

THE CONSTITUTION AND UNITED STATES
SOVEREIGNTY: A CENTURY OF *CHINESE EXCLUSION*
AND ITS PROGENY

*Louis Henkin**

In an issue that reflects our penchant for periodic celebration and our habit of thinking decimally, it will doubtless be noted that the *Harvard Law Review* was born during the centenary of the United States Constitution and that — of course — the *Review's* hundredth birthday occurs as the nation celebrates the Constitution's bicentennial. Several will doubtless seize that coincidence to explore what one hundred years have wrought in constitutional jurisprudence. In this Essay I examine one neglected corner of that jurisprudence, marked out at the time the *Harvard Law Review* was born,¹ that builds on the international sovereignty of the United States and relates its law to international law (once known as the "law of nations").²

In the *Chinese Exclusion Case*,³ the Supreme Court of the United States enunciated two distinct but perhaps not unrelated doctrines. It held that Congress has the power to control immigration because such power, although not enumerated in the Constitution, is inherent in

* University Professor, Columbia University. The author was Book Review Editor of volume 53 of the *Harvard Law Review*.

¹ In the decade in which the *Harvard Law Review* began to appear, the Supreme Court decided, in addition to the cases that are the subject of this Essay, a number of issues deriving from, or reflecting, particular conceptions of the international sovereignty of the United States. The Court upheld, as an exercise of the power of Congress to define offenses against the law of nations, a statute that made it a crime to counterfeit foreign coin. See *United States v. Arjona*, 120 U.S. 479, 486–87 (1887). The Court determined that the United States could apply its criminal law to an act on a foreign vessel in a United States port if that act disturbed the peace of the port. See *Wildenhus's Case*, 120 U.S. 1, 18 (1887). The Court rejected challenges to a conviction of a person who had been brought to trial following abduction from a foreign country. See *Ker v. Illinois*, 119 U.S. 436, 444 (1886). The Court assumed that the Constitution applied to aliens as well as to citizens and held that the fourteenth amendment afforded aliens equal protection of the laws, see *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886), but it held that, whether for citizens or for aliens, "[t]he Constitution can have no operation in another country," *In re Ross*, 140 U.S. 453, 464 (1891).

With the exception of *Ross*, these cases continue to be good law today. The Court dismissed *Ross* thirty years ago as "a relic from a different era." *Reid v. Covert*, 354 U.S. 1, 12 (1957) (plurality opinion).

² In the eighteenth century, the "Law of Nations," U.S. CONST. art. I, § 8, included more than is now subsumed in "international law." At that time, the term covered principles of maritime and international commercial law and perhaps some rules applicable to international conflict of laws. In the intervening years, these subjects have largely become domestic matters governed by domestic law, except to the extent that they are the subject of international agreements. See, e.g., Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26, 26–27 (1952); Rheinstein, *The Constitutional Bases of Jurisdiction*, 22 U. CHI. L. REV. 775, 802–17 (1955).

³ 130 U.S. 581 (1889).

the sovereignty and nationhood of the United States.⁴ The Court also established that the Constitution does not bar Congress from enacting laws inconsistent with the international obligations of the United States and that the courts will give effect to an act of Congress inconsistent with provisions in an earlier treaty.⁵

One hundred years later, *Chinese Exclusion* is still very much with us. The Supreme Court has never reexamined the two doctrines for which the case stands, and it has shown no disposition to do so. Nor has the Court looked seriously at what it and other courts have built on and around those doctrines.⁶ Some courts have concluded that the power to regulate immigration is free from the constitutional constraints applicable to other federal powers. Others have concluded that Congress may act contrary to United States obligations imposed not only by international treaties but also by customary international law. And an appellate court has held — building on opaque dictum of the Supreme Court⁷ derived, I think, from *Chinese Exclusion* — that a court may not enjoin the President, and even some lesser executive officers, to act in accordance with international law.⁸

In these pages I revisit *Chinese Exclusion* and its progeny. First, I explore the constitutional jurisprudence that has come to surround the power to regulate immigration. I then examine the place of international law and treaties in constitutional jurisprudence and the relationship between international law and congressional, executive, and judicial power. I conclude with regret that courts are prepared to abdicate their responsibility to ensure that the executive act in conformity with international law.

