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### A Normative Model for the Integration of Customary International Law into United States Law Notes

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# **A NORMATIVE MODEL FOR THE INTEGRATION OF CUSTOMARY INTERNATIONAL LAW INTO UNITED STATES LAW\***

## **I. INTRODUCTION**

We live in a world of increasing globalization in which international law, previously the domain of States and sovereigns, increasingly affects us in our daily lives. As the nations of the world seem to rush headlong toward internationalization of law, integration of markets, and centralization of government, it is necessary at times to take a step back and examine the goals and consequences of this seemingly unstoppable movement. It is with this aim that this Note will attempt to examine the recent debate regarding customary international law and its integration into U. S. law between Professors Curtis Bradley and Jack Goldsmith on one side, and Professor Harold Koh on the other. After reviewing the positions of both sides in this debate, this Note will then present a constructive compromise, embodying the most positive elements from the various arguments to remedy the apparent flaws in both positions.

## **II. CUSTOMARY INTERNATIONAL LAW**

Before entering this debate, however, a preliminary explanation of customary international law is due. Customary international law is one of the two primary sources of international law which, along with treaties, makes up the bulk of international law rules.<sup>1</sup> Unlike treaties, which are contractual in nature and generally written instru-

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1. See *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* §§ 101-102 (1987) [hereinafter *RESTATEMENT (THIRD)*]. In § 102 of the Restatement are listed as a source of international law, in addition to treaties and customary international law, laws deriving from “general principles common to the major legal systems of the world.” However, in comment I such general principles of law are identified as a “secondary source” of international law, and thus not ranked on par with treaties and customary international law.

ments, customary international law is composed of two elements: State practice and *opinio juris*, or the sense of legal obligation under which a State acts.<sup>2</sup> Through analysis of these two elements, as well as their duration and character, rules of customary international law eventually develop and gain acceptance by the international community as binding law.<sup>3</sup> Traditionally, customary international law has covered areas of international law such as the laws pertaining to territory, immunities, the law of the sea, and the use of force by one State against another.<sup>4</sup> Customary international law is often later codified by treaty.<sup>5</sup>

With the increasing modern development of certain areas of international law, including international human rights law, customary international law has come to cover many areas of the law that it historically did not.<sup>6</sup> Such human rights principles that have attained the status of customary international law include prohibitions on slavery and torture.<sup>7</sup> However, due to the evolutionary process of the creation of customary international law and the subjective nature of its recognition, there are other more controversial principles which are argued also to have attained customary international law status. These principles include prohibitions of some uses of the death penalty,<sup>8</sup> of discrimination based on sexual orientation,<sup>9</sup> and of "the advocacy of national, racial or religious hatred."<sup>10</sup> As is evident from these examples, modern human rights law—and thus customary international law—seeks to govern not only the relationships between States,

2. See generally *id.* § 102 (2), cmts. (b) & (c).

3. See *id.*

4. See generally D.J. HARRIS, *CASES AND MATERIALS ON INTERNATIONAL LAW* (5th ed. 1998).

5. See RESTATEMENT (THIRD), *supra* note 1, § 102 cmt. (i).

6. See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 818 (1997) [hereinafter Bradley & Goldsmith, *Critique of the Modern Position*].

7. See RESTATEMENT (THIRD), *supra* note 1, § 702.

8. See UNITED NATIONS HUMAN RIGHTS COMMITTEE, GENERAL COMMENT ADOPTED BY THE HUMAN RIGHTS COMMITTEE UNDER ARTICLE 40, PARAGRAPH 4, OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, General Comment No. 24(52) at 3, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994) [hereinafter UN COMMITTEE].

9. See David A. Catania, *The Universal Declaration of Human Rights and Sodomy Laws: A Federal Common Law Right to Privacy for Homosexuals Based on Customary International Law*, 31 AM. CRIM. L. REV. 289, 315-18 (1994); James D. Wilets, *International Human Rights Law and Sexual Orientation*, 18 HASTINGS INT'L & COMP. L. REV. 1, 119 (1994).

10. UN COMMITTEE, *supra* note 8, at 3.

but also the relationship between a State and its citizens and the relationships of citizens one to another.<sup>11</sup>

In the United States, international human rights law has been applied in federal courts largely under the auspices of the Alien Tort Statute (ATS), which establishes federal jurisdiction for “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>12</sup> Thus, as interpreted by the Second Circuit Court of Appeals in *Filartiga v. Pena-Irala*,<sup>13</sup> the ATS grants federal question jurisdiction under federal common law for claims under the Act arising from breaches of customary international law.<sup>14</sup> In holding that customary international law was part of federal common law, the court established the ATS as constitutional in granting jurisdiction under one of the established jurisdictional categories of Article III of the Constitution.<sup>15</sup> Thus, claims based on customary international law could satisfy federal court jurisdiction and be decided as a matter of federal common law.

### III. THE CURRENT DEBATE

In February of 1997, Professors Bradley and Goldsmith published a very significant article entitled *Customary International Law as Federal Common Law: A Critique of the Modern Position*. The “modern position,” as they termed it, at the basis of their critique was the aforementioned widely accepted rule that customary international law is part of federal common law in U.S. courts<sup>16</sup>—that rules of customary international law may be applied by U.S. federal courts without prior political branch enactment.<sup>17</sup> The article critiqued the “modern position” and its foundations from the standpoints of history, case law, and policy, outlining several potentially dangerous consequences resulting from the inclusion of customary international law in federal common law. The thrust of their proposal for the integration of customary international law into U.S. domestic law was as follows: customary international law is not federal law unless enacted

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11. See Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 6, at 818.

12. 28 U.S.C. § 1350 (1994). See JOHN M. ROGERS, INTERNATIONAL LAW AND UNITED STATES LAW 113-123 (1999) for a discussion of the ATS.

