law*, the West Digest System, and LEXIS.

Most "international law" cases turn out to involve international law only peripherally, if at all. Thus, many of these cases are constitutional decisions affecting foreign affairs, cases between states of the United States, interpretations of statutes involving foreign interests, statutes incorporating international law standards by reference, determinations of American nationality, or cases simply involving foreign parties or foreign events. These cases were irrelevant for my purposes since I was looking for cases in which the courts applied a rule of customary international law to create a cause of action or to provide the basis for a defense, or cases in which the courts applied such a rule as an integral part of the reasoning necessary to the decision.

I excluded from consideration decisions based on constitutional principles, although these decisions form a part of most public international law courses. Thus I do not count the numerous cases dealing with the effect of diplomatic recognition of foreign governments and states. *See, e.g.*, Pfizer, Inc. v. Government of India, 434 U.S. 308 (1977); Republic of Vietnam v. Pfizer, Inc., 556 F.2d 892 (8th Cir. 1971) (access to courts); Bank of China v. Wells Fargo Bank & Union Trust Co., 104 F. Supp. 59 (N.D. Cal. 1952) (right to claim government bank accounts), *aff'd in part and rev'd in part on other grounds*, 209 F.2d 467 (9th Cir. 1953); Russian Socialist Federated Soviet Republic v. Cibrario, 235 N.Y. 255, 139 N.E. 259 (1923) (no access to courts for unrecognized government "out of respect of the political departments"); Upright v. Mercury Business Machines Co., 13 A.D. 2d 36, 213 N.Y.S.2d 417 (App. Div. 1961) (effect of law of unrecognized government); *In re* Estate of Luks, 45 Misc. 2d 72, 256 N.Y.S.2d 194 (Sup. Ct. 1965) (validity of power attorney authenticated by unrecognized government). I also excluded cases involving the "act of state" doctrine. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (doctrine not required by international law), *on remand*, 272 F. Supp. 836, *aff'd*, 383 F.2d 166, *cert. denied*, 390 U.S. 956 (1968). The modern cases in all these areas are based on constitutional or separation of powers principles. Even the pre-*Sabbatino* cases refusing to recognize the act of state doctrine were based on state public policy, not international law. *See, e.g.*, Vladikaukazsky Ry. v. New York Trust Co., 263 N.Y. 369, 189 N.E. 456 (1934); James & Co. v. Rossia Ins. Co., 247 N.Y. 262, 160 N.E. 364 (1928). The principal issue in the act of state area now seems to be the extent to which executive branch determinations should be conclusive. *See* First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972).

In addition, I did not include conflicts of law, admiralty, and private law of war cases since they do not normally involve government-to-government relations and the result of these lawsuits cannot be the limitation of government political authority or conduct. The law of war dealing with government conduct is largely based on treaties. *See* Reed, *Laws of War: The Developing Law of Armed Conflict—Some Current Problems*, 9 Case W. Res. J. Int'l L. 17 (1977). *See generally* M. Greenspan, The Modern Law of Land Warfare (1959). The Nuremburg "principles" seem based on a unique situation from which general lessons about applications of law can hardly be drawn.

Finally, I have not included a few nineteenth-century land grant cases decided

tion of customary law when the executive branch had not expressed a position.[72] At the same time there were more than 500 cases that applied or interpreted treaty provisions. The disparity—more than ten treaty cases for every case applying "pure" customary international law (i.e., without political branch intercession), underscores the more legiti-

on the basis of the law of nations, because today they are obsolete. In those cases, the courts normally upheld the validity of private land titles (at least when the claimant was in possession) in conquered or ceded territory. The rationales included: treaty interpretation, Henderson v. Poindexter's Lessee, 25 U.S. (12 Wheat.) 530 (1827) (Marshall, C.J.); a mixture of treaty interpretation and the law of nations, Delassus v. United States, 34 U.S. (9 Pet.) 117 (1835), United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833) (Marshall, C.J.), Davis v. Police Jury of Concordia, 50 U.S. (9 How.) 280 (1850); the law of nations alone, Leitensdorfer v. Webb, 61 U.S. (20 How.) 176 (1858), Harcourt v. Gaillard, 25 U.S. (12 Wheat.) 523 (1827) (denied title on grounds that grantor Spanish government had no authority under law of nations to grant title), McMullen v. Hodge, 5 Tex. 34 (1849); and political question grounds, United States v. Reynes, 50 U.S. (9 How.) 127 (1850), Garcia v. Lee, 37 U.S. (12 Pet.) 511 (1838), Clark v. Brandon, 57 U.S. (16 How.) 635 (1835) (Taney, C.J.), Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829) (Marshall, C.J.). *See also* Wayda's Estate, 4 Pa. D. & C. 535 (1924) (by law of nations, private rights not disturbed by transfer of sovereignty upon dissolution of Austro-Hungarian Empire). The California courts adopted the same rule based on a combination of treaty interpretation and the law of nations. *See* Hart v. Burnett, 15 Cal. 530 (1860); Ferris v. Coover, 10 Cal. 589 (1858) (Fields, J.). However, they refused to apply the law of nations when the result would have been to void a contract for the sale of land. *See* Fowler v. Smith, 2 Cal. 39 (1852).

72. I present the numbers to illustrate the probable general distribution of the types of cases discussed. In reading 28 volumes of cases, I have undoubtedly misread or miscategorized a case, and Professor Deak did not purport to include all cases, although it is difficult to imagine what he left out. The following chart summarizes the results of my count. Column A shows the number of cases applying a rule of customary international law without an executive branch suggestion or intervention in the case. Under Column B is the number of cases applying a rule of customary international law where the executive branch interceded in the case. The figures under Column C indicate the number of cases in which a court expressly refused to apply a rule of customary international law. These results do not include cases excluded as explained *supra* note 71, or cases involving the "*Timberlane*" balancing test, *see infra* notes 121–48 and accompanying text.

Subject Matter	A	B	C
Diplomatic and Consular Immunity	9	innumerable	1
Law of Treaties	4	7	2
Sovereign Immunity	15	35	0
Private property (Spanish, etc., land claims)	6	0	0
Human Rights	2	2	8
Total	36	44+	11

mate and authoritative status of treaties.[73] Furthermore, even the small number of customary law cases is deceptively high. Most of those cases are relatively old and an examination of the entire body of cases shows a clear trend away from judicial determination of legal rules and a movement toward judicial deference to political branch direction.[74] Second, there are almost as many cases in which the courts rejected the application of customary international law as there are examples in which courts actually applied it.[75] Consequently, whatever slim support there may have been in the early part of this century for the *Draft Restatement* position or the idea of customary international law as restraint, it has largely vanished. Courts avoid using customary international law except when the government intercedes.[76] A closer look at the various types of cases will show how thin the *Draft Restatement* ice really is.

73. I could not find any case establishing the priority of subsequent customary international law over an earlier act of Congress, comparable to the rule applicable in the case of treaties. *See supra* note 53. Moreover, two cases reject equivalent status for the two types of international law. In United States v. Cadena, 585 F.2d 1252 (5th Cir. 1978), *amplified in* 588 F.2d 100 (5th Cir. 1979), the court said it would dismiss an indictment when the Canadian defendant's vessel had been seized in violation of the 1958 Convention on the High Seas if Canada were a party to the Convention. However, since Canada had not ratified the Convention, the court refused to dismiss the indictment even though it acknowledged that the Convention merely codified customary international law. In Hawaii v. Marley, 54 Hawaii 450, 509 P.2d 1095 (1973), the Hawaii Supreme Court affirmed a trial judge's refusal to give a jury instruction which would equate customary and treaty law. A leading American commentator on trade law has also recognized the greater authority of treaty law. In advocating a new international dispute-settlement procedure, he proposed that only "conventional norms" and not customary law be applied by the new body. *See* Jackson, *The Crumbling Institutions of the Liberal Trade System*, 12 J. WORLD TRADE L. 93, 104 (1978).

74. Other commentators examining relatively smaller parts of the record similarly conclude that the courts rarely apply customary international law. *See* Lillich, *supra* note 22; Nanda, *Application of Customary International Law by Domestic Courts: Some Observations*, 12 N.Y.L.F. 187 (1966); Schechter, *Towards A World Rule of Law—Customary International Law in American Courts*, 29 FORDHAM L. REV. 313 (1960). They seem reluctant, however, to acknowledge political branch law-making authority in the cases involving Executive suggestion. Professor Hill prefers not to do so because of the potential expansion of presidential power involved. *See* Hill, *supra* note 51, at 1054.

75. *See, e.g.*, Tel-Oren v. Libyan Arab Republic, 726 F.2d 744 (D.C. Cir. 1984); Dreyfus v. Von Finck, 534 F.2d 24 (2d Cir. 1976); Handel v. Artukovic, 601 F. Supp. 1421 (C.D. Cal. 1985); *In re* Alien Children Educ. Litig., 501 F. Supp. 544 (S.D. Tex. 1980); Hurt v. BP Exploration Co. (Libya) Ltd., 492 F. Supp. 885 (N.D. Tex. 1980). *Contra* Fiocconi v. Atyben, 462 F.2d 465 (2d Cir. 1972) (Friendly, J.).

76. *See infra* notes 77–118 and accompanying text.

A. *Sovereign Immunity*

The largest group of cases involve foreign sovereign immunity. Although these cases apply the doctrine of sovereign immunity as a defense, the courts have hesitated to justify the result in international law terms. Instead, courts have regularly spoken in terms of separation of powers and of deference to foreign policy considerations. In this century the courts have come to defer completely to the law-making authority of the executive branch and, since 1976, to the applicable act of Congress.

The doctrine of foreign sovereign immunity in the United States was first articulated in *The Schooner Exchange v. McFaddon.*[77] In that case, Chief Justice Marshall did not actually refer to "international law" or the "law of nations" in his opinion. However, he did cite the reknowned international law jurist Vattel, and spoke in terms of "common usage"[78] and the "received obligations of the civilized world."[79] Accordingly, it is fair to count this case as one of genuine customary international law application. On the other hand, the case involved executive branch intervention on behalf of the foreign government. Marshall noted that the arguments in the case made the issues more "questions of policy than of law" and more appropriate "for diplomatic, rather than legal discussion."[80] Subsequent cases similarly mixed international law and constitutional explanations.[81]

The abandonment of international law in favor of deference to the Executive was accelerated in 1938 when the Court said in *Compania Espanola v. The Navemar* that its "duty"

77. 11 U.S. (7 Cranch) 116 (1812) (Marshall, C.J.).

78. *Id.* at 136.

79. *Id.* at 137.

80. *Id.* at 146. Because the decision was supported by "general principles," the Chief Justice felt it was unnecessary to address the other arguments in full.

81. Many cases from the early part of this century mixed international law with foreign affairs rationales. Ervin v. Quintanilla, 99 F.2d 935 (5th Cir. 1938), *cert. denied,* 306 U.S. 635 (1939); The Roseric, 254 F. 154 (D.N.J. 1918) ("judicial policy"); Wulfsohn v. Russian Socialist Federated Soviet Republic, 234 N.Y. 372, 138 N.E. 24 (1923); Bradford v. Director Gen. of Railroads of Mexico, 278 S.W. 251 (Tex. Civ. App. 1925). However, in Berizzi Bros. v. The Pesaro, 271 U.S. 562 (1926), the Supreme Court applied "international usage" and found immunity even though the State Department had reached a contrary conclusion. Some lower courts also did not always follow the State Department. Moore, *The Role of the State Department in Judicial Proceedings,* 31 FORDHAM L. REV. 277, 290 n.77 (1962).

was to follow executive branch direction.[82] Five years later, in *Ex parte Peru* the Court granted immunity after the State Department "suggested" that it do so.[83] The Court stated that "it is of public importance that the action of the political arm of the Government taken within its appropriate sphere be promptly recognized."[84] The "overriding principle of substantive law . . . is that courts may not so exercise their jurisdiction . . . as to embarrass the executive arm of the Government in conducting foreign relations."[85] Finally, in *Mexico v. Hoffman,*[86] the Court expressly approved a general law-making authority for the executive branch when it said that, if the State Department did not intercede, "the Court will inquire whether the ground of immunity [claimed by the foreign government] is one which it is the established policy of the department to recognize."[87]

82. 303 U.S. 68, 74 (1938).

83. 318 U.S. 578 (1943).

84. *Id.* at 587.

85. *Id.* at 588. The courts followed executive branch "suggestions" regardless of whether immunity would have been granted under applicable law. *See* Isbrandtsen Tankers, Inc. v. President of India, 446 F.2d 1198 (2d Cir.), *cert. denied,* 404 U.S. 985 (1971); Renchard v. Humphreys & Harding, Inc., 381 F. Supp. 382 (D.D.C. 1974). A negative inference could even be drawn from State Department silence. *See* Sea Transport Corp. v. The S/T Manhattan, 405 F. Supp. 1244 (S.D.N.Y. 1975).

86. 324 U.S. 30 (1945).

87. *Id.* at 36. By this time the doctrine had become fixed as one of constitutional law (to prevent embarrassment of foreign affairs) rather than international law. *See, e.g.,* The Maliakos, 41 F. Supp. 697 (S.D.N.Y 1941); F.W. Stone Engineering Co. v. Petroleos Mexicanos, 352 Pa. 12, 42 A.2d 57 (1945). After the State Department "suggested" the rules to be followed in sovereign immunity cases, *see* the "Tate Letter," 26 DEP'T ST. BULL. 984 (1952), the courts undertook, in the absence of specific Executive intervention in the case, to simply apply the rules established by the Executive. A much-cited case was Victory Transp., Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 351, 359 (2d Cir. 1964) ("sovereign immunity has been retained by the courts chiefly to avoid possible embarrassment to those responsible for the conduct of the nation's foreign relations"; when the State Department expresses no opinion, "the court must decide for itself whether it is the established policy of the State Department to recognize claims of immunity of this type"), *cert. denied,* 381 U.S. 934 (1965). *See also, e.g.,* National City Bank v. Republic of China, 348 U.S. 356 (1955); Heaney v. Government of Spain, 445 F.2d 501 (2d Cir. 1971); Aerotrade, Inc. v. Republic of Haiti, 376 F. Supp. 1281 (S.D.N.Y. 1974); Pan American Tankers Corp. v. Republic of Vietnam, 296 F. Supp. 361 (S.D.N.Y. 1969). One court granted immunity on the basis of *Victory Transport* even when the State Department reached a contrary conclusion. Gittler v. German Information Center, 95 Misc. 2d 788, 408 N.Y.S.2d 600 (Sup. Ct. 1978). I counted 33 cases prior to 1968 in which the court relied on a foreign affairs rationale, and only 14, mostly pre-*Ex parte Peru* cases, relying on international law. For examples of the latter category of case, see Berizzi Bros. v.