I. IMMIGRATION, DEPORTATION, AND THE BILL OF RIGHTS

A. *The Unenumerated Federal Power Over Immigration*

The sovereignty of the United States was firmly established when the Constitution was adopted in 1789. For one hundred years, however, there was no suggestion that the international sovereignty of the United States implied powers for the federal government not enumerated in the Constitution. Neither the provision in the first section of the first article of the Constitution, that Congress was given only

⁴ See *id.* at 603-04.

⁵ See *id.* at 602.

⁶ The Court has rejected at least two opportunities to reexamine some derivations from *Chinese Exclusion*. See *infra* notes 43, 124.

⁷ See *The Paquete Habana*, 175 U.S. 677, 700 (1900), discussed at pp. 872-78 below.

⁸ See *Garcia-Mir v. Meese*, 788 F.2d 1446, 1453-55 (11th Cir.), *cert. denied*, 107 S. Ct. 289 (1986). This case is discussed at pp. 883-85 below.

the legislative powers "herein granted," nor the stricture of the tenth amendment that powers not delegated to the United States were reserved to the states or to the people hinted of any exceptions. The strongest proponents of federal authority sometimes endorsed "implied powers," but they dared not subscribe to the heresy that federal power might exist unsupported by constitutional language. In the halls of Congress and in the courts, any exercise of federal power, and any denial of power to the states, was supported by constitutional text or at least pretext. The alien and sedition laws, an especially pertinent example that a century later doubtless would have claimed constitutional support as being necessary to uphold national sovereignty and maintain national security, were justified at the time as being within the enumerated powers of Congress.⁹ That the federal government had unenumerated powers probably would not have been claimed, and surely would not have been accepted, before Union victory in the Civil War vanquished states' rights and established federal supremacy by constitutional amendments imposed as the peace treaty of the war.

Before the Civil War, except for the skirmishes over the alien and sedition acts at the turn of the eighteenth century, there was little occasion to probe the sources of federal power to control immigration and regulate aliens. Immigration to the United States was free and encouraged. Indeed, as late as 1868, Congress declared it a natural right of human beings to expatriate themselves, and the United States affirmed the rights of all to seek a new home.¹⁰ By 1875, however, unemployment, economic depression, and growing "nativism," racism, and xenophobia led to the promulgation of the first national immigra-

⁹ Most of the constitutional debates about the alien and sedition laws focused on whether they were barred by the first amendment. Questions with regard to the source of congressional power were marginal. One of the laws was described as supplementing the statute that established a uniform rule of naturalization. One was limited to alien enemies in time of war and therefore was supported by the war power. The laws contained references to treason, and the power of Congress to punish treason is clearly implied in the Constitution. The various acts were also seen as authorized by the necessary and proper clause, because their purpose was to protect the powers of the federal government. See generally J. SMITH, *FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES* 3-155 (1956).

¹⁰ An Act of Congress declared in 1868:

[T]he right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and . . . in . . . recognition of this principle this government has freely received emigrants from all nations, and invested them with the rights of citizenship

An Act concerning the Rights of American Citizens in foreign States, ch. 249, 15 Stat. 223 (1868). Similarly, the Burlingame Treaty of 1868 recognized "the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of . . . free migration and emigration . . . for purposes of curiosity, of trade, or as permanent residents." United States-China, art. V, 16 Stat. 739, 740, T.S. No. 48, at 3 (1868).

tion act¹¹ and then to a series of Chinese exclusion acts from 1882 to 1892.¹²

The power to regulate immigration is not among the enumerated powers of Congress. In the late nineteenth century, however, it was commonly accepted that regulating the immigration of free persons was plausibly a federal power, not one reserved to the states. In fact, at that time state and local spokesmen deplored the influx of Chinese immigrants and invited federal control.¹³ One therefore can understand the disposition of the Supreme Court to find a source for such federal power.