13. See 630 F.2d 876 (2d Cir. 1980).

14. See Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 6, at 832-33.

15. See *id.*

16. See *id.* at 816-17.

17. See *id.* at 820.

as such by the federal political branches.<sup>18</sup> Thus “federal court interpretations of [customary international law] would not be binding on the federal political branches or the states.”<sup>19</sup> The states can enact customary international law into their state law and interpret it in their courts, and the federal courts are obliged to follow the state’s interpretation of customary international law on issues where no other federal law is on point.<sup>20</sup>

It is this last issue of the states’ role in enacting and interpreting rules of customary international law which seems most to have perplexed Professor Koh, who in May of 1998 responded to Bradley and Goldsmith’s arguments with an article entitled *Is International Law Really State Law?*<sup>21</sup> In his article, Professor Koh defended what he called the “hornbook rule” that customary international law is federal common law in U.S. courts,<sup>22</sup> and criticized the “bizarre suggestion” that states could interpret and apply rules of international law and thereby bind the federal courts by their interpretation.<sup>23</sup> He argues that the Supreme Court has “routinely held that a ‘few areas, involving ‘uniquely federal interests,’ are so committed by the Constitution and laws of the United States to federal control that state law is preempted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts.’”<sup>24</sup> He adds that “[t]he Court has specifically found such a ‘distinctive federal interest in’ the exterior relation of this whole nation with other nations and governments.”<sup>25</sup> His interpretation of this doctrine is that “even after *Erie* and *Sabbatino*, federal courts retain legitimate authority to incorporate bona fide rules of customary international law into federal common law.”<sup>26</sup>

Bradley and Goldsmith responded to Koh in June of 1998 with a short article in which they contested Koh’s characterization of their

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18. *See id.* at 870.

19. *Id.*

20. *See id.*

21. See Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998).

22. *Id.* at 1824.

23. *Id.* at 1850.

24. *Id.* at 1834 (quoting *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988) (citation omitted)).

25. *Id.* at 1834-35 (quoting *Boyle v. United Techs. Corp.*, 487 U.S. 500, 508 (1988) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 66 (1941)) (quoting *Henderson v. Mayor of New York*, 92 U.S. 259, 273 (1876))), (internal quotation marks omitted).

26. *Id.* at 1835.

arguments as proposing that customary international law was state law.<sup>27</sup> Their restated position, however, did not seem totally to support this denial: “our view is that [customary international law] should not be a source of law for courts in the United States unless the appropriate sovereign—the federal political branches *or the appropriate state entity*—makes it so.”<sup>28</sup> Though correct in pointing out the fault in the exaggerative language of Koh’s title, Bradley and Goldsmith’s proposal nevertheless included a substantial role for states in the integration of customary international law into U.S. domestic law.

At the heart of this debate seem to be fundamental disagreements on at least two issues regarding how customary international law becomes part of U.S. law. The first has to do with the role of the states in that process. Bradley and Goldsmith conceive of a dual system of authorization—one in which federal and state governments may enact rules originating in customary international law into their respective law.<sup>29</sup> To support this assertion, they point to the history of the application of customary international law in U.S. courts. They cite the use of customary international law as general common law, applied by both federal and state courts in their respective jurisdictions in the pre-*Erie* period.<sup>30</sup> After the Supreme Court’s decision in *Erie Railroad Co. v. Tompkins*<sup>31</sup> and the annulment of federal courts’ ability to make rules of general common law, Bradley and Goldsmith argue that “for several decades . . . it remained an open (and generally unaddressed) question whether [customary international law] was part of this new federal common law.”<sup>32</sup> They critique the rise of the “modern position” through such later developments as the Supreme Court decision in *Banco Nacional de Cuba v. Sabbatino*,<sup>33</sup> the Second Circuit decision in *Filartiga v. Pena-Irala*,<sup>34</sup> and the Restatement (Third) of Foreign Relations<sup>35</sup> as a combination of “mistaken inter-

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27. See Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260 (1998) [hereinafter Bradley & Goldsmith, *Federal Courts*].

28. *Id.* at 2260 (emphasis added).

29. See Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 6, at 870.

30. See *id.* at 822-24.

31. See *Banco Nacional de Cuba v. Sabbatino*, 304 U.S. 64 (1938).

32. Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 6, at 821.

33. See 376 U.S. 398 (1964).

34. See 630 F.2d 876 (2d Cir. 1980).

35. See RESTATEMENT (THIRD), *supra* note 1.

pretations of history, doctrinal bootstrapping . . . and academic fiat.”<sup>36</sup> They see exclusive federal control over the integration of customary international law into U.S. law as unnecessary, arguing that proponents of that position have not shown any recent examples of federal and state governments being at odds over discrete issues of international law. “In fact states rarely consider issues of [customary international law], and when they do, they tend to adopt a very deferential attitude toward the federal government’s views.”<sup>37</sup> Thus, they see exclusive federal control over the integration of customary international law, such as through its inclusion in federal common law, as an unnecessary evolution which “portends a dramatic transfer of constitutional authority from the states to the world community and to the federal judiciary.”<sup>38</sup>

In response to this assertion, Koh traces the development of federal control over foreign affairs from much earlier origins.<sup>39</sup> He cites case law supporting federal foreign affairs dominance beginning in force with Supreme Court cases in the 1930’s that “suggested that the federal power over foreign affairs never derived from the states. . . that power vested directly ‘in the federal government as necessary concomitants of nationality,’”<sup>40</sup> and held that “in respect of our foreign relations generally, state lines disappear.”<sup>41</sup> Koh then cites as seminal the Supreme Court’s 1964 ruling in *Sabbatino*<sup>42</sup> which, contrary to Bradley and Goldsmith’s “serious misreading”<sup>43</sup> of the case, “acknowledged the supremacy of not only Congress and the President, but also federal judges’ making common law rules in the area of external relations.”<sup>44</sup>

Koh is also dubious of Bradley and Goldsmith’s assertion that federal control over customary international law integration is unnecessary and that states would rarely be at variance with the federal government on questions of customary international law.<sup>45</sup> He asserts that the problems caused by diverse and balkanized interpretations of such laws among the fifty states would lead to confusion on issues

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36. Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 6, at 821.

37. *Id.* at 871.

38. *Id.* at 846.

39. See Koh, *Is International Law Really State Law?*, *supra* note 21, at 1846 n.121, 1841.

40. *Id.* at 1846-47 (quoting *U.S. v. Curtis-Wright Export Corp.*, 299 U.S. 304, 318 (1936)).

41. *Id.* (quoting *U.S. v. Belmont*, 301 U.S. 324, 331 (1937)).

42. See 376 U.S. 398 (1964).

43. Koh, *Is International Law Really State Law?*, *supra* note 21, at 1830.

44. *Id.* at 1847.