The trend is clear. Nineteenth-century references to customary law were abandoned in favor of constitutional explanation and recognition of presidential law-making authority.[88] The other customary law cases do not show such a clear line of development—in part, I suspect, because so few such cases reach the courts. Nevertheless, almost all the cases decided in the past fifty years can be explained as recognizing political branch law-making authority similar to that developed in the area of sovereign immunity.

B. *Diplomatic and Consular Immunity*

Before the Constitution was adopted, assault of a diplomat was punished as a common law crime.[89] Common law crimes were eliminated judicially at the beginning of the nineteenth century.[90] The first Congress codified the rules dealing with diplomatic immunity.[91] Consequently, there has been little occasion for judicial application of customary international law in this area. Moreover, the courts have deferred to the Executive's determination of diplomatic status,[92] thereby confirming the deference to political branch authority.[93]

A related area is consular immunity. Traditionally, consuls were not entitled to immunity for personal acts.[94] I do not count those cases as examples of genuine "international law" because there is no "application" of international law in the sense of providing the basis of a cause of action or defense. Of course, one could extract a "rule" of international law from those cases—consuls are not immune under international law. Such an analysis, however, would yield an unlimited number of rules. For example, a rule could be constructed to the effect that under international law foreign nationals are not entitled to immunity, nor are law professors. Instead, I treat a case as a genuine "international law" case only when international law provides the basis for the cause of action (or defense), or serves as an integral part of the chain of reasoning necessary to the decision. For example, I would include cases in which international law confers authority on a consul to represent his nationals, so that he can properly claim property at issue in the case.[95] Immunity has also been given for certain acts within the scope of a consul's duties. But in recent cases, the courts have also regularly deferred to State Department positions.[96] Although

The Pesaro, 271 U.S. 562 (1926); Dexter & Carpenter, Inc. v. Kunglig Jarnvagsstyrelsen, 43 F.2d 705 (2d Cir. 1930) (looked at "practice of nations"), *cert. denied*, 282 U.S. 896 (1931); Lyders v. Lund, 32 F.2d 308 (N.D. Cal. 1929) ("principles of comity and general law" applied in case involving consul); French Rep. v. Inland Navigation Co., 263 F. 410 (E.D. Mo. 1920). *See also* Loomis v. Rogers, 254 F.2d 941 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 928 (1959); World Petroleum Arrangements, 13 F.R.D. 280 (D.D.C. 1952).

88. Professor Lillich correctly concludes that the courts have not done a very good job of applying international law in this area. *See* Lillich, *supra* note 22. Many commentators have criticized the deference of the courts to the State Department. *See id.*; Moore, *supra* note 81. In the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602–1611, Congress provided that "[c]laims of foreign states to immunity should henceforth be decided by courts" rather than by the executive branch. 28 U.S.C. § 1602 (1982). However, it is doubtful that eliminating the previously recognized law-making authority of the executive branch would be constitutionally permissible in view of the foreign affairs powers of the President. *See* Note, *The Iranian Hostage Agreement Under International and United States Law*, 81 COLUM. L. REV. 822, 866–67 (1981). *Cf.* Rubin, *supra* note 7 (Hickenlooper amendment barring act of state doctrine should be declared unconstitutional).

89. Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111 (1784).

90. United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812). The result was reaffirmed in United States v. Coolidge, 14 U.S. (1 Wheat.) 415 (1816). In both cases, the Jeffersonian Attorney General refused to appear to defend prosecutions apparently initiated by federalist prosecutors. For a summary of the politics, see Dickinson, *The Law of Nations as Part of the National Law of the United States (Part II)*, 101 U. PA. L. REV. 792, 792–95 (1953). The result reached by the Supreme Court was apparently not that intended by the drafters of the First Judiciary Act. *See* Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 51, 73 (1923).

91. Punishment of Crimes Act, ch. 9, 1 Stat. 117, 118 (1790); 1 Stat. 119.

92. Early cases established that only the Executive had the power to determine the credentials of a diplomat. *E.g.*, United States v. Ortega, 27 F. Cas. 359 (C.C.E.D. Pa. 1825) (No. 15,971). Executive primacy has been consistently followed. *See In re* Baiz, 135 U.S. 403 (1890); Hellenic Lines, Ltd. v. Moore, 345 F.2d 978 (D.C. Cir. 1965); Shaffer v. Singh, 343 F.2d 324 (D.C. Cir. 1965); Carrera v. Carrera, 174 F.2d 496 (D.C. Cir. 1949); United States of Mexico v. Schmuck, 293 N.Y. 264, 56 N.E.2d 577 (1944).

93. There are, however, three New York cases that squarely applied customary international law to protect a diplomat in transit: Bergman v. De Sieyes, 170 F.2d 360 (2d Cir. 1948) (Hand, C.J.); Wilson v. Blanco, 56 N.Y. Sup. Ct. 582, 4 N.Y.S. 714 (1889); Holbrook v. Henderson, 6 N.Y. Sup. Ct. 619, 4 Sandf. 619 (1839). These cases are an anomaly in the tradition of judicial deference to the executive branch.

94. United States v. Ravara, 2 U.S. (2 Dall.) 297 (1793) (Jay, C.J.); Commonwealth v. Kosloff, 5 Serg. & Rawle 545 (1816) (extensive discussion of applicable law of nations).

95. *See, e.g.*, The Bello Corrunes, 19 U.S. (6 Wheat.) 152 (1821); *In re* Herrman's Estate, 159 Minn. 274, 198 N.W. 1001 (1924); Zolezzi v. Tarantola, 138 N.J. Eq. 579, 49 A.2d 482 (1946); *In re* Bedo, 207 Misc. 35, 136 N.Y.S.2d 407 (Bronx Co. Sur. Ct. 1955).

96. *See, e.g.*, Sarelas v. Rocanas, 311 F.2d 36 (7th Cir. 1962), *cert. denied*, 373 U.S. 949 (1963); Waltier v. Thomson, 189 F. Supp. 319 (S.D.N.Y. 1960). For a

there are relatively few cases, presumably because this area of the law is now largely governed by treaty, the same trend toward judicial deference to the Executive is apparent.[97]

C. *The Law of Treaties*

Theoretically, the most fundamental part of customary international law is that dealing with the status of treaties. Even here the courts have not regularly applied customary international law. Cases involving the date of a treaty's initial effectiveness,[98] its termination,[99] or its application to a successor nation[100] have been decided without reference to international law. Some older cases did apply rules of customary international law to resolve these questions,[101] although they also stated rules without reference to any source of law.[102] And for at least the past fifty years, political branch determinations have regularly been deemed controlling.[103]

case in which the court decided against immunity, but changed its decision after State Department intercession, see Maron v. Lippert, 177 Misc. 139, 30 N.Y.S.2d 172 (Sup. Ct. 1941).

97. *See* Republic of Argentina v. City of New York, 25 N.Y.2d 252, 250 N.E.2d 698, 303 N.Y.S.2d 644 (1969) (consular property exempt under customary international law; State Department filed amicus brief). Nevertheless, the record is not perfectly clear; at least one court applied customary international law in the consular area without prompting from the State Department. American League for a Free Palestine v. Tyre Shipping Co., 202 Misc. 831, 119 N.Y.S.2d 860 (Sup. Ct. 1952) (holding that Israeli consul general was not required to testify about contents of consular archives, citing G. HACKWORTH, DIGEST OF INTERNATIONAL LAW (1940), and J. MOORE, A DIGEST OF INTERNATIONAL LAW (1906)).

98. Haver v. Yaker, 76 U.S. (9 Wall.) 32 (1869) (even though international law requires treaty to be binding from date of signature, date of ratification is effective date as a matter of United States domestic law).

99. Kennett v. Chambers, 55 U.S. (14 How.) 38 (1852) (political question); Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1795).

100. Jhirad v. Ferrandina, 486 F.2d 442, 443 n.3 (2d Cir. 1973) (United States-United Kingdom extradition treaty in effect between United States and India; court relied on position of executive branch and Indian Government).

101. *E.g.*, Karnuth v. United States, 279 U.S. 231 (1929). I counted six such cases.

102. Society for the Propogation of the Gospel v. New Haven, 21 U.S. (8 Wheat.) 464 (1823); The Sophie Rickmers, 45 F.2d 413 (S.D.N.Y. 1930); *see also* Estate of Meyer, 107 Cal. App. 2d 799, 238 P.2d 597 (1951); State v. Reardon, 120 Kan. 614, 245 P. 158 (1926); Goos v. Brocks, 117 Neb. 750, 223 N.W. 13 (1929).

103. Clark v. Allen, 331 U.S. 503 (1947); Terlinden v. Ames, 184 U.S. 270 (1902); Ivancevic v. Artukovic, 211 F.2d 565 (9th Cir.), *cert. denied*, 348 U.S. 818 (1954); Hanafin v. McCarthy, 95 N.H. 36, 57 A.2d 148 (1948) ("the problem is more political than judicial"); Techt v. Hughes, 229 N.Y. 222, 128 N.E. 185 (Cardozo, J.), *cert. denied*, 254 U.S. 643 (1920).

D. *Human Rights and Expropriation Cases*

The cases discussed above show the reluctance of courts to permit the use of "pure" customary international law as a defense in a lawsuit. Courts have been even more reluctant to create a cause of action based on customary international law. Various explanations have been offered: International law deals only with relations among states, and individuals have no status under the traditional view of the system.[104] Alternatively, customary law, like treaties, may be non-self-executing, creating law between states but not in favor of individuals unless Congress has enacted implementing legislation.[105]

Recently, however, some lower court cases involving human rights and the expropriation of foreign property have attracted considerable attention. In *Letelier v. Chile*[106] and *Filartiga v. Pena-Irala*,[107] federal district courts recognized a cause of action against a foreign government official based on customary international human rights law.[108] Another

104. Skiriotes v. Florida, 313 U.S. 69, 73 (1941) (international law "is a part of our law for the application of its own principles . . . concerned with international rights and duties and not with domestic rights and duties"); Dickens v. Lewis, 750 F.2d 1251 (5th Cir. 1984) (no standing to raise claims under Universal Declaration of Human Rights or International Covenant on Civil and Political Rights); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 1354 (1985); Dreyfus v. Von Finck, 534 F.2d 24 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976); *In re* Alien Children Educ. Litig., 501 F. Supp. 544, 591 (S.D. Tex. 1980); Hunt v. BP Exploration Co. (Libya) Ltd., 492 F. Supp. 885 (N.D. Tex. 1980); Kalmich v. Bruno, 450 F. Supp. 227 (N.D. Ill. 1978).

Recently, however, the Second Circuit in dicta rejected the *Dreyfus* approach that limited rights under international law to states. Filartiga v. Pena-Irala, 630 F.2d 876, 884–85 (2d Cir. 1980); *see also* Fiocconi v. Attorney Gen. of the United States, 462 F.2d 475 (2d Cir. 1972) (plaintiff could invoke protection of treaty and international or foreign relations law; but court held that no violation of international law occurred), *cert. denied*, 409 U.S. 1059 (1972). For a critique of *Filartiga*, see Case Comment, *Torture as a Tort in Violation of International Law*: Filartiga v. Pena-Irala, 33 STAN. L. REV. 353 (1981) (although torture should be considered a violation of international law for purposes of establishing federal court protective jurisdiction, it does not follow that there is a private cause of action as a matter of applicable substantive law).

105. United States v. Williams, 617 F.2d 1063, 1090 (5th Cir. 1980), *cert. denied*, 461 U.S. 958 (1983); *see also* Case Comment, *supra* note 104. *But see* Henkin, *supra* note 26, at 1561 (asserting customary law is self-executing).

106. 502 F. Supp. 259 (D.D.C. 1980). However, assets of the Chilean national airline were immune from execution of the judgment. 748 F.2d 790 (2d Cir. 1984).

107. 577 F. Supp. 860 (E.D.N.Y. 1984).

108. Jurisdiction was founded on the "Alien Tort Statute," 28 U.S.C. § 1350

district court recognized such a cause of action against the United States government. The case, however, was affirmed on other grounds.[109] Finally, in cases growing out of the recent Cuban expropriations, the Second Circuit recognized a cause of action (at least as a set-off)[110] against a foreign government based on customary international rules dealing with the expropriation of foreign property.[111]

These cases may seem unusual, even against a background of judicial reluctance to "apply" customary international law, because they entail the creation of a cause of action based on that law. To some commentators these cases herald a renaissance of international law created in American courts.[112] A closer look at even this meager record, however, suggests a more skeptical interpretation. These cases are better understood as judicial reflections of political branch intercession. They are squarely in the tradition exemplified by the sovereign immunity cases in which the courts are not independently creating law, but are applying rules established by the political branches.

In *Filartiga*, the executive branch filed an amicus brief urging the creation of the cause of action, a fact that was noted, if not expressly relied upon, by the court.[113] Similarly, in another human rights case[114] the court dismissed the case after the State Department suggested it do so. In the *Farr, Whitlock* case arising out of the Cuban expropriations, Congress contemporaneously rejected the earlier *Sabbatino* holding, endorsed judicial action, and even prescribed the applicable law in the case.[115] Although it is true that Congress did not expressly create a cause of action—it only required that the courts not apply the act of state doctrine—it in effect directed the course the court followed.[116]

Only *Letelier* involved the creation of a cause of action without reference to some kind of political branch suggestion.[117] However, the "tortious actions in violation of international law" were unnecessary to plaintiffs' recovery in view of the several alternative statutory and common law bases for recovery. Moreover, the same judge in a similar subsequent case rejected the idea of international law creating a cause of

(1982), which provides jurisdiction for actions "by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." For a thorough critique of this use of the Alien Tort Statute, see Rubin, *U.S. Tort Suits by Aliens Based on International Law*, 21 INT'L PRAC. NOTEBOOK 19 (Jan. 1983).

Although this provision covers acts of foreign government officials who may be personally served in the United States, it does not appear to cover cases against foreign governments themselves. Instead, the Foreign Sovereign Immunities Act of 1976 (FSIA) provides the exclusive basis of jurisdiction against foreign governments. Tel-Oren v. Libyan Arab Republic, 517 F. Supp. 542, 549–50 n.3 (D.D.C. 1981), *aff'd on other grounds*, 726 F.2d 774 (D.C. Cir. 1984) (FSIA jurisdiction claim abandoned on appeal), *cert. denied*, 105 S. Ct. 1354 (1985). *Cf.* Ruggiero v. Compania Peruana de Vapores "Inca Capac Yupanqui," 639 F.2d 872 (2d Cir. 1981) (Friendly, J.) (FSIA exclusive basis for suit when plaintiff also claimed diversity jurisdiction); *see supra* note 31 (discussing Siderman v. Argentina).