In the *Head Money Cases*¹⁴ of 1884, the Court held that such power lay within Congress's constitutional authority to regulate commerce with foreign nations.¹⁵ Immigration, however, did not fit comfortably within the commercial rubric. In those days at least, immigration largely was a matter of individual choice rather than of commerce with foreign nations; moreover, although the Constitution doubtless included in commerce the "importation of persons"¹⁶ — a euphemism for the slave trade — it was demeaning to lump the "huddled masses yearning to breathe free" together with coal and hides.¹⁷

¹¹ See An act supplementary to the acts in relation to immigration, ch. 141, 18 Stat. 477 (1875). That act excluded persons convicted of felonies (other than political offenses) and women imported for prostitution. See *id.* § 5, 18 Stat. at 477.

¹² See An act to execute certain treaty stipulations relating to Chinese, ch. 126, 22 Stat. 58 (1882); An act to amend an act entitled "An Act to execute certain treaty stipulations relating to Chinese," ch. 220, 23 Stat. 115 (1884); An act to supplement an act entitled "An act to execute certain treaty stipulations relating to Chinese," ch. 1064, 25 Stat. 504 (1888); An act to prohibit the coming of Chinese persons into the United States, ch. 60, 27 Stat. 25 (1892) [hereinafter Prohibition Act]. In 1862, Congress had legislated to ensure that immigration from China and other "Oriental" countries was voluntary on the part of immigrants. See An Act to prohibit the "Coolie Trade" by American Citizens in American Vessels, ch. 27, §§ 2158-2164, 12 Stat. 340 (1862) (codified at 8 U.S.C. §§ 332-334), repealed by Act of Oct. 20, 1974, Pub. L. No. 93-461, 88 Stat. 1387. The Chinese exclusion act of 1882 was the first congressional restriction on voluntary immigration. The 1892 act continued the "temporary suspension" of Chinese immigration and provided for deportation of Chinese aliens residing in the United States if they were present unlawfully or had failed to obtain a certificate of residence. See Prohibition Act, *supra*.

For a brief history of United States immigration policy, including the less-than-noble story of the treatment of Chinese aliens in the middle of the nineteenth century leading to the legislation at issue in the *Chinese Exclusion Case*, see T. ALEINIKOFF & D. MARTIN, IMMIGRATION PROCESS AND POLICY 1-81 (1985). Some of that story is also included in the opinion of Justice Field in the *Chinese Exclusion Case*, 130 U.S. 581, 593-99 (1889).

¹³ See T. ALEINIKOFF & D. MARTIN, *supra* note 12, at 3, 45.

¹⁴ 112 U.S. 580 (1884).

¹⁵ See *id.* at 600.

¹⁶ See U.S. CONST. art. 1, § 9.

¹⁷ Compare Justice Jackson's concurrence in *Edwards v. California*, 314 U.S. 160, 182 (1941), in which he expressed his reluctance to treat the interstate travel of human beings as interstate commerce.

The Court therefore sought other support for federal control over immigration. In *Chinese Exclusion*, Justice Field found this support in nationhood and sovereignty:

That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. . . .

. . . [T]he United States, in their relation to foreign countries and their subjects or citizens are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory. . . .