45. See *id.* at 1851-52.

ranging from transnational business dealing to treatment of foreign heads of State.<sup>46</sup> Koh argues that the Bradley and Goldsmith proposal would, for example, “allow Massachusetts to deny the customary international law protection of head-of-state immunity to Queen Elizabeth on tort claims arising out of events in Northern Ireland, whereas the forty-nine other states could choose instead to grant the Queen every conceivable variant of full or partial immunity.”<sup>47</sup>

The second issue at the heart of the current debate seems to be the identification of the entity or entities best suited to fill the role of conduit for the integration of customary international law into domestic law. Under Bradley and Goldsmith’s proposal, all federal authorizations of customary international law rules into U.S. domestic law would have to be made by the federal political branches.<sup>48</sup> They would circumscribe the federal common law of U.S. courts so as to exclude customary international law principles and leave to federal courts the sole responsibility of interpreting federal political branch enactments in this area.<sup>49</sup> On the state level it seems that Bradley and Goldsmith are prepared both to allow state legislatures to enact principles of customary international law into state law, and to allow state courts to bring customary international law principles into their jurisprudence absent state legislative approval.<sup>50</sup> State interpretations of customary international law rules would then govern in federal court diversity cases absent conflicting federal law.<sup>51</sup> Thus, in a very real way, states would be the first, and often final, authority in many cases in determining which customary international law principles would enter U.S. domestic law and how those principles should be interpreted.

Bradley and Goldsmith argue that state authority in domestic reception of customary international law rules is not only justified historically,<sup>52</sup> but is also an important safeguard against federal power over traditionally state-governed areas of the law. They point out that because the customary international law of human rights is arguably more protective of individual rights in some cases than state constitutions and statutes, federal judicial incorporation of such laws

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46. *See id.* at 1841, 1850-51.

47. *Id.* at 1829 (footnote omitted).

48. *See* Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 6, at 870.

49. *See* Bradley & Goldsmith, *Federal Courts*, *supra* note 27, at 2260.

50. *See id.*; Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 6, at 870.

51. *See* Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 6, at 870.

52. *See supra* notes 30, 32 and accompanying text.



could, for example, prohibit the application of some state death penalty statutes.<sup>53</sup> They contend that such abrogation of state law by customary international law rules could extend to matters "ranging from personal jurisdiction over foreign defendants to the extraterritorial application of state law, including state tax law."<sup>54</sup>

Professor Koh's position begins with the proposition that foreign relations is the exclusive domain of the federal government.<sup>55</sup> In support of his position, he cites concerns as early as those of Alexander Hamilton regarding the possibility that the United States, which at the time was in its vulnerable infancy as a nation, could be the subject of military reprisal due to the errant ruling of a state court on an issue of international law.<sup>56</sup> He points out Hamilton's consequent division of "cases arising upon treaties and the laws of nations and those which may stand merely on the footing of the municipal law,"<sup>57</sup> with "[t]he former . . . supposed proper for the federal jurisdiction, the latter for that of the [s]tates."<sup>58</sup> Koh argues that issues arising from customary international law, such as head of state immunity, in which it is necessary for the nation to have one voice, "raise precisely the kind of 'basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community' that the Supreme Court held 'must be treated exclusively as an aspect of federal law.'"<sup>59</sup>

Koh examines Supreme Court cases such as *Sabbatino*<sup>60</sup> and *Boyle v. United Technologies Corp.*<sup>61</sup> and determines that it is not only appropriate but a settled principle of law that foreign affairs, and thus the incorporation of customary international law into U.S. law, presents an area of "uniquely federal interest[]." <sup>62</sup> Such integration is thereby "committed by the Constitution and laws of the United States to federal control," with the effect that "state law is pre-empted and

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53. See Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 6, at 846-47.

54. *Id.* at 847.

55. See Koh, *Is International Law Really State Law?*, *supra* note 21, at 1834-35.

56. See *id.* at 1841.

57. THE FEDERALIST NO. 80, at 476 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

58. *Id.*

59. Koh, *Is International Law Really State Law?*, *supra* note 21, at 1829 (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964)).

60. See 376 U.S. 398 (1964).

61. See 487 U.S. 500 (1988).

62. Koh, *Is International Law Really State Law?* *supra* note 21, at 1834 (quoting *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988) (citation omitted)).

replaced, where necessary, by federal law of a content prescribed . . . by the courts—so-called ‘federal common law.’”<sup>63</sup>

Thus, in Koh’s view, when the political branches have not directly spoken to an issue of customary international law, the federal courts retain the authority to incorporate those rules into federal common law and use them as the basis for decision in federal cases.<sup>64</sup> This authority, he asserts, derives not only from a federal interest in foreign relations, but from the grant of power in the Constitution, Article 1 Section 8, to “define and punish”<sup>65</sup> breaches of international law, as well as from other constitutional grants and federal statutes.<sup>66</sup> Thus, federal courts may interpret rules of customary international law with the force of federal law, binding upon the states.<sup>67</sup>

#### IV. A NORMATIVE MODEL

##### A. Theoretical Underpinnings

This Note will attempt to fashion a compromise of sorts between the two positions summarized above on both the issue of the role of states in the integration of customary international law into U.S. law and the issue of the entity or entities properly authorized to bring about that integration. Before doing so, it will be helpful to examine and take sides in yet another international law debate—that of the monists versus the dualists. While at first seemingly removed from the current issue under examination, this latter debate is actually at the very heart of the question of the integration of customary international law into U.S. law, or into any nation’s law for that matter. It is a debate, the outcome of which is important in determining what role nations play in the international legal order now and in the future.