109. Rodriguez-Fernandez v. Wilkinson, 505 F. Supp. 787 (D. Kan. 1980), *aff'd on other grounds*, 654 F.2d 1382 (10th Cir. 1981).

110. Sometimes the set-off has been explained on the basis of "equitable principles" that prevent the Cuban government from invoking federal court jurisdiction while avoiding responsibility for its expropriations. First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 630–33 (1983); First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 772 (1972) (Douglas, J., concurring); *cf.* National City Bank of New York v. Republic of China, 348 U.S. 356 (1955) (defense of sovereign immunity against set-off impliedly waived by foreign government upon bringing lawsuit in United States court).

111. *See* Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875 (2d Cir. 1981); Menendez v. Saks & Co., 485 F.2d 1355 (2d Cir. 1973), *rev'd*, 425 U.S. 682 (1976); Banco Nacional de Cuba v. Farr, Whitlock & Co., 383 F.2d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968); Banco Nacional de Cuba v. Chemical Bank New York Trust Co., 594 F. Supp. 1553 (S.D.N.Y. 1984). The existence of such a cause of action seems to have been implicitly accepted in First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611 (1983).

The courts have also recognized a cause of action when an expropriation contravenes a bilateral treaty provision. *See* Kalamazoo Spice Extraction Co. v. Ethiopia, 729 F.2d 422 (6th Cir. 1984), *on remand*, 616 F. Supp. 660 (W.D. Mich. 1985); American Int'l Group, Inc. v. Islamic Republic of Iran, 493 F. Supp. 522 (D.D.C. 1980), *rev'd on other grounds*, 657 F.2d 430 (1981). The executive branch intervened in both cases to urge application of international law. *See Kalamazoo Spice Extraction Co.*, 729 F.2d at 427; *see also* Statement of the Legal Advisor, Dep't of State, 83 DEP'T ST. BULL., No. 2070 (Jan. 1983) at 70 (urging courts not to apply act of state doctrine to avoid applying international law in cases where there is a "controlling legal standard," such as a treaty, unless the Executive specifically intercedes in the case to indicate otherwise).

112. *See supra* note 28.

113. 630 F.2d at 884. *See* Rohlik, *supra* note 60, at 329–30.

114. Siderman v. Argentina, No. CV 82-1772-RMT (C.D. Cal. Mar. 12, 1984); *see supra* note 31.

115. Banco Nacional de Cuba v. Farr, Whitlock & Co., 383 F.2d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968). Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), was overturned by 22 U.S.C. § 2370(e)(2).

116. In these cases the act of state doctrine has also been involved, so that the courts regularly investigate the executive branch position on that issue. *See, e.g.*, Banco Nacional de Cuba v. Chemical Bank New York Trust Co., 594 F. Supp. 1553 (S.D.N.Y. 1984). Additionally, it seems likely that the State Department's consistent opposition to the Cuban government on this issue, dating back to 1970, strongly influences the judicial decision to recognize a cause of action. *See id.* at 1565–66.

117. 502 F. Supp. 259 (D.D.C. 1980).

action.[118]

The reluctance of courts to apply customary international law independently of political direction is not as damaging to the cause of international human rights as some activists might fear.[119] In the first place, actions may not be brought against foreign governments for noncommercial torts unless the injury occurs in the United States.[120] Furthermore, foreign government torturers and other human rights violators may be sued here as individuals. But their presence in the United States would be fortuitous and, at least in recent years, illegal because United States policy denies them entry. Moreover, under my analysis the courts would be open if the political branches signalled their assent.

In sum, a survey of two hundred years of case law lends little support for the claim that the courts apply "pure" customary international law. To the contrary, the record indicates that courts follow political branch direction in the creation and application of that body of law.

E. *Extraterritorial Application of Law*

The possible restriction of government authority to apply law extraterritorially merits special discussion. The *Draft Restatement* asserts that a new rule of customary international law has emerged limiting the scope of national law by reference to a standard of reasonableness.[121] Thus the antitrust laws would not apply to otherwise illegal conduct abroad when such application would be unreasonable. This standard is applied by balancing a number of factors to determine whether the United States interest is sufficiently high, as compared with the foreign interest, to justify application of United States law. The factors range from the vague and imponderable—like the "importance of the regulation in question to the international political, legal or economic system" and whether it is "consistent with the traditions of the international system"—to more concrete factors like the nationality of the parties and location of the conduct.[122] In this

118. Tel-Oren v. Libyan Arab Republic, 517 F. Supp. 542 (D.D.C. 1981), *aff'd on other grounds*, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 1354 (1985). District Judge Green rejected the existence of federal question jurisdiction on the grounds that applicable treaties and customary law did not confer private rights of action. 517 F. Supp. at 545. She also rejected jurisdiction under the Alien Tort Claims Act on the grounds that there was insufficient agreement on terrorism to permit the formulation of customary international law covering the acts of terrorism involved. *Id.* at 550. The Court of Appeals affirmed the District Court decision, but each judge assigned a different reason. Judge Bork relied on separation of powers principles; Judge Robb believed that the issue was nonjusticiable because it presented a political question; and Judge Edwards concluded that the conduct involved did not violate the law of nations. For a critique of the appellate opinions, see Note, *supra* note 28.

119. However, the cause may deserve more critical scrutiny than it receives. *See* Kennan, *Morality and Foreign Policy*, *supra* note 7; Lane, *supra* note 60.

120. *See* cases cited *supra* note 108.

121. *See* 1985 DRAFT RESTATEMENT, *supra* note 32, pt. IV, introduction, at 181, § 403. "The principle that an exercise of jurisdiction on the basis of established principles is nonetheless unlawful if it is unreasonable has emerged as a principle of international law." *Id.* § 403 comment a.

As originally proposed in the 1981 Draft, § 403 seemed to permit only the state with the most reasonable claim to assert jurisdiction in a given case. In response to criticism, § 403 was revised to recognize that more than one state may legitimately claim jurisdiction. *See* Maier, *Resolving Extraterritorial Conflicts, or "There and Back Again,"* 25 VA. J. INT'L. L. 7 (1984). Nevertheless, the revised version would still require an interest-balancing approach in cases of direct conflict. In such cases the new Draft provides that the state with the lesser basis for jurisdiction "is expected to" refrain from exercising its jurisdiction. *Id.* at 39. My objection is to the inclusion of *any* requirement providing for a judicially-imposed limitation based on customary international law. The revised § 403 still purports to require a "reasonableness" limitation of the scope of a congressionally-enacted statute, and not merely moderation in the application of sanctions for noncompliance. *See* 1985 DRAFT RESTATEMENT, *supra* note 32, § 403 (1), (2).

The 1965 Restatement only imposed a balancing test for purposes of determining sanctions. *See* 1965 RESTATEMENT, *supra* note 54, § 40; 1985 RESTATEMENT, *supra* note 32, § 403 reporters' note 10. For a description of the effect of § 40, see Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280, 294–96 (1982) [hereinafter cited as Maier, *Crossroads*]. For an argument that even this more limited use of "balancing" was not required by international law, see Metzger, *The Restatement of the Foreign Relations Law of the United States: Bases and Conflicts of Jurisdiction*, 41 N.Y.U. L. REV. 7, 18–20 (1966). Many courts take foreign interests into account in fashioning a decree, *see, e.g.*, United States v. Watchmakers of Switzerland Information Center, Inc., 1963 Trade Cas. (CCH) ¶ 70,600 (S.D.N.Y.); United States v. General Elec. Co., 115 F. Supp. 835, 878 (D.N.J. 1952); United States v. Imperial Chem. Indus., 105 F. Supp. 215 (S.D.N.Y. 1952). The 1985 *Draft Restatement*, however, would apply the balancing test to determine whether United States law should be applied to the conduct in the first place. This extension of judicial authority under the guise of applying customary international law is more troublesome than merely allowing discretion in fashioning sanctions for violations of law. It places the courts in a role similar to that assumed in constitutional adjudication, and enables them to restrict the force, in a more limited way, of an act of Congress. Professor Maier has advocated an even more active judicial role than that embodied in § 403, arguing that courts should somehow "coordinate" conflicting governmental claims, consider the needs of the international system in light of shared community values, and thereby develop shared expectations and "contribute to transnational interaction energized by unusual respect and reciprocal restraint." Maier, *Crossroads*, *supra*, at 318–19.

122. 1985 DRAFT RESTATEMENT, *supra* note 32, § 403. For an explanation of the intellectual underpinning of § 403 by one of the reporters, see Lowenfeld, *Public*

analysis, if the United States interest is not sufficiently high, customary international law would require that the regulation not be applied.

In this way, customary international law becomes another way of limiting political branch authority. It even restrains congressional action (as does constitutional law). This is particularly true in view of the related maxim that Congress should be *presumed* not to violate international law unless it expressly indicates the contrary.[123] The increasing amount of economic regulation and the ease of transacting business across national boundaries have made potential effects of the use of this doctrine especially significant. In my view, this potential use is more significant than its application in the form of human rights law. It threatens to limit a host of economic regulatory schemes, including antitrust, securities, tax, and commodities trading regulation. In addition, it may limit the effectiveness of criminal law.

Although the courts have sometimes engaged in this kind of interest analysis and "balancing," they generally have not characterized their activity as an application of international law. Instead they have referred to "comity," to presumed congressional intent, or simply to judicial precedent and the *Restatement*.[124] Nevertheless, let us assume that in these cases the courts implicitly were applying international law. Looking at the results, however, I reach the same conclusion that I draw from the other "international law" cases: the courts have not applied customary international law as a restraint against government authority.

Law in the International Arena: Conflict of Laws, International Law and Some Suggestions for their Interaction, 163 REC. DES COURS 311 (1979). The approach is modeled on "interest analysis," drawn from American conflicts of laws doctrine. Even this foundation, however is highly unstable, because in practice it has led in the opposite direction from that intended by the *Draft Restatement*. The principal creator of "interest analysis" would require the forum state to apply its own law in any case involving a "true" conflict of interests. Currie, *Comments on* Babcock v. Johnson, 63 COLUM. L. REV. 1233, 1242 (1963). Since true conflicts are easily constructed, the approach rarely leads a court to refrain from applying its own law. *See* Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 398-99 (1980). Thus, this approach is not in fact likely to stem the extraterritorial application of law. For recent criticisms of interest analysis from different points of view, see Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173 (1981); Hill, *The Judicial Function in Choice of Law*, 85 COLUM. L. REV. 1585 (1985); Juenger, *Conflict of Laws: A Critique of Interest Analysis*, 32 AM. J. COMP. L. 1 (1984).

123. 1985 DRAFT RESTATEMENT, *supra* note 32, § 134.

124. Baxter, *Foreword*, AMERICAN INTERNATIONAL LAW CASES 1783–1968, *supra* note 71, at xiii–ix; *see also* 1985 DRAFT RESTATEMENT, *supra* note 32, § 403 comment a (decisions often explained as "comity").

Indeed, the cases contradict the *Draft Restatement* approach. The few cases that do impose limits are old and reflect an obsolete, rigidly territorial view of state sovereignty. As in the cases involving sovereign immunity and most other areas of customary international law, there is a trend away from judicially created limitations on political branch conduct.

Before the Civil War, the Supreme Court occasionally refused to apply an act of Congress extraterritorially, relying on the law of nations, presumed congressional intent, or some combination of the two.[125] More recently, there have been a few similar cases in the lower courts,[126] and in *Ameri-*

125. *See* The Appolon, 22 U.S. (9 Wheat.) 362 (1824) (Story, J.). The Court refused to apply United States law to conduct on navigable river, where United States and Spain shared jurisdiction, holding that:

> [H]owever general and comprehensive the phrases used in our municipal law may be, they must always be restricted in construction, to places and persons, upon whom the Legislature have [sic] authority and jurisdiction . . . . It cannot be presumed that Congress would voluntarily justify such a clear violation of the laws of nations [to permit United States seizure of vessel in Spanish port].

Id. at 370–71; *see also* United States v. Palmer, 16 U.S. (3 Wheat.) 610 (1818) (Marshall, C.J.) (United States criminal law does not apply to crimes committed aboard foreign vessels on high seas; congressional intent controlled); United States v. Davis, 25 F. Cas. 786 (C.C.D. Mass. 1837) (Story, J.) (United States criminal law did not apply to crime consummated on a foreign vessel in foreign waters).

126. Ito v. United States, 64 F.2d 73 (9th Cir.) (refusing to apply United States law on high seas absent contact with United States territory; no discussion of international law), *cert. denied*, 289 U.S. 762 (1933); United States v. Baker, 136 F. Supp. 546 (S.D.N.Y. 1955) (dismissing indictment of alien for immigration offense committed abroad, relying on international law principles), *cert. denied*, 392 U.S. 936 (1968); United States v. Smiley, 27 F. Cas. 1132 (C.C.N.D. Cal. 1864) (No. 16,317) (Field, J.) (refusing to apply United States criminal law to conduct in Mexican territorial waters); Southern Pac. Ry. of Mexico v. Gonzalez, 48 Ariz. 260, 61 P.2d 377 (1936) (refusing to apply United States law imposing liability on shipper, relying on international law principles); People v. Tyler, 7 Mich. 161 (1859) (murder law not applicable to crime in Canadian territorial waters).

The two twentieth-century cases that were based on international law are readily dismissed from my consideration. *Gonzalez* involved private relations and can be seen as a conflict of laws case. Moreover, in another conflict of laws case, the California Supreme Court refused to apply Mexican law, even when required by the law of nations, because it would be "unjust" to do so. Fowler v. Smith, 2 Cal. 39 (1852). A modern reverberation of this rule can be seen in First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611 (1983), in which the Supreme Court refused to apply Cuban law giving effect to plaintiff's separate jurisdicial status when it would lead to an inequitable or unjust result. Second, the

can Banana Co. v. United Fruit Co.,[127] the Supreme Court held that the antitrust laws did not apply extraterritorially. *American Banana* was the only Supreme Court case in this century to limit extraterritorial application of the antitrust laws, and it has long been abandoned.[128] In fact, for every old case restricting regulatory authority, there are more recent cases, dealing with the same subject matter, refusing to apply a limitation on political branch authority based on customary international law. The courts have refused to restrict the applicability of criminal laws on the high seas[129] and in foreign territorial waters,[130] to shipping[131] and fishing regulation by states,[132] and to federal laws dealing with con-

Baker case was rejected in Rocha v. United States, 288 F.2d 545 (9th Cir.), *cert. denied*, 366 U.S. 948 (1961), and was apparently repudiated by the same district judge in a later case, United States v. Pizzarusso, 388 F.2d 8 (2d Cir.), *cert. denied*, 392 U.S. 936 (1968).

127. 213 U.S. 347 (1909) (Holmes, J.).