To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character or from vast hordes of its people crowding in upon us.¹⁸

There is no reason to resist Justice Field's suggestion that control over immigration is a right of every sovereign state and that it is inherent in state independence and sovereignty. It is not obvious, however, that in a federal state, particularly in our federal state, control of immigration is a power lodged in the federal government. All powers of government, all police powers, are inherent in nationhood, in sovereignty, but in our constitutional system most of them were not delegated to the federal government. The relation that Justice Field found between excluding Chinese laborers and preserving national security seems far-fetched; moreover, preserving national security is not to be found among the enumerated powers of Congress or of the federal government. Nevertheless, whether one proceeds from original intent or from commitment to "a living Constitution," immigration is plausibly a national problem requiring national solutions, and control over it is appropriately a federal power. Indeed, although basing this power in sovereignty was novel and in principle might have frightened many of the original framers as well as later guardians of states' rights,¹⁹ the conclusion that Congress had authority to regulate immigration was in fact accepted and has not been challenged.²⁰

¹⁸ 130 U.S. 581, 603-06 (1889).

¹⁹ In the late nineteenth century, state resistance to expanding federal power was directed elsewhere — at congressional civil rights acts, see *Civil Rights Cases*, 109 U.S. 3 (1883), and soon at Congress's novel uses of its interstate commerce power, see *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895).

²⁰ Apparently, at the time the *Chinese Exclusion Case* was decided, legal commentators were

A half-century later, the Supreme Court generalized and extended the *Chinese Exclusion* principle that sovereignty was a source of federal power. In order to justify an extensive delegation of authority by Congress to the President in foreign affairs, the Court set out to distinguish sharply between foreign and domestic affairs in constitutional jurisprudence. In *United States v. Curtiss-Wright Export Corp.*,²¹ Justice Sutherland expounded the doctrine that the powers of external sovereignty did not derive from the Constitution. These powers, he said, were lodged in the United States, rather than in the individual states, before the Constitution was adopted and remained there — and therefore in the federal government — under the Constitution.²² In the decades since *Curtiss-Wright*, the Court has found in that doctrine other powers such as the power to regulate the conduct of United States citizens in foreign countries.²³ The full reach of *Curtiss-Wright* has not yet been determined, and we do not know all the powers inherent in national sovereignty, but the power to control immigration surely is one of those powers.

B. Congressional Power Without Constitutional Limits

That Congress has a power to control immigration, a power not rooted in any provision of the Constitution, is no more radical a jurisprudential innovation than are some others we have assimilated during our constitutional history. However, the accretions to that doctrine — notably the notion that immigration controls are not subject to the constitutional limitations applicable to congressional acts generally — cry out for the sharpest criticism. Even in *Chinese Exclusion*, the Court did not say that the power to regulate immigration is immune from constitutional constraints. In that case, an alien had been lawfully admitted to the United States, had lived here peacefully, and then had left with the promise that he could return. The Court held that Congress could exclude him: it found that the determination of Congress was “conclusive upon the judiciary.”²⁴ Apparently, the alien claimed no constitutional rights, and the Court did not independently probe possible constitutional objections to his exclusion.

unperturbed by the idea that the federal government had an unenumerated power to exclude immigrants. The *Harvard Law Review* merely reported the holding of the case without comment. See 3 HARV. L. REV. 136 (1889).

²¹ 299 U.S. 304 (1936). For commentary on this case, see L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 19–28 (1972).

²² See 299 U.S. at 316–18.

²³ See, e.g., *Perez v. Brownell*, 356 U.S. 44, 57 (1958), overruled on other grounds, *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967).

²⁴ *The Chinese Exclusion Case*, 130 U.S. 581, 606 (1889).

It is possible that the *Chinese Exclusion* Court thought that the Constitution applied only in the United States and therefore could not protect someone who was outside the country's boundaries.²⁵ Perhaps the Court saw no applicable constitutional provision. The plausible candidate, the due process clause, had not yet begun to flower, and the right of return to the United States was not clearly a "liberty" or "property" that it might protect.²⁶ Perhaps, perceiving as it did a link between immigration and national security, the Court found that any constitutional right the individual might possess was outweighed by the public interest in exclusion.²⁷ Whatever the Court intended, both its holding and its sweeping dictum have been taken to mean that there are no constitutional limitations on the power of Congress to regulate immigration. Congress can determine whether to admit aliens, how many to admit, and whom to admit.