Monists believe that national law (domestic law) and international law are both part of the same legal system.<sup>68</sup> In one influential monist model, domestic law is seen as secondary in rank within that single system to international law, and indeed derives its validity from

63. Boyle, 487 U.S. at 504.

64. See Koh, *Is International Law Really State Law?*, *supra* note 22, at 1835.

65. U.S. CONST. Art. I, § 8, cl. 10.

66. See Koh, *Is International Law Really State Law?*, *supra* note 21, at 1835.

67. See *id.* at 1825, 1846.

68. See LOUIS HENKIN ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 141 (2d ed. 1987); Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 *VAND. L. REV.* 1103, 1106 n.7 (1990). See generally HANS KELSEN, *PRINCIPLES OF INTERNATIONAL LAW* 553-88 (Robert W. Tucker ed., 2d ed. 1966).

it.<sup>69</sup> Thus, international law is not subject to domestic law limitations, including those in national constitutions, but rather reaches into the domestic legal system even without formal enactment by national lawmaking bodies.<sup>70</sup> Under the monist conception of legal order, substantial control over fundamental areas of domestic law is transferred to international law and international law-making.<sup>71</sup>

Dualists, however, see domestic law and international law as two distinct legal systems, existing in two separate spheres of influence.<sup>72</sup> For there to be exchange between these two systems certain procedures must be followed. For international law rules to be used by domestic courts, the international laws in question must first be formally "transformed" into the domestic legal system by the proper domestic legal authorities.<sup>73</sup> This aspect carries with it the further effect that international law rules so transformed into domestic law are by that process made subject to constitutional constraints which are placed on any other domestic laws so enacted.<sup>74</sup>

As applied in world legal systems, these doctrines have been variously accepted and modified by nations and used as a basis for the integration of international law rules into their respective domestic legal systems.<sup>75</sup> As is readily apparent, determining which conception and what variation thereof should be accepted by a particular nation is vital to understanding how that nation should receive international law principles into its legal order.

This Note supports a variation of the dualist conception of world legal order. Doing so accepts and reinforces the sovereignty of the nations of the world as independent personalities which, though the makers of international law, retain independent sovereignty over their own domestic law. This conclusion also seems eminently more reasonable in light of the present evolutionary stage of world legal, political, social, and cultural divergence and the formidable barriers

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69. See Kelsen, *supra* note 68, at 553.

70. See *id.*

71. See *supra* notes 1-11 and accompanying text.

72. See HENKIN ET AL., *supra* note 68, at 140. See generally Jonathan Turley, *Dualistic Values in the Age of International Legisprudence*, 44 HASTINGS L.J. 185 (1993); J.G. Starke, *Monism and Dualism in the Theory of International Law*, 1936 BRIT. Y.B. INT'L L. 66; J.G. Collier, *Is International Law Really Part of the Law of England?*, 38 INT'L & COMP. L.Q. 924, 925 (1989) ("Dualism is associated with positivist theories and with the notion that States, not individuals, are the primary subjects of international law.").

73. See HENKIN ET AL., *supra* note 68, at 140.

74. See *id.*

75. See generally *id.* at 141-48.

presented thereby to a seamless, unified legal order encompassing all nations of the world.

It is important not to mistake such a position supporting a dualistic legal system for one that necessarily eschews or opposes international law generally. Rather, it is a position that seeks to provide a world legal structure in which the proper domain of international law is established and regulated by powers of national sovereignty and autonomy. These powers, while necessarily compromised to a degree by the very fact of an international legal system, should not be so compromised as to relinquish necessary national control over areas of domestic lawmaking most suited for and most fundamentally the interest of national political bodies.

Thus accepting as a premise the dualist conception of international law and the necessity of domestic procedures to bring international law principles into domestic law, it remains to be examined how these domestic procedures and authorities may be organized so as best to fit within the framework of this conception in the context of the integration of customary international law into U.S. law.

## B. The Role of the States

As to the issue of the role of the states in the integration of customary international law, this Note supports the preliminary position of Professor Koh that acceptance of customary international law rules is intrinsically tied to the foreign relations of the United States and should thus be treated exclusively as a question of federal law.<sup>76</sup> In support of this position, further evidence can be mustered of constitutional intent from its framers, such as the observation of John Jay that “under the national Government, treaties and articles of treaties, as well as the laws of nations, will always be expounded in one sense, and executed in the same manner—whereas adjudications on the same points and questions, in thirteen States . . . will not always accord or be consistent.”<sup>77</sup> Also compelling is James Madison’s admonition that “[i]f we are to be one nation in any respect, it clearly ought to be in respect to other nations.”<sup>78</sup> This support of the federalization of foreign relations matters is demonstrated further by Supreme Court jurisprudence establishing soundly that “[p]ower over external affairs is not shared by the [s]tates; it is vested in the national gov-

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76. See *supra* notes 60-62 and accompanying text.

77. THE FEDERALIST NO. 3, at 15 (John Jay) (Jacob E. Cooke ed., 1961).

78. THE FEDERALIST NO. 42, at 279 (James Madison) (Jacob E. Cooke ed., 1961).

ernment exclusively”<sup>79</sup> and that “[o]ur system of government is such that the interest of the cities, counties, and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference.”<sup>80</sup>

Questions of customary international law interpretation have enormous potential for raising issues of the relations of the United States with other nations. This potential has been demonstrated most poignantly by the concern, historically realized, of national responsibility rising out of state government interpretation and application of rules of international law.<sup>81</sup> Indeed, such potential was foreseen by Alexander Hamilton in Federalist No. 80:

[t]he union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts . . . is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned.<sup>82</sup>

An example of such a case of national responsibility potentially arising from erroneous state court ruling is the prosecution of Alexander McLeod, a Canadian citizen, in 1840 by the state of New York for murder and arson rising from his participation in the sinking of the steamer *Caroline*.<sup>83</sup> Great Britain contested the basis of his prosecution, asserting rules of international law protecting public officials acting in obedience of higher orders.<sup>84</sup> In connection with this case, some enlightening correspondence was carried out between Ameri-

79. *U.S. v. Pink*, 315 U.S. 203, 233 (1942).

80. *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941).

81. See *Draft Articles on State Responsibility: Report of the International Law Commission on the Work of its Forty-Eighth Session, 6 May-26 July 1996*, U.N. GAOR, 51st Sess., Supp. No. 10, art. 7(1), U.N. Doc. A/51/10/ (1996), reprinted in D.J. HARRIS, *CASES AND MATERIALS ON INTERNATIONAL LAW* 499 (5th ed. 1998) (stating that “[t]he conduct of an organ of a territorial governmental entity within a State shall also be considered as an act of that State under international law, provided that organ was acting in that capacity in the case in question”); Vienna Convention on the Law of Treaties, May 23, 1969, art. 27, 1155 U.N.T.S. 331, 339 (stating that “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”).