128. *See* Continential Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962); United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945) (Hand, J.) (case decided by the Second Circuit on transfer from the Supreme Court because of a lack of a quorum of qualified judges). A federal district judge observed that *American Banana* is "not a seminal decision but an aberration: it's apparently the only foreign trade antitrust case lost by the Department of Justice for want of [subject matter] jurisdiction." Dominicus Americana Bohio v. Gulf & Western Indus., 473 F. Supp. 680, 687 (S.D.N.Y. 1979).

129. *See, e.g., In re* Cooper, 143 U.S. 472 (1891) (refusing to apply international law three-mile limit against Executive seizure of vessel on high seas); *cf.* La Ninfa, 75 F. 513 (9th Cir. 1896) (applying three-mile limit against similar Executive seizure after limit was established in arbitration award which had effect of treaty); *see also* Church v. Hubbart, 6 U.S. (2 Cranch) 187, 234–36 (1804) (Marshall, C.J.) (limit of territorial waters not fixed); Gillam v. United States, 27 F.2d 296 (4th Cir.), *cert. denied*, 278 U.S. 635 (1928); United States v. Bengochea, 279 F. 537 (5th Cir. 1922); The Grace and Ruby, 283 F. 475, 478 (D. Mass. 1922) ("How far our authority [on the sea] shall be extended . . . is a matter for the political departments of the government rather than for the courts to determine."); Commonwealth v. MacLoon, 101 Mass. 1 (1869) (rejecting argument that law of nations prohibited states from convicting defendant for murder arising out of injury on high seas resulting in death in state). *But see* United States v. James-Robinson, 515 F. Supp. 1340 (S.D. Fla. 1981) (dismissing indictment of foreign national on stateless vessel on high seas; Congress intended to apply international law).

130. *See, e.g.*, United States v. Rodgers, 150 U.S. 249 (1893) (using international law to construe statute expansively, conferring United States jurisdiction over act on United States vessel in foreign territorial waters).

131. *See e.g.*, Wilson v. McNamee, 102 U.S. 572 (1881) (applying pilotage law to act by foreign vessel fifty miles at sea).

132. *See, e.g.*, Ocean Indus. v. Greene, 15 F.2d 862 (N.D. Cal. 1926) (refusing to prevent California from enforcing fishing regulation in Monterey Bay even though plaintiff's activities were beyond three-mile limit); Ocean Indus. v. Superior Court, 200 Cal. 235, 252 P. 722 (1927); *cf.* Mahler v. Norwich & New York Transp. Co., 35 N.Y. 352 (1866) (using rule of international law to uphold authority of New York in "historic bay").

scription,[133] prohibition,[134] taxation,[135] antitrust,[136] and immigration.[137] Many of the decisions are expressed in terms of congressional intent, but whatever the explanation, the lesson is clear: there is no historical basis for the proposition that courts in fact restrain the government through the application of customary international law. To the extent that changes in judicial attitudes may be observed, the trend is toward expanding United States regulatory authority, not constraining it.

It may, however, be argued that a new trend has developed in the past decade, prompted by the increased volume and interdependence of international economic activity and the friction in foreign relations that results from conflicting national regulation of that activity. The bellweather case marking this supposed trend is *Timberlane Lumber Co. v. Bank of America.*[138] *Timberlane* involved the application of the United States antitrust laws to foreign conduct by mostly foreign nationals. The Ninth Circuit held that a "balancing" test should be applied to determine "whether the interests

133. *See, e.g.*, United States *ex rel.* Pfefer v. Bell, 248 F. 992 (E.D.N.Y. 1918) (plaintiff argued that Congress was prevented by international law from drafting an alien; court said it could not declare act unconstitutional if within legislative authority "even though the law itself be in contravention of the so-called law of nations"). *Id.* at 995; *see also* Chandler v. United States, 171 F.2d 921 (1st Cir. 1948) (refusing to apply customary international law to prevent United States from bringing defendant from Europe to try him for treason), *cert. denied*, 336 U.S. 918 (1949). Other conscription cases rejected the claim that international law prohibited United States government action. *See* United States v. Weiman, 3 C.M.A. 216 (1953); United States v. Wyngall, 5 Hill 16 (N.Y. Sup. Ct. 1843).

134. *See, e.g.*, S.S. Co. v. Mellon, 262 U.S. 100 (1923) (applying Prohibition statute to foreign vessels in American territorial waters; rejecting argument that Congress should be presumed not to have violated international comity).

135. *See, e.g.*, Cook v. Tait, 265 U.S. 47 (1924) (rejecting argument that United States had no power under international law to tax foreign source income).

136. *See supra* note 128.

137. United States v. Pizzarusso, 388 F.2d 8 (2d Cir.), *cert. denied*, 392 U.S. 936 (1968); Rocha v. United States, 288 F.2d 545 (9th Cir.), *cert. denied*, 366 U.S. 948 (1961). Cases like these have lead to the creation of another rule of international law: A state has authority to prescribe law governing conduct abroad (even if there is no effect in its territory) when an "essential governmental interest" is involved. This basis of jurisdiction could easily be expanded to include "social" effects (like drug addiction) and adverse national security or foreign policy effects (like those caused by the use of western technology used in Europe to help the Soviet gas pipeline project). With these developments the rejection of any idea of limitation imposed by international law is complete.

138. 549 F.2d 597 (9th Cir. 1976).

of, and links to, the United States . . . are sufficiently strong, vis-à-vis those of other nations, to justify an assertion of extraterritorial authority."[139] The *Draft Restatement* elaborates this balancing test and elevates it to the status of a rule of customary international law.[140]

There is a major problem with this position: most courts seem to have rejected it. Furthermore, even those courts that have rhetorically adopted *Timberlane* have found, for the most part, that the balance favored United States interests. Hence, there is no support in the actual holdings of these cases for the proposition that a rule of customary law can be applied to frustrate policies endorsed by the political branch.

Since *Timberlane,* there have been at least nineteen cases involving the application of United States antitrust, securities, intellectual property, and commodity trading regulation extraterritorially. Only two cases applied a balancing test and found insufficient United States interests.[141] Neither of

139. *Id.* at 613. The court said the more comprehensive analysis required reflected a conflict of laws approach that was embodied in § 40 of the 1965 Restatement. *Id.* The factors to be weighed include "degree of conflict" with foreign law, *id.* at 614, as well as the more traditional factors such as nationality of the parties, situs of conduct, relative effects in the United States and abroad, foreseeability of effects, intentional nature of harm to United States interests, and likelihood of compliance. *Id.* The court characterized its holding as one of "international comity and fairness," not international law. *Id.* at 615.

140. *See supra* note 121.

141. Timberlane Lumber Co. v. Bank of Am. 749 F.2d 1378 (9th Cir. 1984); Montreal Trading Ltd. v. Amax, Inc., 661 F.2d 864 (10th Cir. 1981), *cert. denied,* 455 U.S. 1001 (1982). In *Montreal Trading* there seemed to be no direct effect on United States commerce, so the case could have been dismissed without regard to "balancing." *See* Nat'l Bank of Canada v. Interbank Card Ass'n, 666 F.2d 6 (2d Cir. 1981) (accepted "pertinence" of balancing, but reversed because no effect on United States commerce); Fidenas AG v. Compagnie Internationale Pour l'Informatique CII Honeywell Bull S.A., 606 F.2d 5 (2d Cir. 1979) (no United States contacts); Mormels v. Girofinance, S.A., 544 F. Supp. 815 (S.D.N.Y. 1982) (no United States contacts).

Application of a balancing test is more frequent—and is more appropriate—when the court is determining only whether a particular sanction should be imposed. Thus the Tenth Circuit refused to permit sanctions to be imposed in a classic antitrust conflict case, in which the Canadian government prohibited compliance with a discovery order. *In re* Westinghouse Elec. Corp. Uranium Contracts Litig., 563 F.2d 992 (10th Cir. 1977); *see also supra* note 126. On the other hand, a district court in related litigation rejected a balancing approach and ordered discovery. *In re* Uranium Antitrust Litig., 480 F. Supp. 1138 (N.D. Ill. 1979).

Recently, cases involving service of process and discovery orders have been a major source of jurisdictional conflict. *See generally* Rosenthal, *The Multinational in the Middle—Conflicting U.S. and Foreign Law,* 10 INT'L TAX J. 397 (1984); April & Fried *Compelling Discovery and Disclosure in Transnational Litigation,* 16 N.Y.U. J. INT'L L. & POL. 961 (1984); and Note, *Limiting American Extraterritorial Authority to Order the Production of Documents in Violation of Foreign Law,* 33 DE PAUL L. REV. 183 (1983). In this limited area courts have restricted enforcement using customary international law. *See* Commodity Futures Trading Comm'n v. Nahas, 738 F.2d 487 (D.C. Cir. 1984); United States v. First Nat'l Bank of Chicago, 699 F.2d 341 (7th Cir. 1983). Even in this more limited area, however, the judicial trend has been to expand United States authority, not curtail it. Rosenthal, *supra,* at 401.

those involved an attempt by the government (as opposed to a private party) to enforce a regulatory scheme, so even these cases did not involve a direct restraint of the political branches. Eleven cases rejected the balancing approach; the Second and D.C. Circuits seem squarely opposed to it.[142] Three more cases accepted a balancing approach, but found the United States interest prevalent.[143] Three cases were re-

142. *See* Laker Airways Ltd. v. Sabena Belgian World Airlines, 731 F.2d 909, 948–56 (D.C. Cir. 1984) (thorough critique of balancing approach). Most post-*Timberlane* courts have simply looked to find some minimum connection with United States territory (including effects in United States territory) or with United States nationals, or have asked "what Congress would have done if it had anticipated the problem." They thus reject the *Timberlane* approach. Tamari v. Bache & Co. (Lebanon) S.A.L., 730 F.2d 1103 (7th Cir.), *cert. denied,* 105 S. Ct. 221 (1984); Psimenos v. E.F. Hutton & Co., 722 F.2d 1041 (2d Cir. 1983); *In re* Japanese Elec. Prods. Antitrust Litig., 723 F.2d 238 (3d Cir. 1981) (citing *Timberlane,* but not "balancing"; rejecting argument that United States did not have jurisdiction as a matter of customary international law); IIT v. Cornfeld, 619 F.2d 909 (2d Cir. 1980) (Friendly, J.); *In re* Uranium Antitrust Litig., 617 F.2d 1248 (7th Cir. 1980) (*Timberlane* only goes to discretionary question whether jurisdiction *should* be exercised; district judge did not have to apply balancing factors); Continental Grain (Australia) Pty. v. Pacific Oilseeds, Inc., 592 F.2d 409 (8th Cir. 1979); SEC v. Kasser, 548 F.2d 109 (3d Cir.), *cert. denied,* 431 U.S. 938 (1977); Arthur Anderson & Co. v. Finesilver, 546 F.2d 338 (10th Cir. 1976) (rejecting argument that international comity prevents a court order in violation of foreign law; emphasizing distinction between power to compel discovery and imposition of sanctions for noncompliance), *cert. denied,* 429 U.S. 1096 (1977). Even the Ninth Circuit does not follow its balancing approach in securities cases. Grunenthal GmbH v. Hotz, 712 F.2d 421 (9th Cir. 1983) (any connection with United States is sufficient; international law or comity not discussed); *accord* Des Brisay v. Goldfield Corp., 549 F.2d 133 (9th Cir. 1977).

143. AVC Nederland B.V. v. Atrium Inv. Partnership, 740 F.2d 148 (2d Cir. 1984) (applying 1981 Draft Restatement); American Rice, Inc. v. Arkansas Rice Growers Coop. Ass'n, 701 F.2d 408 (5th Cir. 1983) (Lanham Act); Industrial Inv. Dev. Corp. v. Mitsui & Co., 671 F.2d 876 (5th Cir. 1982). The *Mitsui* judgment was vacated on other grounds, 460 U.S. 1007 (1983), but the Fifth Circuit reaffirmed its previous decision. 704 F.2d 785 (5th Cir.), *cert. denied,* 464 U.S. 961 (1983). Both the Seventh Circuit in the *Uranium* case, 617 F.2d 1248 (7th Cir. 1980), and the Fifth Circuit in the *Mitsui* case agreed that *Timberlane* did not apply in determining whether the court had subject matter jurisdiction, but was only relevant in determining whether that jurisdiction *should* be exercised. The Fifth Circuit held that *Timberlane* did not have to be applied, so I counted it as among the cases in note 142 rejecting *Timberlane.* The Fifth Circuit specifically rejected the Seventh Circuit's holding that the determination of whether jurisdiction *should* be exercised

manded or continued for development of the record for purposes of carrying out the prescribed interest analysis.[144] On the basis of this limited experience, I infer a different rule of customary international law—that states are free to regulate economic activity that has minimum contacts with its territory or nationals whenever its interests so dictate, subject only to limitation by treaty (as in the tax field). The court decisions do not support a more restrictive view.[145]

In addition, there are more fundamental arguments against the *Draft Restatement* rule of restraint. It may be appropriate for a court to restrain the action of a low-level official, at least until an authoritative confirmation of authority is advanced, or to mitigate sanctions in light of foreign considerations. But the judiciary should not place general limitations on the application of rules constitutionally promulgated by the political branches, for the reasons elaborated below in Parts III and IV. Customary international law is not an appropriate doctrinal vehicle for general restraint of considered political branch action. It lacks the ideological legitimacy and the widespread scrutiny that constitutional-type norms should have. Moreover, the courts are institutionally unsuited to engage in the kind of "national interest" analysis that the *Draft Restatement* balancing test necessarily entails. For example, the *Draft Restatement* would require a court to "identify and weigh the strength of the respective interests of more than one state in regulating (or immunizing from regulation) a given activity or transaction."[146] In making the necessary determination, the *Draft Restatement* directs a court of the United States "to take into account . . . a diplomatic note . . . parliamentary debates, press conferences or communiques."[147] Those materials illustrate what a court cannot adequately evaluate. For example, a diplomatic note may be pro forma, and it may allude to extraneous problems or factors that the court has no way of knowing about. How can a court compare the "strength" of the United States interest in competition and the Canadian interest in a healthy uranium industry?[148]

Ultimately, the effect of the *Draft Restatement* view is to shift to Congress the burden of inertia in adapting regulatory schemes to rapidly changing conditions. Increased interdependence undoubtedly means that jurisdictional conflicts will increase. At the same time, modern developments in communications and transportation make it increasingly easy to internationalize economic activity, to attempt to avoid national regulation, and to create conflicts among potential sources of regulatory authority. Corporations can be created by a simple exchange of telexes with remote tax-haven jurisdictions. Securities transactions can be electronically routed and rerouted across national boundaries. Dominant corporations can influence the passage of conveniently conflicting laws to protect themselves against an aggressive regulator. The widespread development of "blocking legislation" encourages this kind of activity.[149]

The question is who should have to take the initiative to meet creative challenges to national regulatory authority. Should the United States regulatory regime be presumed to apply unless Congress or the President indicates otherwise, or should the courts invoke vaguely defined limitations of customary international law unless the Congress or the Presi-

was a matter for the trial court's discretion. 671 F.2d at 884. The Fifth Circuit nevertheless held in favor of taking jurisdiction, so I have counted it as part of the cases in this note. *See also In re* Bank of Nova Scotia, 740 F.2d 817 (11th Cir. 1984) (contempt for failure to comply with subpoena), *cert. denied*, 105 S. Ct. 778 (1985); United States v. Vetco, Inc., 691 F.2d 1281 (9th Cir.) (contempt sanctions for failure to comply with IRS Summons), *cert. denied*, 454 U.S. 1098 (1981).