Four years later, the Court extended the holding of *Chinese Exclusion* to declare that Congress may expel aliens lawfully present in the United States. In *Fong Yue Ting v. United States*²⁸ the Court declared, "[t]he right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance"²⁹ Congress, then, can deport any alien or all aliens, for any reason or for no reason. Its power of deportation, like its power of exclusion, is "absolute and unqualified."

The *Chinese Exclusion* doctrine and its extensions have permitted, and perhaps encouraged, paranoia, xenophobia, and racism, particularly during periods of international tension. For several decades after

²⁵ It was only two years after *Chinese Exclusion* that the Court held that the Constitution did not apply outside the United States. See *In re Ross*, 140 U.S. 453, 464 (1891); see also *Fong Yue Ting v. United States*, 149 U.S. 698, 738 (1893) (Brewer, J., dissenting) (stating that "[t]he Constitution has no extraterritorial effect, and those who have not come lawfully within our territory cannot claim any protection from its provisions").

²⁶ Substantive limitations were found in the due process clause only once before the Civil War, in the *Dred Scott* case. See *Scott v. Sandford*, 60 U.S. (19 How.) 393, 452 (1857). The doctrine of substantive due process was in gestation at the time that *Chinese Exclusion* was decided. See *Mugler v. Kansas*, 123 U.S. 623, 660-63 (1887) (holding that a Kansas prohibition statute did not violate the due process clause). The Supreme Court invalidated a statute on due process grounds for the first time since *Dred Scott* in 1897. See *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897).

²⁷ "The power of exclusion of foreigners being an incident of sovereignty . . . , [that power] cannot be granted away or restrained on behalf of any one. . . . Nor can [the exercise of powers of Government] be hampered, when needed for the public good, by any considerations of private interest." *Chinese Exclusion*, 130 U.S. at 609.

²⁸ 149 U.S. 698 (1893). Several Justices dissented sharply in *Fong Yue Ting*. Among them was Justice Field, the author of the Court's opinion in *Chinese Exclusion*. See *Fong Yue Ting*, 149 U.S. at 744 (Field, J., dissenting).

²⁹ 149 U.S. at 707.

the Court decided *Chinese Exclusion*, Congress discriminated in admission of aliens on grounds that were unacceptable in other contexts. Under the euphemism of "national origins" quotas, immigration law admitted some aliens and excluded many others because of their race, religion, or ethnic origin.³⁰ In the decade following the second world war, as a result of the international tensions of the cold war and the fears that it generated, United States immigration authorities excluded aliens on the basis of the vaguest standards and undisclosed findings of fact. In 1950 the Supreme Court explicitly held that Congress need provide no particular procedures for determining whom to admit.³¹

Three cases, out of many, illustrate the baleful influence of the *Chinese Exclusion* doctrine. In *United States ex rel. Knauff v. Shaughnessy*,³² the Court upheld the exclusion, without a hearing, of the alien wife of a United States citizen whose admission the immigration authorities had found would be "prejudicial to the interests of the United States."³³ In *Shaughnessy v. United States ex rel. Mezei*,³⁴ the Court held that the immigration authorities could exclude a returning alien without a hearing and on the basis of undisclosed evidence,³⁵ and if the alien could not be deported because no country would receive him, he could be detained indefinitely.³⁶ In *Galvan v. Press*,³⁷ the Court upheld the power of Congress to deport an alien who had lived in the United States lawfully for thirty years, because he briefly had been a member of the Communist Party.³⁸

³⁰ The National Origins Act required that the number of immigrants of any nationality for fiscal years beginning after July 1, 1927, not exceed the number that would bear the same ratio to 150,000 as the number of inhabitants of that national origin in the United States in 1920. See Immigration Act of 1924, ch. 190, § 11(b), 43 Stat. 153, 159 (commonly known as the National Origins Act). The Act excluded from the category of inhabitants of the United States descendants of slave immigrants and American aborigines. See *id.* §11(d), 43 Stat. at 159.