82. THE FEDERALIST NO. 80, at 536 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

83. See *People v. McLeod*, 25 Wend. 483 (N.Y. Sup. Ct., 1841); see generally David J. Bederman, *The Cautionary Tale of Alexander McLeod: Superior Orders and the American Writ of Habeas Corpus*, 41 EMORY L.J. 515 (1992).

84. See Bederman, *supra* note 83, at 518; Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 6, at n.56.

can and British officials. One such communication, written by Secretary of State Daniel Webster, maintained that although the U.S. government agreed with the British arguments pursuant to international law, the U.S. government had no power to intervene in the proceeding of a state criminal prosecution.<sup>85</sup> This denial of federal authority provoked a strong reaction from the British minister to Washington, who had earlier remarked

[w]ith the particulars of the internal compact which may exist between the several States which compose the Union, Foreign Powers have nothing to do; the Relations of Foreign Powers are with the aggregate Union . . . . Therefore when a Foreign Power has redress to demand for a wrong done to it by any State of the Union, it is to the Federal Government, and not the separate State, that such Power must look for redress for that wrong. And such Foreign Power cannot admit the plea that the separate State is an independent Body over which the Federal Government has no control.<sup>86</sup>

Although disclaiming the authority to correct a state court ruling, Webster nevertheless recognized U.S. responsibility for consequent violations of international law.<sup>87</sup> In a letter to Joshua Spencer, the U.S. District Attorney representing McLeod, Webster stated that

[t]he care of the foreign relations of this country is confided to the Government of the United States . . . and that government is responsible if anything occur, which it could prevent, furnishing just ground of complaint to other nations . . . . If the pacific relations now subsisting between the United States and England should be disturbed, by the proceedings in the case of McLeod, the consequences are to fall, not on New York alone, but on the whole union.<sup>88</sup>

Included in Webster's concerns of national responsibility for acts of a state breaching international law, in addition to fears of war, were surely well grounded fears of adverse effects to the fledgling U.S. economy resulting from trade sanctions or other economic countermeasures imposed by Great Britain, the economic superpower of the time, in response to such a violation.<sup>89</sup> In modern terms, the eco-

85. See Bederman, *supra* note 83, at 519-20.

86. Letter from Mr. Fox to Mr. Webster (March 12, 1841), in 1 THE PAPERS OF DANIEL WEBSTER, DIPLOMATIC PAPERS, 1841-1843, at 43 (Kenneth E. Shewmaker et al. eds., 1983).

87. See Letter from Mr. Webster to Mr. Spencer (August 6, 1841), in 1 THE PAPERS OF DANIEL WEBSTER, DIPLOMATIC PAPERS, 1841-1843, at 101 (Kenneth E. Shewmaker et al. eds., 1983); Letter from Mr. Webster to Mr. Fox (September 20, 1841), in 1 THE PAPERS OF DANIEL WEBSTER, DIPLOMATIC PAPERS, 1841-1843, at 145 (Kenneth E. Shewmaker et al. eds., 1983).

88. Letter from Mr. Webster to Mr. Spencer (August 6, 1841), *supra* note 87.

89. See generally Charles M. Wiltse, *Foreword* to 1 THE PAPERS OF DANIEL WEBSTER, DIPLOMATIC PAPERS, 1841-1843 (Kenneth E. Shewmaker et al. eds., 1983) at viii (discussing

nomie price for violations of international law attributable to national governments also includes sometimes significant monetary damages awarded in suits before international tribunals.<sup>90</sup>

Interestingly, the desire of the founding fathers to have federal government control over interpretations of international law is a point conceded by Bradley and Goldsmith.<sup>91</sup> They argue that even with state authority to interpret and apply customary international law rules in their jurisdictions, effective federal control over the process would remain.<sup>92</sup> They point to two constitutional powers granted the federal government: the authorization granted Congress and the President to incorporate customary international law into federal statutes and treaties, and Congress' power to make federal jurisdiction exclusive in areas to which federal subject matter jurisdiction attaches.<sup>93</sup>

However, while there is certainly a role for the federal political branches to play in controlling customary international law integration, as will be discussed later in this Note, without exclusive federal authority over this area of law an expectation of federal control rising from political branch legislative power is unrealistic. Limiting to federal court jurisdiction those areas of the law to which federal subject matter jurisdiction extends would not subsume all questions which might arise from a breach of customary international law and end up in the courts, and would therefore not provide this exclusivity. Consider, for example, that a case is brought against a state by resident parents of a youth convicted of murder, alleging that the state, in violation of a rule of customary international law forbidding the execution of children, is planning to execute their son pursuant to a properly enacted, arguably constitutional, state law. This case, being strictly between a state and its citizens, and presenting a question of state law, would nowhere arise under any area qualifying for subject matter jurisdiction in federal court. Thus, even if these subject matter areas were exclusive, it would not stop this case, or others like it, from

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Webster's interest in international trade and economic matters and his zealous efforts while Secretary of State to "extend and enlarge the international trade that constituted for him the sinews of national prosperity").

90. See John W. Smagula, *Redirecting Focus: Justifying the U.S. Embargo Against Cuba and Resolving the Stalemate*, 21 N.C. J. INT'L L. & COM. REG. 65, 89-90, n.224 (1995) (noting that compound interest is awardable as part of damage awards in some suits before international tribunals, specifically in cases of expropriation).

91. See Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 6, at 824-25.

92. See *id.* at 825-26.

93. See *id.*

being decided and, absent some other power of federal oversight and alteration of the state court decision, would allow the state supreme court the final say on a matter of customary international law interpretation.

The most prudent solution, and the most warranted historically and doctrinally, would thus seem to be exclusive federal control over the integration of customary international law into U.S. law. It is only through exclusive federal authority over this integration that the nation can, as it must, speak truly in one voice concerning these interpretations which, as demonstrated, have the potential for profound impact on U.S. foreign relations. Through such federal control, fears of national responsibility rising from erroneous state interpretations of international law can be ameliorated and the entity and its full constituency who will bear the burden of any such adverse decision will have more direct control over, and representation in, its handling.

Unless this authority is exclusive, there would, under any configuration of such state authority—even if subject to federal political branch supervision—rest a heavy onus of responsibility on the federal government to police the varying state court interpretations of customary international law.<sup>94</sup> This responsibility, in addition to being a costly use of scarce government resources, is in the end an unnecessary expenditure in a system with other safeguards of traditional state prerogatives. Such concerns, as voiced by Bradley and Goldsmith in support of the states' role in integration,<sup>95</sup> can be substantially eliminated in a system in which the federal political branches are the exclusive conduit of customary international law rules. It is this second issue in the current debate to which consideration now turns.