144. Wells Fargo & Co. v. Wells Fargo Express, 556 F.2d 406 (9th Cir. 1977) (Lanham Act); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979) (antitrust); Dominicus Americana Bohio v. Gulf & Western Indus., 473 F. Supp. 680 (S.D.N.Y. 1979).

145. The Ninth Circuit has applied *Timberlane* in antitrust but not in securities cases. The Tenth Circuit has applied it in securities cases but not in ordering discovery. The Third Circuit has applied it in one antitrust case, but not another, and not in a securities case. The pattern seems incoherent.

146. 1985 DRAFT RESTATEMENT, *supra* note 32, § 403 reporter's note 6.

147. *Id.*

148. The State Department Legal Advisor criticized the earlier draft of § 403 on this ground. *See* Robinson, *Conflicts of Jurisdiction and the Draft Restatement*, 15 LAW & POL'Y INT'L BUS. 1147, 1154–55 (1983). Another experienced commentator accepts the viability of *Timberlane* balancing, but urges more political branch involvement in the weighing of these factors. Shenefield, *Thoughts on Extraterritorial Application of the United States Antitrust Laws*, 52 FORDHAM L. REV. 350, 369–70 (1983).

149. Blocking rules prohibit the release of information by the nationals of a foreign government either generally or in response to United States legal compulsion. For an outline of these developments, see Rosenthal, *supra* note 141, at 399; and Rosdeitcher, *Foreign Blocking Statutes and U.S. Discovery: A Conflict of National Policies*, 16 N.Y.U. J. INT'L L. & POL. 1061 (1984).

dent has specifically responded to particular new developments?

The "emerging rule" discerned by the *Draft Restatement* also reflects an ideology in which a paramount value is the freedom of entrepreneurs to make economic decisions in a free-market environment.[150] General restraint of national jurisdiction undoubtedly would facilitate international trade, investment, and other corporate activity.[151] On the other hand, there are obviously competing values, such as the foreign policy concerns reflected in the Export Administration Act,[152] and interests such as those of the steel industry or a local community that may be at odds with a laissez-faire regime.

The international argument over extraterritorial application of United States law reflects basic national differences over economic, social, and political philosophy. The choice that must be made is a political choice. For example, the recent decision by President Reagan to terminate a criminal antitrust investigation of international air carriers implies a preference for foreign policy over consumer interests, and brings benefits to some air carriers at the expense of others.[153] Such choices seem more appropriate for political officials than for the judiciary.

Judicial application of a restraint doctrine could even undercut attempts by the Executive to negotiate compromises over jurisdictional conflicts, as has been accomplished in the area of tax.[154] Many important trading partners and allies have vigorously opposed extraterritorial application of

150. This may not have been the intention of the drafters. A *Timberlane*-type limitation may be based on the need to respect the sovereign authority of formally equal states and to minimize foreign relations problems. However, the actual friction caused to foreign relations seems overstated. Moreover, there will always be differences between states; the task of diplomacy (and international lawyers) is to solve them. My point here is simply that the effect, intended or not, of the *Draft Restatement* rule is to elevate free-market values over other contenders.

151. I assume that international regulation (e.g., through Codes of Conduct adopted by the U.N. General Assembly) is not a serious alternative to national authority. The only real alternative to no regulation is national regulation.

152. 50 U.S.C. §§ 2401–20 (1982). This Act includes the Foreign Boycott legislation and provides for restrictions on trade with Communist countries.

153. N.Y. Times, Nov. 20, 1984, § 4, at 1, col. 4.

154. *See* HARVARD LAW SCHOOL INTERNATIONAL PROGRAM ON TAXATION, TAXATION IN THE UNITED STATES 1148–75 (E. Owens ed. 1963). For a current, comprehensive analysis of the effect of tax treaties, see generally D. TILLINGHAST, TAX ASPECTS OF INTERNATIONAL TRANSACTIONS (2d ed. 1984).

United States law, and urge at a minimum the kind of restraint proposed by the *Draft Restatement.*[155] The judiciary's favorable response to the positions of foreign governments may weaken the Executive's position in potential negotiations, making it more difficult to gain concessions such as commitments to cooperate in more narrowly defined areas of investigation.

I should emphasize that my rejection of the *Draft Restatement's* "interest-balancing" approach does not mean that I favor unlimited expansion of United States law across the world. I am merely suggesting that the limits should be determined in a political process. Treaties are the appropriate vehicle, not customary international law.

III. THE COURTS AND CUSTOMARY INTERNATIONAL LAW

In this Part, I raise objections to judicial use of customary international law for a different reason: namely, limitations on the institutional capacity of American courts to participate in the development of that law. In this regard customary international law is fundamentally different from common law. The same objections do not apply to judicial application of treaty law. This further illustrates the hierarchical inferiority of customary international law.

A. *Limitations Inherent in the Judicial Function*

In this analysis the first and most basic question is how to justify the law-making authority of unelected judges in a "democratic" society.[156] Most commentators stress or assume the existence of significant limitations on the exercise of judicial authority, such as those inherent in the case-by-case approach, the availability of appeals, and the prospect of legislative reversal (in nonconstitutional cases).[157] It is also significant that judges are appointed through a political pro-

155. *See* April & Fried, *supra* note 141 (any unilateral determination is unsatisfactory); Rosenthal, *supra* note 141.

156. This is a vast field that I approach with some reticence. My point, however, is a limited one. I only wish to show that, whatever the "true" motivations underlying judicial behavior, the power of a court is not unlimited, and that an important limitation on that power is the acknowledged necessity (for whatever reasons) to render reasoned decisions based on traditional sources of legal doctrine.

157. *See* M. Eisenberg, The Theory of Adjudication (1985) (unpublished manuscript) (on file at UCLA Law Review).

cess, and are part of a cultural, social, and political tradition that provides a limiting framework for the exercise of their power.

Some critics have argued that this conventional wisdom is misleading and conceals the flexibility actually available to judges. It seems clear that influences other than logical reasoning from obvious premises affect judicial behavior.[158] Thus, judges may be seen—consciously or unconsciously—to pursue economic objectives or interests,[159] and, as in the case of legislators, to respond to shifts of public opinion. I accept this critique as persuasive. Extraneous influences undoubtedly affect at least some judicial behavior. At the same time, no matter what the motivations and no matter how inscrutable the process may be, judicial discretion is not unlimited. In the end, decisions must be explained in a manner that will be perceived by most observers as within the permissible bounds of judicial behavior. One of the most important limitations lies in a judicial commitment to render "principled" decisions.[160] Whether invoking common law, statutes, or constitutional law, courts are expected to respect prior judicial precedent and other evidence of accepted changes in the legal landscape (such as legislative initiatives). Evolution of the common law may therefore be fairly described as "principled."

On the other hand, no such inhibition applies to the development of customary international law.[161] Changes in that body of law are not limited to those consistent with "principle." On the contrary, shifts in "national interest" provide a permissible basis for change. For example, when a country abandons support for freedom of the high seas in favor of a two-hundred-mile exclusive economic zone, no one expects it to appeal to precedent. Foreign policy is not necessarily guided by principle.

Because the accepted mandate of the judiciary does not run to general assessments of foreign policy, and because courts cannot readily make judgments about changed international circumstances, they lack an institutional capacity to participate fully in the development of customary international law. This incapacity provides another illustration of the inferiority of customary law. The courts have no comparable institutional inhibition against applying treaty law.

158. The point seems obvious, but was controversial when Justice Benjamin Cardozo articulated it in THE NATURE OF THE JUDICIAL PROCESS (1921). *See* G. GILMORE, THE AGES OF AMERICAN LAW 76–77 (1977).

159. *See, e.g.*, M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW (1977).

160. Commentators from across the political spectrum seem to agree that some minimum commitment to principle is a necessary part of, or is at least normally associated with, the judicial function. *See, e.g.*, R. POUND, THE SPIRIT OF THE COMMON LAW 182–83 (1921); Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982, 983 n.6, 1001 (1978); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); M. Eisenberg, *supra* note 157, at 9–13. Professor Shapiro argues that principled decision making is important to keep the lawyers happy, which in turn helps preserve the Supreme Court's political position. Shapiro, *The Supreme Court and Constitutional Adjudication: Of Politics and Neutral Principles*, 31 GEO. WASH. L. REV. 587, 605–06 (1963); *see also* G. CALABRESI, *supra* note 70, at 8–15, 91–119 (principled decision making is a source of legitimacy and is traditionally demanded of law-making bodies like administrative agencies; it most adequately explains the judicial creation of common law); Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169 (1968) (if the problem is that courts are not democratic, the solution is that they should be cautious, not that they should be principled—the latter is inherent in the judicial process).

161. For example, the dramatic developments in the law of the sea from national sovereignty to freedom of the sea, and the rapid formation of a law of freedom in outer space reflect shifting power relationships and national interests, not changes explicable by reference to "principle." *See* P. CORBETT, *supra* note 16; Richardson, *Power, Mobility and the Law of the Sea*, 58 FOREIGN AFF. 902 (1980).

162. The same problem affected early American common law. *See* M. HORWITZ, *supra* note 159, at 21 (1977).

163. L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *supra* note 20, at 36.

164. 59 Stat. 1055, 1060, T.S. No. 993 (1945).

165. L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *supra* note 20, at 36. *See generally* A. D'AMATO, *supra* note 61; K. WOLFKE, *supra* note 56, at 30–50 (1964).

B. *The Theoretical Framework*

At the outset, there are basic theoretical problems inherent in the idea of customary international law that illustrate the difficulties of explaining how it can be applied by courts.[162] In a perfectly functioning system, the law would never change. The Statute of the International Court of Justice is the traditionally accepted authority as to the sources of international law.[163] Article 38 of the Statute refers to "international custom, as evidence of a general practice accepted as law," as one source.[164] Critics have argued that the drafters of the Statute got it backwards—that it should be "international practice, as evidence of custom accepted as law," practice being simply the physical manifestation of an underlying body of custom.[165] Practice means the acts of individual states in the world of international relations. Cus-

tom may mean something more ethereal, like a "brooding omnipresence in the sky."[166]

In turn, "practice" as a source of customary international law normally is broken down into two required components: there must be a uniform or general practice of states *and* that practice must be observed by states out of a sense that it is legally required.[167] For example, assume that most of the countries of the world assert jurisdiction over a three-mile band of sea adjacent to their land territories (the "three-mile limit"), and that they generally decline to extend jurisdiction beyond the three-mile limit out of a sense of obligation imposed by international law.[168] In this case, the three-mile limit is legally binding because it is observed in practice and because states think it is legally required.

The definition obviously has a circular tendency.[169] The more difficult problem, however, is that it literally does not seem to permit any change of the rule. Once enough practice has accumulated to create a rule of law—in my example, whenever enough states have adopted the three-mile limit—any deviation is necessarily unlawful. Only if all states simultaneously changed their three-mile limits could any change occur. Nevertheless, customary international law, like the common law, has evolved over the centuries and has accommodated gradual change.[170] Indeed, the once generally recognized three-mile limit itself recently may have become a

166. The quotation is from Southern Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) (describing what the common law is *not*).

167. *See supra* note 56 and accompanying text.

168. In the United States, Congress never adopted the three-mile limit, although it acknowledged such a limit when it conferred authority on the states to license oil drilling on the continental shelf. *See* 43 U.S.C. § 1301(a)(2) (1982); Feldman & Colson, *The Maritime Boundaries of the United States*, 75 AM. J. INT'L L. 729, 738 (1981). Presumably, state authority has not been expanded from three miles to twelve miles by operation of President Reagan's statement accepting the parts of the UN Law of the Sea Convention dealing with the territorial sea. *See* Statement of President Reagan, United States Ocean Policy, PUB. PAPERS 378–79 (Mar. 10, 1983). *Cf.* State v. Bundrant, 546 P.2d 530 (Alaska) (limiting effect of Submerged Lands Act to three-mile belt), *appeal dismissed*, 429 U.S. 806 (1976). *But see* 1985 DRAFT RESTATEMENT, *supra* note 32, § 135 comment d.

169. *See* Farer, *supra* note 12, at 433 (theory is "incoherent").

170. *Id.* In fact, some commentators regard customary international law as little more than a description of state conduct. Watson, *Legal Theory, Efficacy and Validity in the Development of Human Rights Norms in International Law*, 1979 U. ILL. L.F. 609 (1979).

twelve-mile limit.[171]

One escape from this theoretical quandary is to attack an assumption in the stated problem. My formulation assumes that the practice of states always perfectly reflects a shift in an underlying custom. Perhaps, however, the custom could change without being immediately reflected in practice. There are two reasons to reject this analysis. First, its natural law assumptions are obsolete. Second, if custom is defined as conduct based on right reason, it becomes particularly easy to justify the legality of deviant conduct. It is difficult to imagine customary international law prohibiting anything that a state might realistically want to do.

There is, however, another explanation that permits change in customary international law. Professor D'Amato has pointed out that the system must be constructed so as to accept the possibility of illegal conduct by states.[172] To accomplish this it is simply declared acceptable that at a time of change a state may deviate from the legal course of action. If other states follow its example, the law is changed. If other states do not follow, the state that sought to initiate change must bear the consequences of acting illegally. In either event, change is accommodated by admitting the potential legality of an illegal act. While this explanation seems eminently sensible, and may well accurately describe the process of change in the international world, it raises a theoretical problem that especially affects the participation of courts in the process of change. One may be willing to concede that states may act illegally. But is it tolerable to say that courts may do so? There seems to be at least a tension, if not an inconsistency, between the necessary judicial commitment to principled decision making and the necessity of accommodating change in customary international law.

Traditional international law theory places no limits on the process of change. National interest (however a particular state may choose to define it) is the basis of legal development. Unlike the case of judicial law making, there is no requirement that a change be explained in accordance with

171. Howard, *The Third United Nations Conference on the Law of the Sea and the Treaty/Custom Dichotomy*, 16 TEX. INT'L L.J. 321 (1981); MacRae, *Customary International Law and the United Nations' Law of the Sea Treaty*, 13 CAL. W. INT'L L.J. 181, 212–19 (1983).