³¹ "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950). "[I]t is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the government to exclude a given alien." *Id.* at 543; accord *Fong Yue Ting*, 149 U.S. at 713 (stating that if Congress saw fit to entrust the final determination of facts regarding the admissibility of an alien to an executive officer, his order was due process of law); *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892) (stating that "in such a case . . . in which a statute gives a discretionary power to an officer . . . no other tribunal . . . is at liberty to reexamine or controvert the sufficiency of the evidence on which he acted").

³² 338 U.S. 537 (1950).

³³ *Id.* at 540.

³⁴ 345 U.S. 206 (1953).

³⁵ See *id.* at 210-11.

³⁶ See *id.* at 215-16.

³⁷ 347 U.S. 522 (1954).

³⁸ See *id.* at 529-32. The Court earlier had upheld deportation in a similar case. See *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952). In both *Harisiades*, see 342 U.S. at 581, and *Galvan*, see 347 U.S. at 523, communist party membership was not a statutory ground for deportation during the time the alien was a member.

During the 1950s, when these cases were decided, the Supreme Court was expanding the scope of constitutional protections for the individual in almost every other context. In immigration, however, the Court apparently felt bound by the legacy of *Chinese Exclusion*:

In light of the expansion of the concept of substantive due process as a limitation upon all powers of Congress, even the war power, much could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens. . . .

But the slate is not clean.³⁹

More than three decades later, in new contexts, the offspring of *Chinese Exclusion* still reign to deny constitutional protection to many thousands of aliens against new indecencies.⁴⁰ Lower courts have refused to consider claims of discrimination based on race and national origin in the treatment of undocumented aliens physically present in the United States,⁴¹ despite the principles of equal protection now firmly incorporated in the due process clause of the fifth amendment.⁴² Relying on *Mezei*, which the Supreme Court has never reexamined,⁴³ courts have held that detaining thousands of undocumented Cubans for several years does not deprive them of liberty without due process of law.⁴⁴ A district court has condoned not only the seizure on the high seas by United States officers of persons believed to be coming unlawfully to this country from Haiti but also the forcible return of

³⁹ *Galvan*, 347 U.S. at 530-31 (citation omitted). The Court more recently applied the *Chinese Exclusion* doctrine in *Kleindienst v. Mandel*, 408 U.S. 753, 769-70 (1972), in which it declined to inquire into the Attorney General's "facially legitimate and bona fide" decision not to waive the statutory exclusion of an alien.

⁴⁰ By feats of creative interpretation, the Supreme Court has provided some safeguards for returning resident aliens. See *Rosenberg v. Fleuti*, 374 U.S. 449 (1963) (holding that the return from an afternoon trip to Mexico was not "entry" within the meaning of the Immigration Act); *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953) (holding that a regulation authorizing detention and exclusion without a hearing was not applicable to a returning resident alien); see also *Landon v. Plasencia*, 459 U.S. 21 (1982) (holding that a returning resident alien, unlike new arrivals, was entitled to due process in the exclusion hearing).

⁴¹ See, e.g., *Jean v. Nelson*, 727 F.2d 957, 978 & n.30 (11th Cir. 1984) (en banc), *aff'd*, 105 S. Ct. 2992, 2998 (1985) (without reaching the equal protection issue).

⁴² See *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

⁴³ Justices Marshall and Brennan have unsuccessfully urged the Court to reconsider *Mezei*. See *Jean v. Nelson*, 105 S. Ct. 2992, 3005-11 (1985) (Marshall, J., joined by Brennan, J., dissenting). The same Justices dissented from the Court's denial of certiorari in *Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir.), *cert. denied*, 107 S. Ct. 289 (1986).