### C. Political Branch Control

The second prong of Koh's argument, namely that customary international law may be implemented or "transformed" into U.S. law by federal courts in the absence of a conflicting federal statute, is more problematic.<sup>96</sup> It does not follow that because customary international law integration should be treated exclusively as an aspect of federal law, therefore the federal courts should have power by federal common law to incorporate such principles into U.S. law in the ab-

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94. See Koh, *Is International Law Really State Law?*, *supra* note 21, at 1852.

95. See *supra* notes 52-53 and accompanying text.

96. See *supra* note 64 and accompanying text.



sence of political branch authorization. Conversely, sound arguments both in constitutional principle and policy oppose that logical leap.

Firstly, this argument disregards the fact that there is a constitutional system already in place expressly for the purpose of handling questions of the integration of international law into domestically enforceable U.S. law. The relevant sections are found, importantly, in Articles I and II—the articles addressing powers of the legislative and executive branches.<sup>97</sup> There is no relevant power spoken of in Article III.<sup>98</sup> In fact, cases arising under the “law of nations” are conspicuously absent from Section 2 of Article III, which lists those subject areas of law to which “the judicial power shall extend.”<sup>99</sup>

The constitutional system of integration includes references to both major sources of international law—treaties and customary international law.<sup>100</sup> Treaties and their integration into U.S. law are addressed in Article II, which provides that the President “shall have Power, by and with the advice and Consent of the Senate, to make treaties.”<sup>101</sup> Only after the political branches have so acted and have brought the principles embodied in the treaty into domestically enforceable U.S. law does the judiciary have the power, under Article III, to adjudicate cases arising under such treaty.<sup>102</sup>

Similarly, the issue of integration of customary international law is addressed in Article I, Section 8 of the Constitution with the following grant of power: “The Congress shall have Power . . . to define and punish . . . Offenses against the Law of Nations.”<sup>103</sup> Thus, the exclusive power not only to punish offenses against the law of nations (the ancestor in title of customary international law),<sup>104</sup> but also to *define* those offenses, or rather to give them birth as cognizable U.S.

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97. See U.S. CONST. arts. I-II.

98. See U.S. CONST. art. III.

99. U.S. CONST. art. III, § 2, cl. 2. See generally Arthur M. Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205, 1222-23 (1988) (arguing that the drafters of the Constitution intentionally did not include the law of nations within the “Laws of the United States”); Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 831-32 (1989).

100. See *supra* note 1 and accompanying text.

101. U.S. CONST. art. II, § 2, cl. 2.

102. See U.S. CONST. art. III, § 2, cl. 1 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . .”).

103. U.S. CONST. art. I, § 8.

104. See Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 6, at 819.

law, is expressly given to Congress.<sup>105</sup> Though this exclusivity has been challenged,<sup>106</sup> a textual reading of the Constitution itself seems to endow only the Congress with this right of definition, concurrent with its other lawmaking functions.<sup>107</sup> Similar to the system for treaties, only after Congress has defined those principles that will have the force and effect of U.S. law does the judiciary have the authority, under Article III, to adjudicate cases arising under such "Laws of the United States."<sup>108</sup> Thus, in the constitutional system, congressional enactment of the law of nations is to be treated no differently than any other congressional legislative act, having the same force, granting judicial competence to adjudicate, and embodying all other attributes and limitations of any other congressional legislation.

It is this feature of the constitutional system for integration of customary international law that should put to rest fears concerning the abrogation of state authority in areas of traditional state control. In the constitutional system, congressional enactments of customary international law carry with them the same limitations from elsewhere in the Constitution as do any other federal statutes. The most fundamental of these limitations, or protections of states' rights, is the doctrine of limited powers, or the inability of Congress to legislate outside the sphere of its constitutionally granted prerogatives<sup>109</sup>—a doctrine enforceable through judicial constitutional review.<sup>110</sup> Thus, in the constitutional system of integration of customary international law, Congress can do nothing by application of international law principles that it cannot do by any other legislation. Therefore, areas of traditional state control should remain as such, with no more federal interference in state law than has historically occurred.

105. See U.S. CONST. art. I, § 8, cl. 10. This power is, of course, exercised along with the Presidential power of veto in Article I, Section 7.

106. See Koh, *Is International Law Really State Law?*, *supra* note 21, at 1825.

107. See U.S. CONST. art. I, § 1 ("All Legislative Powers herein granted shall be vested in a Congress of the United States . . . ." (emphasis added)); see also *supra* note 98 concerning Presidential veto power.

108. U.S. CONST. art. III, § 2, cl. 1.

109. See THE FEDERALIST NO. 45, at 313 (James Madison) (Jacob E. Cooke ed., 1961) ("The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite."); see also Alfred Hill, *The Erie Doctrine in Bankruptcy*, 66 HARV. L. REV. 1013, 1033 (1953) ("If the Congress is powerless to intervene in areas which have been reserved to the states, so too are the federal courts. The constitutional doctrine of limited powers is applicable to both alike.");

110. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

This constitutional system for the proper integration of customary international law is not purely theoretical. There are multiple examples of Congress enacting several pieces of legislation punishing offenses against the law of nations, thereby making those offenses punishable under U.S. law.<sup>111</sup> These examples are strictly in following with the constitutional system of customary international law integration, in which international law principles do not become binding as U.S. law until they are transformed from the sphere of international law into national law. Further, it is important to note that, as Bradley and Goldsmith state, "Congress' selective incorporation would be largely superfluous if [customary international law] were already incorporated wholesale into federal common law, as advocates of the modern position suggest."<sup>112</sup>

Such political branch incorporation can and sometimes does leave some room for judicial discretion and interpretation. The Alien Tort Statute, for example, creates a cause of action in which the substantive applicable law is "the law of nations or a treaty of the United States."<sup>113</sup> However, such judicial discretion regarding applicable law is limited to those laws that would be civilly actionable "by an alien for a tort only."<sup>114</sup> Thus the area of customary international law or treaty law is significantly limited to only those situations meeting criteria of persons and type of action expressly delineated. An example of an even more specifically limited area of applicable law can be found in an early congressional act prohibiting "the crime of piracy as defined by the law of nations."<sup>115</sup> In these exemplary statutes, Congress, acting in its authority under Article I of the Constitution, is defining and making actionable "[o]ffenses against the Law of Nations"<sup>116</sup> while granting to the federal judges who must apply that law some discretionary leeway in determining and interpreting exactly which principles of treaty law or customary international law to apply. Given the recent proliferation of international human rights law and other international law principles that will potentially impact and be integrated into domestic law,<sup>117</sup> it would seem advisable for Congress

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111. See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 508 n.16 (2nd ed. 1996) (citing examples).

112. Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 6, at 857.

113. 28 U.S.C. § 1350 (1994).

114. *Id.*

115. 18 U.S.C. § 1651 (1994).

116. U.S. CONST. art. I, § 8.

117. See *supra* notes 5-10 and accompanying text.

to delineate and define with more clarity and detail than it has historically which principles it desires to be applicable in U.S. law.<sup>118</sup> However, the paradigm for political branch enactment of customary international law into U.S. law and the delegation of delineated authority, in varying degrees, to the federal courts who must apply it, has been set from the time of the nation's infancy.

Regarding the delegation of limited discretion to federal judges, perhaps a helpful analog to guide in the application of this principle could be found in principles of U.S. administrative law and the so-called "Chevron doctrine," arising from the highly influential case of *Chevron U.S.A. Inc. v. NRDC, Inc.*<sup>119</sup> *Chevron* announced a test for determining whether or not an executive agency is within its statutory grant of authority (contained in its enabling legislation) in creating and applying administrative regulation.<sup>120</sup> The two-step test first asks whether Congress has expressly spoken to the issue in dispute.<sup>121</sup> If Congress has not, then the second step allows the agency a limited amount of discretion in its rulemaking and application to which the court would give a degree of deference.<sup>122</sup> While analogous only to a degree in the case of statutory grants of authority for judicial application of customary international law, a similar system of examination could be employed in such cases whereby, absent prior congressional law on point, a federal court would be granted discretion within its statutorily established bounds (set by the specific statute under which the action is brought) to apply and interpret customary international law principles. The outer limits of this discretion could then be policed by appeal, as with any other question of law, as well as by ultimate reversal by legislation if it is deemed that the courts have abused their granted discretion. It is important to note that this system differs from the one espoused by Professor Koh in that such federal court discretion would be bounded by specific statutory grants of

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118. Perhaps the best example of a statute overly broad in its definition of an offense against the law of nations is the aforementioned Alien Tort Statute, which makes actionable claims by aliens for torts committed in breach of the law of nations, seemingly in its entirety, or a U.S. treaty. See 28 U.S.C. § 1350 (1994). Such a large scope of potentially applicable law seems overly broad and arguably not judicially manageable, in addition to giving the judiciary excessive discretion in deciding which principles of law to apply and in what form.

119. See 467 U.S. 837 (1984).

120. See ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* 466-71 (1993).

121. See *Chevron*, 467 U.S. at 842.

122. See *id.* at 843-44; AMAN, *supra* note 120.

authority and not exercisable at all in the case of a complete lack of statutory law on point.

Such a system would allow federal judges to exercise a degree of authorized discretion, and would facilitate customary international law integration through the political system by not requiring detailed specificity in legislation. By the same token, the system would make institutional allowance for the dynamic character of customary international law, as discussed below, and would permit a degree of evolution in the substantive rules of customary international law. The effect of this system would be to enhance significantly the ability of the U.S. legal system to incorporate and apply desirable principles of customary international law effectively, while retaining substantial control over which principles of customary international law to so incorporate in the political branches of the federal government—entities constitutionally endowed with such authority.<sup>123</sup>

Secondly, the logical extension from federal control over customary international law to its inclusion in federal common law is controverted by policy arguments focusing on the nature of customary international law itself. As previously noted, unlike treaties, which are contractual, written instruments, customary international law is a very dynamic source of international law.<sup>124</sup> It is “created” by the acts and intentions of States, and is thus in a relatively constant state of flux, with the continual possibility of change from a variety of sources.<sup>125</sup> Indeed, the very terms by which such acts and intents are analyzed, namely State practice and *opinio juris*, are definitionally unsure and often very difficult to apply.<sup>126</sup> Even when agreed on the definition of its terms, nations are not the final arbiters of what is or is not customary international law. The only means, absent codification by treaty, of concretely establishing rules of customary international law is by the rendering of an opinion in an adjudication before an international court.<sup>127</sup> Since adjudication of international disputes is

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123. See *supra* note 104 and accompanying text.

124. See *supra* notes 6-11 and accompanying text.

125. See *supra* note 2 and accompanying text.

126. See D.J. HARRIS, *CASES AND MATERIALS ON INTERNATIONAL LAW* 25, discussion note 2, 41 discussion note 4 (5th ed. 1998).

127. See *STATUTE OF THE INTERNATIONAL COURT OF JUSTICE* art. 38(i) (1945) (stating that the I.C.J., the judicial arm of the United Nations, “whose function is to decide in accordance with international law such disputes as are submitted to it,” is to apply, among other things, “international custom, as evidence of a general practice accepted as law.”). Thus the I.C.J. applies the elements of customary international law to see if it is indeed present in the facts presented to it, and then uses such divined rules as its basis of decision. It is only through

relatively rare,<sup>128</sup> many averred principles of customary international law have yet to be ruled upon by any such court. Customary international law rules thus suffer from ambiguity, as they often lack sure existence and are interpretively unclear in many instances.

In addition, customary international law rules have the characteristic of being one degree further removed from whatever validity there is to representative participation in lawmaking at the national level. Analysis of State practice and *opinio juris* gives no weight to expressed popular sentiment within a nation but focuses rather on the actions and intent of the nation's leaders.<sup>129</sup> While it may be maintained that these leaders, elected in many cases by the citizenry of a nation, do represent their interests, the representation in international fora by a very few of those elected (and more often appointed) officials constitutes a tenuous hold on principles of true representation of a nation's citizens.

Moreover, in the making of customary international law by these processes it is possible for a nation to become bound by rules of international law to which its representatives did not consent, or even tried to reject.<sup>130</sup> By no stretch of reasoning can such rules be maintained as representative of the citizens of that nation.