172. A. D'AMATO, *supra* note 61, at 93–96.

principle. But perhaps courts could simply play a more limited role than other branches of government. Thus, the executive and legislative branches could act without regard to principle, thereby initiating needed changes in law, while courts would be bound to act in accordance with principle.

This solution, however, proves to be too effective. It potentially puts courts at odds with other political institutions within a state. If there is a completely independent judiciary with full jurisdiction to restrain the political branches (as apparently contemplated by the *Draft Restatement* and the courts in *Wilkinson* and *Timberlane*),[173] the result would again prevent any change in customary international law. If the President or Congress attempted to deviate from customary law (at least in the absence of a specific act of Congress subsequent to the emergence of the custom), the federal courts could strike the action down. Changes could only be accomplished by actors outside the United States political system. The basic theoretical problem would be revived for nations with independent judiciaries. Moreover, since all states do not have such judiciaries, an asymmetry in obedience to, and participation in the formation of, customary law would be created. The United States would be strictly bound to existing norms, while those states with weak judiciaries would be able to participate fully in the changes of law demanded in a fast-moving world.

The suggested solution also fails a test of plausibility. Some recent examples illustrate this point. It would have required the federal courts to enjoin the Truman Proclamation extending jurisdiction to the Continental Shelf, thereby frustrating a major shift in customary international law.[174] It would now require the courts to enjoin the President's attempt to keep the United States government in line with the evolution of the law of the sea occasioned by the negotiations of the United Nations Law of the Sea Convention.[175] Given the courts' traditional deference to the President in matters affecting foreign relations, it is not credible to imagine the

173. *See supra* notes 29, 32.

174. Proclamation No. 2667, 59 Stat. 884. For the background, see D'Amato, *What Counts As Law?*, *supra* note 58, at 103–06. On this shift in international law, see generally Richardson, *supra* note 161, at 903–05.

175. Statement by President Reagan, United States Oceans Policy, PUB. PAPERS 378–79 (Mar. 10, 1983).

courts engaging in this kind of activism. It would be more consistent with tradition—and case law—for the courts simply to follow executive branch and congressional direction whenever a question of customary international law is raised.

C. *The Practical World*

The above analysis, however, may be viewed as too mechanical or perhaps too theoretical. Theoretical problems have not, in fact, inhibited the growth of customary international law. The world is constantly changing, and international law changes to accommodate new circumstances. It may be a mystical process, but in practice it works. A court, like a foreign ministry, can recognize new situations as they develop and can declare new rules accordingly. After all, the Supreme Court sometimes reverses itself, and has often adapted to changes in society. The school integration decisions are a notable example.[176] In this view, municipal courts ought to be able to read international circumstances as well, and to see when it is appropriate to initiate a change in the law. Courts applying customary international law only need the authority that common law courts have always had to find new principles, or to adapt old ones, as a basis for developing the law.

The fallacy in this argument is that domestic courts have institutional weaknesses that cripple their ability to apply customary international law. Their ability to apply common law is not similarly affected because of the fundamental differences in the ways these courts interpret traditional common law. There are vast differences in the landscapes of common law and customary international law from which principles can be selected.

A common law judge may look to legislative developments, judicial precedents in related fields, and other sources of public policy. He or she may also draw on intuitions in order to ascertain the right direction for legal development. In the case of customary international law, however, the judge does not have the same opportunity or ability. Foreign developments are more difficult to learn about and understand than changes in the domestic legal landscape. The academic training and professional experience of a person who

176. Brown v. Board of Educ., 347 U.S. 483 (1954).

becomes a federal judge is not likely to include widespread exposure to foreign cultures. Moreover, the regular sources of information available to professional people in the United States are not likely to cover foreign developments in significant depth. Even if counsel could remedy those deficiencies, the training, background, and ordinary experience of a judge do not provide a good basis for forming intuitions about desirable new directions for the law. Furthermore, the constituency to whom the court must appeal is radically different. That problem in turn raises questions of judicial accountability to the political community,[177] which I take to be fundamentally important.[178]

177. Although federal judges are not elected, there are significant checks on their behavior which make them accountable in a meaningful way to the political community. These checks include their training, manner of appointment, criticism by the bar and the media, and even the threat of impeachment. Many state judges are actually elected, or their actions may be reviewed through the electoral process.

178. *See infra* notes 185–239 and accompanying text. International law decisions of course affect the entire international community, and it seems doubtful that United States court decisions would be regarded as authoritative. Indeed, there is another problem of institutional competence affecting the federal courts in this area. The American law of nations, to which modern customary international law traces its ancestry, grows out of a natural law tradition, *see* O'Brien, *Natural Law and International Law in the American Tradition*, 141 WORLD AFF. 104, 105–08 (1978), that has largely been abandoned in this century. That change suggests another obstacle to the application by American courts of customary international law. In the early nineteenth century American judicial decisions—including international law decisions—were frequently explained in natural law terms. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 715–16 (1975). The Court stated that the "law of nations is the law of nature . . . ." Johnson v. Twenty-One Bales, 13 F. Cas. 855 (C.C.D.N.Y. 1814). "It is a law founded on the great and immutable principles of equity and natural justice . . . ." The Venus, 12 U.S. (8 Cranch) 253, 297 (1814). To ascertain its content "we resort to the great principles of reason and justice." Bentzon v. Boyle, 13 U.S. (9 Cranch) 191, 198 (1815).

With the advent of legal realism, however, that tradition has been largely abandoned. *See* Sprout, *Theories as to The Applicability of International Law in the Federal Court of the United States*, 26 AM. J. INT'L L. 280–81 (1932); *see also* G. CALABRESI, *supra* note 70, at 1 ("We have gone from a legal system dominated by the common law, divined by courts, to one in which statutes, enacted by legislatures, have become the primary source of law."); H. COMMAGER, *supra* note 7, at 312, 359–90; G. GILMORE, *supra* note 158; M. HORWITZ, *supra* note 159, at 1–2, 11–16. *But see* Henkin, *supra* note 26, at 1561–62 (says courts "find" international law, but does not say where). This shift in intellectual framework has direct implications for the role of the judiciary and customary international law.

As judges came to be understood to "make" law, and not merely to discover it, it became important to establish their legitimacy to do so as part of a government of formally limited powers. An early result was the scrapping of one part of the old "law of nations," the part derived from the "law merchant." For a description of this aspect of the "law of nations," see Dickinson, *The Law of Nations as Part of the National Law of the United States (Part I)*, 101 U. PA. L. REV. 26, 26–28, 48–49 (1952); and Dickinson, *supra* note 90, at 796–803.

Erie R.R. v. Tompkins, 304 U.S. 64 (1938), overruled Swift v. Tyson, 41 U.S. 1 (1842) (Story, J.) (applying general commercial law that "may be truly declared in the language of Cicero . . . to be in a great measure, not the law of a single country only, but of the commercial world"), on the grounds that the federal courts could not apply federal common law in cases in which the federal government had no legislative authority. 304 U.S. at 78–79. *But see id.* at 91–92 (Reed, J., dissenting) (Congress may have authority to enact the applicable substantive law under article III and the "necessary and proper" clause of the Constitution). The federal government also lacks "legislative authority" against foreign governments in the development of international law. As in *Erie*, the federal government as a whole has no authority to declare law for other states, and the federal courts are in no better position. In this way the abandonment of a natural law framework has deprived the federal courts of an institutional legitimacy.

Finally, the application of particular rules of customary international law can have important foreign policy implications. Traditionally, and for good reason, the role of courts in matters significantly affecting foreign affairs has been strictly limited.[179] I have elaborated this theme elsewhere, and will therefore only restate my conclusions here.[180] The reasons for deference include the possibility of complicating foreign affairs in ways the courts can neither understand nor control through subsequent dispositions and the frequently reiterated need for the nation to "speak with one voice."

A possible, even natural, conclusion to draw would be that the courts should follow the directions of the political branches regarding questions of customary international law. Alternatively, courts could independently apply customary international law, but only when the question has not been addressed by the political branches and when there is no danger of complicating the nation's foreign policy. This formulation is consistent with dicta in *The Paquete Habana* case, and represents the view of some commentators,[181] but is subject to the objections outlined above, at least in the case of extraterritorial application of law.

The *Draft Restatement* view, on the other hand, is directly opposed to this line of argument. Customary international

179. *See* Columbia Note, *supra* note 60, at 759.

180. *See* Trimble, *Foreign Policy Frustrated*, *supra* note 7.

181. Franck, *The Courts, The State Department and National Policy: A Criterion for Judicial Abdication*, 44 MINN. L. REV. 1101 (1960) (deference appropriate only when genuine question of international law important to national interest is involved; author criticizes courts for deferring in cases in which private rights are involved and no important national interest implicated). For contrary views, see R. FALK, *supra* note 22; Lillich, *supra* note 22; Moore, *supra* note 81.

law, whenever it emerges, may be equivalent to an act of Congress, and may override earlier statutes or treaties.[182] The time at which a rule emerges from the swamp of state practice becomes critically important. Since custom can be seen as being in a constant state of flux, a rule could emerge and reemerge. Given the amorphous process of customary international law formulation advocated by many commentators,[183] the "bouncing ball" problem described above could be more than hypothetical. The resulting shift in political power from Congress to the judiciary (or to the President) seems to me to be wholly undesirable.[184]

I would favor the diametrically opposite solution: courts should never apply customary international law except pursuant to political branch direction. This solution would take account of the weak political foundations of that body of law and the institutional shortcomings of the judiciary in the foreign affairs field. It would also regard treaty law as more authoritative than custom. Moreover, my approach would force the judiciary to pay close attention to the source of authority for the political branch direction and particularly to implicit constitutional claims to authority by the Executive. It may be desirable to recognize presidential law-making authority against foreign governments. But for either the judiciary or the President to claim such authority against an act of Congress seems much less tenable.

IV. The Weak Legitimacy of Customary International Law

In this Part, I raise a different, but equally fundamental, objection to the judicial application of customary international law. That objection is based on the incompatibility of the process of customary international law formation with American political philosophy. It suggests that the use of that doctrine is unacceptable to the affected political

182. *See supra* note 32.

183. *See supra* notes 57–62 and accompanying text.

184. Professor Oliver also has noted the potential deterrent effect that this kind of judicial law making would have on treaty negotiations (and I would imagine on diplomats generally—if declarations can become law, diplomats at least should be tempted more often to remain silent). It could also create a political backlash against international law making similar to that reflected in the Bricker amendment. Oliver, *The Treaty Power and National Foreign Policy As Vehicles for the Enforcement of Human Rights in the United States*, 9 Hofstra L. Rev. 411 (1981).

community.[185]

A. *The Problem of Legitimacy*

I characterize this objection as a problem of legitimacy. I argue that the stated use of customary international law is illegitimate. Because the concept of legitimacy can be used in a number of different ways,[186] I first illustrate the precise target of my argument. I then explain the basis for my judgment that customary international law lacks legitimacy. My analysis of the legitimacy problem, in turn, illuminates the qualitative differences between customary international law and law derived from treaties.

I start with the assumption that an exercise of authority should be explained by a coherent theory of power that is accepted by the relevant political community. American courts must explain their decisions in ways that are coherent

185. At the outset, I should identify some basic issues raised and assumptions made in this Part that I cannot pursue within the scope of this Article. First, there is obviously no single "political community" in the United States, and no unified view within any of the particular communities that could be identified. Thus the idea of customary international law may be perceived quite differently by State Department political appointees, Foreign Service officers, members of Congress, multinational corporate officials and the public at large. Second, there undoubtedly would be differences of opinion within each of those groups. Third, there are problems of knowing what the attitudes of group members are. Direct evidence in the form of polls and surveys seems absent. Finally, the question can always be raised why "acceptance" of a doctrine by "the political community" should be the test of its legitimacy.

Although the evidence is not conclusive, I expect that the predominant attitudes of most members of Congress, the executive branch, the public, or any other definable domestic community (even including international lawyers) would harbor the same reservations about customary international law that are reflected in the judicial decisions discussed in Part II. I resolve the first three problems based on my intuition that attitudes do not differ much among or within groups. In addition, my belief as to the importance of this lack of acceptance can be traced to a fundamental assumption about the desirability of representative government and an assumption that acceptance is good evidence of fair representation (and vice versa). In this Part, I argue that political philosophy and tradition fairly reflect the attitudes and values of American political communities and show why the idea of customary international law is not acceptable to them. On that basis I conclude that its application by the United States judiciary is illegitimate.

186. *See* Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 Wis. L. Rev. 379. One commentator refers without elaboration to the "tenuous nature of its [international law's] claim to legitimacy," which he states is reflected in the debate over sources. Columbia Note, *supra* note 60, at 751. In this Part, I expose an even more fundamental problem that affects customary international law in general (and not just the law based on General Assembly resolutions dealt with in the Columbia Note).

and acceptable to American society. I do not question the legitimacy of the judiciary as an institution or its authority to restrain the political branches. Instead, I attack its use of a particular doctrine. An example will illustrate my point: if the courts order the executive branch to release a prisoner because it says his constitutional rights have been violated, the order would routinely be obeyed by government officials and accepted by the American political community. Although there may be dissatisfaction with the court's judgment as to what the Constitution requires, practically everyone would agree that the court had the right to do what it did for the reasons it gave. On the other hand, if the court ordered the release of the same prisoner because the judge saw three crows cross the full moon the night before the decision, the order would probably not be obeyed, and certainly would not be accepted. I believe that customary international law is more like the story of the crows than the explanation based on the Constitution.

B. *Customary International Law and American Political Philosophy*

To illustrate my thesis I look to traditional American political philosophy. The task of political philosophy is to explain and justify the exercise of political power.[187] Accordingly, I will test the compatibility of the doctrine of customary international law with the American political tradition, and will demonstrate again its inadequacy as a tool of judicial restraint and its inferiority to treaty law.

The story of customary international law, like that of the crows, does not fit the American political tradition.[188] The location of law-making authority outside American institutions cannot be reconciled with American political philosophy. The foundations of the American political tradition are many and diverse, but its principal ideas can be traced to a

187. "The mind of man is 'the *only* foundation' for any system of politics. Men never submitted to a king because he was stronger or wiser than they were, but because they believed him born to govern. And likewise men have become free and equal when they have thought they were so." G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at vii (1970) (quoting J. BARLOW, ADVICE TO THE PRIVILEGED ORDERS IN THE SEVERAL STATES OF EUROPE (1792)).

188. Even the consistency of normal common law adjudication with "popular sovereignty" was debated in the late eighteenth century. M. HORWITZ, *supra* note 159, at 19–23.

group of seventeenth-century libertarians and eighteenth-century figures of the Enlightenment, notably John Locke.[189] The American colonists borrowed, elaborated, and adopted as their distinct contribution to eighteenth-century thought a number of general principles that were said to govern the exercise of government power: the notion of limited government absolutely barred from interfering with natural rights, and the notion that the source of political authority resided in the "people."[190] Originally viewed quite strictly, this philosophy held that elected representatives could only carry out the precise instructions given them and had no independent ability to do what they thought was good for the country.[191] These ideas shaped the new constitutional structure of government—limited legislative authority in the federal government, with law making concentrated in politically accountable branches of government through a complicated system of checks and balances—and they have informed the rhetoric of power ever since.[192] The authority of law-making institutions was said to rest on the consent of the governed and to be directly responsive to the wishes of their constituencies.[193]

189. *See* B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 26–54 (1967); L. HARTZ, THE LIBERAL TRADITION IN AMERICA 140 (1955) ("Locke dominates American political thought, as no thinker anywhere dominates the political thought of a nation. He is a massive national cliche."); *see also* Masters, *The Lockean Tradition in American Foreign Policy*, in THEORY AND REALITY IN INTERNATIONAL RELATIONS 74 (J. Farrell & A. Smith eds. 1967).

190. *See* G. WOOD, *supra* note 187, at 593–608; B. BAILYN, *supra* note 189, at 161–98, 227–28; *see also* H. COMMAGER, THE AMERICAN MIND 310–11 (1950); R. HOFSTADTER, THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT 7–12 (2d ed. 1973). Of course, the "people" did not include most of the population.

191. B. BAILYN, *supra* note 189, at 161–75.

192. R. HOFSTADTER, *supra* note 190, at xxxviii–xxxix ("the issues of the twentieth century are still debated in the language of Jefferson's time").

193. For many Americans through the nineteenth century the idea of a social contract was more than a metaphor. It really happened: Before disembarking the *Mayflower*, the colonists agreed to a compact of rules detailing the delegation of government authority, a process repeated thousands of times in the next 250 years. D. BOORSTIN, THE AMERICANS: THE NATIONAL EXPERIENCE 65–72 (1965). For example, it was common practice for members of a group setting out for the West to draw up regulations concerning the basic matters of governance. *Id.* at 66–68. Thus grounded in reality, the notion that government authority was based on the acts and consent of the governed became deeply embedded in American political rhetoric. In addition, throughout the nineteenth century, many different communities organized for particular purposes and passed their own laws, often independent of (and sometimes in advance of the organization of) formal govern-

Of course, as life became more complicated the reality changed—direct instruction was replaced by representative government. Government remained responsive to the particular interest of the electors, however, because the power "surrendered by the people" was in the hands of representatives elected by them and loyal to the interests of the immediate constituency.[194]

Although our society has undergone radical changes in 200 years, the power of these central ideas remains strong. American political tradition is remarkably continuous, and although there have indeed been sharp debates over important issues, some basic assumptions of the system—and much of the rhetoric used to explain it—remain unchanged.[195] The Supreme Court still explains decisions by reference to the intent of the framers.[196] Members of Congress invoke the Original Plan in opposition to contemporary treaties.[197] And political commentators invoke the Founders and eighteenth-century political philosophy to support policy positions.[198] The American eighteenth-century tradition,

ment. *Id.* at 71–72, 72–90. For example, settlers sometimes organized "Claims Clubs," in advance of "government," for the purpose of protecting land titles. *Id.* at 74–78; *see also* G. WOOD, *supra* note 187, at 127–28 ("It is difficult to recapture the intensity of excitement felt by Americans in 1776 over the prospect of forming new republican governments.").

194. For an account of the evolution of colonial American thinking on the nature of representation, see G. WOOD, *supra* note 187, at 181–96.

195. *See generally* D. BOORSTIN, THE GENIUS OF AMERICAN POLITICS (1953); H. COMMANGER, *supra* note 190, at 315–17; L. HARTZ, *supra* note 189.

196. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 120–30 (1976); Reid v. Covert, 354 U.S. 1, 23–30 (1957).

197. Opposition to the Genocide Convention and other Human Rights Conventions was expressed in terms of protecting states' rights and principles of federalism. *See* Henkin, *Rights: American and Human*, 79 COLUM. L. REV. 405, 415–24 (1979) (reasons given in opposition included no federal constitutional authority because of limited scope of treaty power and because of states' rights); Kuhn, *The Genocide Convention and State Rights*, 43 AM. J. INT'L. L. 498 (1949); *see also Helms Blocks Committee Vote on Genocide Pact*, N.Y. Times, Sept. 13, 1984, at 6, col. 1.

198. *See, e.g.*, Lewis, *Freedom, Not Comfort—The Founders and the First Amendment*, N.Y. Times, Dec. 10, 1984, at 23, col. 5; Johnson, *Compromise and Realism—The Only Way to Solve American Problems*, Manchester Guardian Weekly, Dec. 9, 1984, at 15, col. 1 (reprinting Washington Post commentary) (invoking understandings of Hamilton and "other hard-eyed realists who founded the Republic . . . ."); Lewis, *Where Are We Going?*, N.Y. Times, Oct. 29, 1984, at 23, col. 1 ("Sectarian emotions [arising from the introduction of religion into the current election campaign] are what the Framers of the American Constitution wanted to keep out of politics"); *see also* Stone, *Presidential First Use Is Unlawful*, FOREIGN POL'Y (No. 56) 94, 95–98, 102–05 (Fall 1984) (arguing for restrictions against presidential first use of nuclear weapons).

exalting limited and responsive representative government, lives on in today's rhetoric and political philosophy.[199] No doubt the use of this rhetoric conceals other underlying objectives and motivations. But the fact that eighteenth-century rhetoric is still used to explain positions surely is significant. It suggests that some basic values concerning the conditions of governmental authority remain intact, and that popular acceptance of the particular form of judicial power discussed in this Article is not likely.

In this intellectual universe the idea of customary international law encounters substantial problems, because at least some of the potential lawmakers, such as foreign governments, are neither representative of the American political community nor responsive to it. The foreign nature of these sources of legal obligation cannot be reconciled with American political philosophy. It is one thing to delegate authority to Congress and the President, checked and balanced by each other, and elected by different groups within the political constituency. But if customary international law can be made by practice wholly outside the United States it has no basis in popular sovereignty at all. Many foreign governments are not responsive to their own people, let alone to the American people.

This critique of customary international law in terms of a domestic political tradition may be criticized as an outdated and parochial view, inappropriate to the interdependent world of the 1980's.[200] I believe it is not outdated because we still use traditional rhetoric, presumably because it expresses an attitude and yields results acceptable to the American political community. It may be parochial, but that too reflects the community. America has always had an active isolationist tendency, and even when it became actively involved on a regular basis with other countries after the Second World War, it did so with a parochialism that continues

199. Paradoxically, Locke believed that foreign policy was the one thing that should not be subjected to representative control or "consent of the governed." Masters, *supra* note 189, at 78.

200. For example, Professor Falk has repeatedly called for new theories to explain and reform the existing system of international relations. *E.g.*, R. FALK, THE END OF WORLD ORDER (1984); R. FALK, THE STATUS OF LAW IN INTERNATIONAL SOCIETY (1970); Falk, *The Adequacy of Contemporary Theories of International Law—Gaps in Legal Thinking*, 50 VA. L. REV. 231 (1964); *see also* Deutsch, *The Probability of International Law*, in RELEVANCE OF INTERNATIONAL LAW, *supra* note 1, at 57–83.

to reflect its suspicion of "foreign ways."[201]

America has been especially suspicious of international law-making ventures.[202] The Senate frustrated a variety of attempts to conclude arbitration treaties by Presidents Cleveland, McKinley, Roosevelt, and Taft.[203] It then repudiated the League of Nations, and for twelve years stalled consideration of United States participation in the World Court, finally rejecting it in 1935.[204] When the Senate eventually consented to the jurisdiction of the International Court of Justice in 1945, it did so only with a reservation that essentially negated the effect of ratification.[205] The prospect of international supervision led the Senate to refuse to consider the Human Rights Conventions.[206] President Carter did not even submit the Optional Protocol to the International Covenant on Civil and Political Rights, which would have subjected the United States to international supervision.[207]

These are not isolated acts. They reflect a deep and enduring attitude toward law-making authority that is removed from representative control. Judicial application of customary international law would be an anomaly against this tradition.

C. *The Law of Nations as Part of American Political Tradition*

It may be argued, however, that the "law of nations" played a prominent role in American legal history, and is as much a part of the political tradition as the Constitution itself. Many of the Founding Fathers studied law and were familiar with Grotius, Vattel, Pufendorf, and other giants of the international law pantheon.[208] The Constitution expressly refers to the law of nations,[209] and it is generally agreed that this body of law was incorporated into the common law of the colonies.[210] There is no doubt that the law of nations is part of the political tradition.

Nevertheless, there is substantial doubt that modern customary international law is entitled to claim any legitimacy from the tradition of the law of nations. The connection between the two bodies of law is slight. The law of nations referred primarily to the law merchant and maritime law.[211] Its modern descendants are admiralty law, international commerical law, and conflicts of law. It was primarily concerned with the settlement of private disputes. It is true that the subjects of piracy, diplomatic immunity, and the capture of vessels in wartime were considered to be part of the law of nations. However, in the United States the first two were hardly applied by courts as customary law; they were

201. G. MOWRY & B. BROWNELL, THE URBAN NATION 1920–1960 at 170–95 (1965); *see also* R. DALLEK, THE AMERICAN STYLE OF FOREIGN POLICY (1983) (emphasizing the effect of domestic political and social factors on the content of American foreign policy); L. HARTZ, *supra* note 189, at 284–309 (tracing Wilsonianism and isolationism to the intolerance of diversity derived from a uniform liberal tradition); R. HOFSTADTER, *supra* note 190, at xxxix ("[T]here has been . . . a unity of cultural and political tradition, upon which American civilization has stood. That culture has been intensely nationalistic and for the most part isolationist . . . ."). *But cf.* Vagts, *Trends in International Business Law: Towards a New Ethnocentricity?*, 1 NW. J. INT'L L. & BUS. 11 (1979) (noting ethnocentric trend in trade protectionism and extraterritorial application of law, but arguing that the picture is mixed due to increased recognition of foreign judgments in conflicts of law; concluding that there is "reason to hope that an ethnocentric trend will not prevail").

202. *See* Henkin, *supra* note 197, at 422 (the real reason for rejection of human rights accords is our reluctance to be judged by others; "[a] deep isolationism continues to motivate many Americans, even some who are eager to judge others and to intercede on behalf of human rights in other countries"); Rusk, *A Personal Reflection on International Covenants on Human Rights*, 9 HOFSTRA L. REV. 515 (1981); *see also* W. GALENSON, THE INTERNATIONAL LABOR ORGANIZATION—AN AMERICAN VIEW (1981); R. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY 47 (1975) (in drafting GATT the United States rejected ITO dispute settlement procedures).

203. R. ANAND, STUDIES IN INTERNATIONAL ADJUDICATION 1–35 (1969).

204. *Id.*

205. See the "Connally Reservation" to the United States Declaration, 61 Stat. 1218, T.I.A.S. No. 1598 (1946), under which the United States accepted jurisdiction of the Court but not with respect to matters "which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America." On its debilitating effect, see H. MORGENTHAU, *supra* note 1, at 287–89. Since this Article was written, the United States has withdrawn its acceptance of the compulsory jurisdiction of the World Court. *See* 24 INT'L LEGAL MATERIALS 1742 (1985).

206. Rusk, *supra* note 202.

207. For strong criticism of the Carter proposed reservations to the Human Rights Conventions, see Henkin, *supra* note 197, at 423–25.

208. Dickinson, *supra* note 178, at 35.

209. U.S. CONST. art. I, § 8, cl. 10.

210. *See* Bourguignon, *Incorporation of the Law of Nations During the American Revolution—The Case of the San Antonio*, 71 AM. J. INT'L L. 270 (1977); Dickinson, *supra* note 178; Dumbauld, *John Marshall and the Law of Nations*, 104 U. PA. L. REV. 38 (1955).

211. R. BRIDWELL & R. WHITTEN, THE CONSTITUTION AND THE COMMON LAW 51–60 (1977); Dickinson, *supra* note 178; *supra* note 90. I should note that the Bridwell-Whitten view of the common law as simply reflecting private conduct seems implausible. *See* G. GILMORE, *supra* note 158; and Braybrooke, *Custom as a Source of English Law*, 50 MICH. L. REV. 71 (1951) (common law does not originate in popular action; it is the practice of courts).

quickly codified by Congress in statutes.[212] Accordingly, those two subjects do not serve as examples of customary international law applied by the courts as a restraint of political branch conduct.

The law of prize may require more extensive treatment. This body of law governed the rights of government and private ships to capture enemy ships and contraband cargo on neutral ships in time of war.[213] In the nineteenth century there were many prize cases.[214] Although most cases involved nongovernmental parties and could thus be categorized as "private" (like other cases in admiralty), even the private captors were operating under government authority and were clearly serving the government's direct military interests. Thus, the subject matter is not as "private" as a contract dispute and fairly may be viewed as a kind of public law. Moreover, the courts were called upon to judge private captor and government conduct, and may be seen as performing a "restraint mission" (using the explanatory terminology of international law). In this way, customary international law arguably could find a home in the American political tradition.

Prize law, however, has vanished from the American scene in this century.[215] Apparently, there has not been a single prize case decided by the courts since the Spanish-American War.[216] There are a variety of reasons for this phenomenon. Nations may now prefer simply to sink ships rather than capture them.[217] More importantly, Congress repealed the provisions for private prize and military bounties in 1899.[218] In this century government prize activity has been governed by statute and executive order, not by customary law.[219] *The Paquete Habana* itself could have been decided on the basis of presidential authority.[220] In fact, the Court in *Paquete Habana* expressly referred to the obligation to defer to political branch authority where it had been exercised.[221] Accordingly, prize law does not provide a persuasive example in the contemporary context of international law restraining political branch action.

Even when it was applied, prize law was viewed as "American law."[222] Courts did not normally look to foreign precedents. Modern customary international law, on the other hand, looks primarily to foreign authorities as a basis of legal obligation.

Finally, prize law was primarily used to legitimate expansion of political branch power rather than to force restraint. Although a particular case might involve conduct found to fall outside the boundaries of permissible activity, the major purpose of the law was to confirm authority, not limit it. It provided the means by which good title was assured to purchasers of the enemy vessels captured by privateers acting in the national defense interest. In this regard it is different from the law of human rights or state responsibility, in which the main point is to delineate restraints.