The process of creating customary international law, while representative on the international level as among States, is hardly so on the individual level. This fact becomes even more important when it is remembered that customary international law rules, with the evolution of the international law of human rights, have come to affect more and more the relationships between nations and their citizens and between individuals—subjects in which representation of the individual in lawmaking is of manifest importance.<sup>131</sup>

Customary international law being so ambiguous and unrepresentative, it is of fundamental importance that the political branches

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this process in such tribunals that rules of customary international law can be given concrete definition and force.

128. See HARRIS *supra* note 126, at 985 (“In international relations, most disputes are settled through negotiation between the parties or by third party assistance in the form of good offices, conciliation, or the conduct of fact finding-inquiries.”).

129. See *id.* at 25 n.2 (listing several forms of state practice, all consisting of official action).

130. Though it is possible in some cases for a state to object persistently to a rule of customary international law and thus not be subject to it, successful persistent objection is rare and can be a high standard in terms of required action for a State to meet. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. d (1987); David A. Colson, *How Persistent Must the Persistent Objector Be?*, 61 WASH. L. REV. 957, 967 (1986).

131. See *supra* note 11 and accompanying text.

of the federal government be the exclusive conduit of its integration into domestic law. First, for the sake of clarity of integrated customary international law rules, political branch enactment through statute would guarantee a relatively clear statement of such law as it applies to domestic contexts, or at least substantially limit and delineate which areas of customary international law are to be considered and under what circumstances they are to be applied in U.S. law. Such legislation would also provide guidance to the courts on how it should be interpreted. This procedure would simplify and clarify the force and effect of transformed international law principles and aid in proper enforcement by domestic authorities.

Second, exclusive political branch authority would allow decisions regarding which laws to adopt and in what form to rest substantially with duly elected, representative officials of the national citizenry and not with federal judges. Surely few will argue that there are no problems with the existing U.S. political system, or that the legislative process is not vulnerable, or even prone to corruption from various influences. However, whatever the faults of that system, it is decidedly more representative of the will of the majority of the nation's populace than are the views of unelected jurists whose very status as life-tenure judicial authorities is derived from a desire to make them politically insulated, un-answerable to the voice of the people in their decisions.<sup>132</sup> Such authorities are definitionally incompetent to act as lawmakers, representative of the best interests of the nation as expressed through the will of its citizens. Lawmaking generally, and especially in the case of laws which have such significant effects on the foreign relations of the nation as well as potential internal effects on fundamental relationships between citizens and government, should be the province of the representatives of the people as the principle of representation may be best realized.

Thus by both constitutional principle and policy, the authority of federal judges to interpret and apply principles of customary international law without prior legislative authorization is a doctrine which is imprudent at best and a threat to American principles of democracy at worst. Conversely, the exclusive authority of the federal political branches to transform and enact customary international law principles into domestic U.S. law is a doctrine sound in constitutional principle and one which has effects of clarity and the realization of repre-

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132. See Martin H. Redish, *Judicial Discipline, Judicial Independence, and the Constitution: A Textual and Structural Analysis*, 72 S. CAL. L. REV. 673, 685 (1999).

sentative democracy in its processes that are lacking in the judicial integration model.

#### D. Summary and Effects of the Normative Model

By way of summary, then, this Note supports the proposition by Professor Koh that customary international law integration into U.S. domestic law should be an area exclusively within the competence of the federal government. It also supports the position of Professors Bradley and Goldsmith that the federal political branches should be the sole conduit for customary international law integration at the federal level. The cumulative effect of these assertions is, therefore, to make the federal political branches the sole entities empowered to transform customary international law principles into U.S. domestic law.

This normative model, based on principle and fundamental doctrine, will have effects adverse to the wishes of some legal theorists, perhaps especially to the wishes and goals of some proponents of international human rights law. Admittedly, it will be more difficult to get some more revolutionary and sweeping human rights laws through Congress than it would be to have those same principles transformed into U.S. law through judicial decision.<sup>133</sup> It will also, for the same reason, limit the number of international law principles generally which have the force of law in the United States.

However, it is this very aspect of such a normative system which will provide other observers of international law and relations with some comfort and assurance that U.S. domestic laws will not be subverted by international actors with whom they share only some common interests—that domestic law will continue to be governed by national representation and values. Indeed, such concerns are at the heart of the dualist conception of world legal order. A fundamentally dualistic system, as the one proposed by this Note, allows for the making of international law and for its efficacious application in the international legal sphere, properly governing those entities which had a proper hand in making it—namely the nations of the world in their capacity as world citizens. However, the system also preserves

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133. This will of course depend on the court in which suit is brought. It is an unfortunate byproduct of judicial lawmaking that parties may, through forum shopping, pick those judges which they think most sympathetic to their views. Such forum shopping for sympathetic law-makers is substantially limited if the lawmaking must take place within the single body of Congress, theoretically representing proportionately the panoply of political positions within the United States.



to the individual nation the authority to take from the international sphere those laws which it feels, according to its expert understanding of its national values and goals, are best calculated to be in harmony with the same, and integrate them into its domestic law. This role of filter or instrument of discernment is best filled by the representative officials of the individual nations, and not through the osmotic process of seeping in through its courts.

On balance, such a dualist understanding and application of the role of national and international legal institutions has a more substantial foundation in the constitutional law of the United States.<sup>134</sup> The system incorporates fundamentally important positive effects in policy which make it, in the final analysis, a more prudent position for U.S. adoption, and one more beneficial to the interests of the United States and to the preservation of important aspects of its sovereignty now and in the future, than the judicial integration model.

#### IV. CONCLUSION

This Note has attempted to reach a constructive compromise between the positions advanced in the recent debate over customary international law integration into U.S. domestic law. By so doing, it has attempted to contribute, if modestly, to an area of law the effects of which are only beginning to be felt by the nations and peoples of the world. Indeed, it is an area the importance of which few in the world realize, but one which will increasingly affect their lives, and the lives of their posterity over the coming decades and centuries.

It is hoped that a greater awareness of the importance and evolution of customary international law, and international law and institutions generally, will lead to informed judgments as to the directions of that evolution, and that important principles of democratic government and national sovereignty are not left in its wake.

Daniel H. Joyner

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134. See generally Curtis A. Bradley, *Beard, Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529 (1999).