For these reasons it seems to me that the eighteenth-century law of nations, including the law of prize, does not provide a precedent for judicial application of customary international law in the American political tradition.

212. Act of April 15, 1790, 1 Stat. 112, 117 (diplomatic immunity); Act of March 3, 1819, 3 Stat. 510, 513 (piracy).

213. *See generally* C. COLOMBOS, A TREATISE ON THE LAW OF PRIZE (1926).

214. *See, e.g.*, cases cited *id.*, at 18–19 nn.4–8.

215. The leading admiralty commentators state that the subject of prize "is of little practical interest to the modern American admiralty lawyer." G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 44 (1975).

216. Knauth, *Prize Law Reconsidered*, 46 COLUM. L. REV. 69, 81 (1946).

217. *See* Stolz, *Pleasure Boating and Admiralty: Erie at Sea*, 51 CALIF. L. REV. 661 (1963).

218. C. COLOMBOS, *supra* note 213, at 333; Knauth, *supra* note 216, at 82–86.

219. C. COLOMBOS, *supra* note 213, at 333; Knauth, *supra* note 216, at 82–93.

220. In that case a Presidential Proclamation directed federal officials to conduct the blockade "in pursuance of . . . the law of nations . . . ." 175 U.S. 677, 712 (1900). Like most "international law" cases decided in American courts, this case can be understood as a judicial recognition of presidential law-making authority exercised pursuant to constitutional foreign affairs powers. *See supra* notes 71–155 and accompanying text. "In effect, the seizure of the particular vessels [in *Paquete Habana*] was treated by the Court as in violation of these expressions of executive policy." Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1043 n.127 (1967).

221. 175 U.S. at 700.

222. *See* C. COLOMBOS, *supra* note 213, at 17–18; 11 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 96–101 (1968). *Cf.* Rowson, *Prize Law During the Second World War*, 24 BRIT. Y.B. INT'L L. 160, 162 (1947) ("international law has played a small part in the development of [prize courts'] structure, organization, competence, and procedure"). The same seems to be true of the "general maritime law" in admiralty. *See generally* L. ERADES & W. GOULD, *supra* note 53, at 249; G. GILMORE & C. BLACK, *supra* note 215, at 46–52; M. HORWITZ, *supra* note 159, at 27–28.

D. *The Analogy to Constitutional Law*

Another way of grounding customary international law in the American political tradition would be to emphasize its similarities to constitutional law. The analogy between the two bodies of public law is frequently drawn.[223] Both are concerned with the allocation of government authority and with limitations on the exercise of power. Both derive their effectiveness from sources other than the threat of sanctions. If a federal court can overturn a political branch decision because it is unconstitutional, why cannot the same court overturn a political branch decision because it violates international law?

The reasons are those summarized above.[224] The Constitution regularly provides a basis for political discourse and rhetoric accepted by American society, while customary international law remains an alien concept. The public-at-large is therefore likely to reject the concept of customary international law as a legitimate part of political discourse. Even those judges and political branch officials who would have the most occasion to use it seem not to have found much use for the doctrine.[225] Again, the absence of acceptance by the affected political community is a major barrier to the legitimacy of customary international law.

Moreover, the audience to whom the norms of judicially applied customary international law would be applied is the world-at-large. Yet the areas of law of greatest interest today—human rights, expropriation of alien property, and extraterritorial application of law—are among the most fiercely disputed issues of our day. For example, it seems doubtful that the norms of the Human Rights Covenants are in fact

223. *See, e.g.*, Chayes, *A Common Lawyer Looks At International Law*, 78 HARV. L. REV. 1396 (1965); Fried, *supra* note 1, at 102, 120–25.

224. *See supra* note 188 and accompanying text.

225. *See supra* notes 71–155 and accompanying text; *see also supra* note 74. Judge Linde has specifically adverted to the problems involved in judicial application of human rights law, and has counseled caution in expecting much from this development. *See* Linde, *supra* note 67. It seems doubtful that political branch officials have very different reactions. For example, Elihu Root, at the conference responsible for drafting the World Court Charter, objected to the inclusion of custom as a source of law to be applied by the court. He reasoned that governments would not submit disputes to the court in the absence of "positive rules supported by an accord." *See* K. WOLFKE, *supra* note 56, at 110.

widely accepted throughout the international community.[226] And the debate over expropriation has not cooled since Justice Harlan wrote that "there are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens."[227] Recently, the Legal Adviser to the Department of State called extraterritorial application of law "one of the thorniest international politico-legal problems confronting the United States and the international community."[228] It is difficult to imagine a United States court writing an opinion that would be acceptable to a substantial portion of the affected international constituencies.[229] Even judges of international courts are not viewed as truly independent of their national perspectives,[230] and their opinions are not likely to be perceived as "objective" determinations of international law.

E. *The Basic Differences Between Customary International Law and Treaties*

My demonstration of the incompatibility of customary international law with domestic political tradition also illuminates why treaty law should be treated as qualitatively different from customary international law.[231] While customary international law may be created largely outside the domestic political process (or rests on the vaguely defined constitutional foreign affairs authority of the President) and thus

226. *See, e.g.*, E. HAAS, HUMAN RIGHTS AND INTERNATIONAL ACTION (1970); Kennan, *Morality and Foreign Policy*, *supra* note 7; Lane, *supra* note 60.

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

228. D. Robinson, *Reflections on the Current States of "Extraterritoriality" or Conflicts of Jurisdiction* (address to the American Branch of the International Law Association) (Nov. 2, 1984), *reprinted in* 29 INT'L PRAC. NOTEBOOK 1 (Jan. 1985).

229. *See, e.g.*, J. BRIERLY, *supra* note 1, at 91–92; G. GILMORE & C. BLACK, *supra* note 215, at 46–52; Franck, *International Law: Through National or International Courts?* 8 VILL. L. REV. 139, 142 (1963) (national courts are wedded to "particular national concept of international law"); Lillich, *The Proper Role of Domestic Courts in the International Legal Order*, 11 VA. J. INT'L L. 9, 47–48 (1970); Columbia Note, *supra* note 60 (nation-states will not accept judicial imposition of values because there is no general sharing of the "deference and esteem" that is accorded judges in American society).

230. *See* T. FRANCK, THE STRUCTURE OF IMPARTIALITY—EXAMINING THE RIDDLE OF ONE LAW IN A FRAGMENTED WORLD 251–70 (1968); L. PROTT, THE LATENT POWER OF CULTURE AND THE INTERNATIONAL JUDGE (1976).

231. Judge Linde implicitly reaches the same conclusion. *See* Linde, *supra* note 67, at 78–80.

lacks an adequate political foundation, a treaty is in a much stronger position. The norm of a self-executing treaty has been approved twice by the President (upon submission to the Senate and upon ratification) and by at least two-thirds of the Senate.[232] It has thus passed some formidable political hurdles with all the potential attendant publicity and consensus building entailed by the process. Before an agreement can be concluded, the Secretary of State first must approve the negotiation on the basis of a standard operating procedure.[233] If the subject matter of the negotiation affects constituencies outside the State Department, such as labor, trade, or agriculture, the concurrence of the relevant department must be obtained.[234] In taking a position on a proposed negotiation, it would not be unusual for the other departments to consult members of the sector affected. In any event, those departments reflect the parochial interests of their particular constituencies and serve as advocates for those interests in interagency deliberations.[235]

After a decision by the Secretary of State to initiate a negotiation, other departments normally continue to monitor its progress and may even participate in the negotiation itself.[236] Before the President (or his designee) signs the resulting agreement, the departments reflecting domestic interests normally have another opportunity to raise objections.[237]

After the agreement is signed, if it takes the form of a treaty, it is transmitted to the Senate for advice and consent to ratification.[238] The Senate Foreign Relations Committee then holds a hearing. If, on the other hand, the agreement is to be authorized by the Congress as a whole, legislative authorization is requested. If implementing legislation is required (in the case of a non-self-executing treaty), or if the

232. U.S. CONST. art. II, § 2, cl. 2.

233. *See* State Department Procedures on Treaties and Other International Agreements, Partial Text Circular 175, Oct. 25, 1974, 11 FAM 700, *reprinted in* 3 LEGISLATION ON FOREIGN RELATIONS THROUGH 1980, at 91–106 (Joint Comm. Print, Comm. on Foreign Relations, Comm. on Foreign Affairs 1981) [hereinafter cited as Circular 175].

234. *Id.* § 722.3a, at 95.

235. *See generally* BUREAUCRATIC POWER IN NATIONAL POLITICS 7–28, 54–78, 182–99 (F. Rourke 3d ed. 1978).

236. *See* Circular 175, *supra* note 233, §§ 723.1b, 723.1i, at 96–97.

237. *Id.* § 723.1g, at 97.

238. U.S. CONST. art. II, § 2, cl. 2.; Circular 175, *supra* note 233.

agreement is to be approved by the Congress as a whole, two other public hearings are held, by the House and Senate committees with legislative jurisdiction over the subject matter of the agreement. The domestic constituencies affected by the proposed norms are thereby given another opportunity to express objection. The objective of this elaborate process is to assure publicity of the proposed international norm. In the process, political compromises can be made. The new rule is not only in fact likely to have received explicit assent through a widely recognized law-making process, but it also carries whatever symbolism of legitimacy follows its emergence from the political process.

Undoubtedly, the system does not work in all cases as the ideal model suggests. But given the powerful and attentive media, extensive congressional staff, and innumerable special interest lobbies, it is not unfair to conclude that most legislation and proposed treaties do not escape some significant measure of critical scrutiny.

Customary international law, on the other hand, may not be known to the legislature, or even to most of the executive branch. In the most extreme case, a rule could evolve out of the practice of foreign nations while remaining entirely unknown to all or most of the United States government (as in the case of state practice formed by treaties concluded by other governments). The State Department has the primary responsibility to follow foreign events. However, many of the acts that comprise state practice would not command attention outside that Department. In many cases, there would not be any particular reason for a United States reaction.

Yet some commentators regard acquiescence in other states' practice as equivalent to United States acceptance. If that were really the case, the State Department would have to keep track of all potential developments that could amount to state practice and regularly issue appropriate denials of United States acquiescence. That is simply unrealistic. Civil servants tend to focus on the immediate and pressing problems of the day. Remote or potential problems, lacking vocal protagonists, tend to be deferred to the indefinite future.

Even if an emerging foreign practice involves United States domestic interests, it might not be considered important enough to attract the attention of another department

that is concentrating on matters of more immediate concern to its own primary constituencies. Thus the United States government interaction with emerging customary international law may be limited to the State Department, which is relatively insulated from domestic political constituencies.[239] The problem of the State Department's narrow perspective is compounded by the fact that the decision to act or to acquiesce may frequently be taken at a relatively low level in the Department. No doubt most government "action" is taken at low levels of the bureaucracy, but in this context we are talking about law-making, or potential law-making, activity.

Many votes in international organizations fit this category. A United States position in the General Assembly Legal Committee on distantly emerging space law could be taken on the authority of two or three officials below the level of assistant secretary (itself the third rung of the bureaucratic ladder below the Secretary of State), without clearance of any other agency. A General Assembly vote on a human rights question might attract higher-level State Department attention, and a question involving Vietnamese intervention in Cambodia could reach the desk of the Secretary and even the White House. But these are exceptional cases. Congressional and public participation in the vast body of potential customary international law norms would be even more unusual.

Evolving norms of customary international law do not receive the scrutiny that a proposed statute or treaty would receive within the executive branch, within Congress, or among concerned members of the American public. Denied this process, these norms are not supported by the mythology of popular consent that a law or ratified treaty acquires. Because a customary norm has a much weaker political foundation than a treaty, it should not be treated as equally authoritative.

Finally, there is a practical difference between executive branch attitudes toward the two types of law that also bears on their relative effectiveness. Any official who has faced a congressional committee knows the impact of hostile questioning on future decision making. The Senate takes a special institutional interest in treaties. An official contemplating conduct in violation of a treaty may have to personally explain his or her conduct to the senators or congressmen who approved the agreement or at least their successors in political interest. No similar spectre haunts the potential violator of customary law.

239. For a discussion of the particular perspective of the State Department, see Rockman, *America's Departments of State: Irregular and Regular Syndromes of Policy Making*, 75 AM. POL. SCI. REV. 911 (1981).

CONCLUSION

In this Article I have demonstrated that customary international law has rarely been applied by American courts, and that when it has been applied, its application can be understood best as a reflection of explicit political branch direction in the particular case. I have also pointed out some fundamental institutional infirmities that undermine the ability of common law courts to participate in the development of customary international law. And I have argued that the application of this doctrine by American courts is illegitimate because it cannot be reconciled with American political tradition and is unlikely to be accepted by the affected community.

My analysis blurs the image projected by international lawyers that customary international law is like any other law, and exposes the fallacy of the common view of international law as an undifferentiated mass. At the same time, the preceding analysis unquestionably has a limited scope. Judicial application of international law is not as important as application by the political branches. And the American experience is but one part of a larger and more diverse picture. I can only claim that in the American context treaties are more authoritative than customary international law.

I do, however, believe that some tentative, general lessons may be drawn. For example, I expect that foreign ministry officials, legislators, and international civil servants adopt attitudes not much different in this regard from American judges. I believe that the restraint function emphasized by realists operates much less strongly in the case of customary international law than in the case of treaties. Accordingly, customary international law more readily fits the image of the realists' view of law as an ineffective force, while treaty law more readily fits the opposing view of the international law community.

My analysis also offers an alternative way of understanding international law. It starts with an analysis of domestic law and society, not of the international "system." Thus, it provides a more accurate view of the real meaning of international law as understood by the actors applying the law.[240] It avoids primary reliance on overarching—and strained—premises for international society and generally shared attitudes. Cultural differences are more readily accomodated by my approach.

Although I have examined only the American experience, I believe that my emphasis on the importance of reconciling norms of international law with domestic political tradition applies with equal force to other governments and societies. The effectiveness of international law depends on genuine consensus, and that consensus depends on the involvement of processes grounded in domestic political traditions.

In this way I believe that the reality of international law is more persuasively presented. This kind of analysis can form an important part of the rebuttal of the realists, and by tempering the case of the international lawyers, it can also serve as an effective antidote to the excessive legalism so accurately described by George Kennan.[241]

240. Professor Fisher has emphasized the importance of integrating international law into the domestic legal system as a way of enhancing the prospects for compliance. *See generally* R. FISHER, IMPROVING COMPLIANCE WITH INTERNATIONAL LAW (1981).

241. Kennan, *Morality and Foreign Policy*, *supra* note 7.

LIABILITIES IN THE PARTNERSHIP CONTEXT—POLICY CONCERNS AND THE FORTHCOMING REGULATIONS

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