⁴⁴ See the numerous proceedings leading up to *Fernandez-Roque v. Smith*, 734 F.2d 576 (11th Cir. 1984), and *Garcia-Mir*, 788 F.2d 1446. See, however, *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981), in which the court drew on constitutional and international law principles to limit the statutory authority to detain.

such persons to the country from which they fled.⁴⁵ Aliens argue in vain that deportation deprives them of life, liberty, or property without due process of law.

The doctrine that the Constitution neither limits governmental control over the admission of aliens nor secures the right of admitted aliens to reside here emerged in the oppressive shadow of a racist, nativist mood a hundred years ago. It was reaffirmed during our fearful, cold war, McCarthy days. It has no foundation in principle. It is a constitutional fossil, a remnant of a prerights jurisprudence that we have proudly rejected in other respects. Nothing in our Constitution, its theory, or history warrants exempting any exercise of governmental power from constitutional restraint. No such exemption is required or even warranted by the fact that the power to control immigration is unenumerated, inherent in sovereignty, and extraconstitutional.⁴⁶

As a blanket exemption of immigration laws from constitutional limitations, *Chinese Exclusion* is a "relic from a different era."⁴⁷ That era was one in which constitutional restraints were deemed inapplicable to actions by the United States outside its territory; when orotund generalities about sovereignty and national security were a substitute for significant scrutiny of governmental action impinging on individual rights; when the Bill of Rights had not yet become our national hallmark and the principal justification and preoccupation of judicial review. It was an era before United States commitment to international human rights; before enlightenment in and out of the United States brought an end both to official racial discrimination at home and to national-origins immigration laws; before important freedoms were recognized as preferred, inviting strict scrutiny if they were

⁴⁵ See *Haitian Refugee Center v. Gracey*, 600 F. Supp. 1396 (D.D.C. 1985), *aff'd on other grounds*, No. 85-5258 (D.C. Cir. Jan. 9, 1987). The district court rejected a number of arguments including a claim of deprivation of liberty without due process of law. See *id.* at 1405.

⁴⁶ In 1957 Justice Black stated:

The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. . . .

. . . .
The language of Art. III, §2 manifests that constitutional protections for the individual were designed to restrict the United States Government when it acts outside of this country, as well as here at home.

Reid v. Covert, 354 U.S. 1, 5-7 (1957) (footnotes omitted). Applying *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), twenty years after it was decided, the Court said:

Broad as the power in the National Government to regulate foreign affairs must necessarily be, it is not without limitation. The restrictions confining Congress in the exercise of any of the powers expressly delegated to it in the Constitution apply with equal vigor when that body seeks to regulate our relations with other nations.

Perez v. Brownell, 356 U.S. 44, 58 (1958).

⁴⁷ The Court in *Reid*, 354 U.S. at 12, used this phrase to reject *In re Ross*, 140 U.S. 453 (1891).

invaded and requiring a compelling public interest to uphold their invasion. Since that era, the Supreme Court has held that the Bill of Rights applies to foreign as well as to domestic affairs, in war as well as in peace, to aliens as well as to citizens, abroad as well as at home. The Court has left only immigration and deportation outside the reach of fundamental constitutional protections.

The power of Congress to control immigration and to regulate alienage and naturalization is plenary. But even plenary power is subject to constitutional restraints. I cannot believe that the Court would hold today that the Constitution permits either exclusion on racial or religious grounds⁴⁸ or deportation of persons lawfully admitted who have resided peacefully here. I do not believe that the Constitution permits indefinite detention of persons for no reason other than that our government wishes not to admit them and cannot deport them because no other country will take them or that it wishes to mistreat them in order to discourage others from coming here.

Chinese Exclusion — its very name is an embarrassment — must go.

II. INTERNATIONAL LAW IN UNITED STATES LAW

Chinese Exclusion confirmed another doctrine and in so doing established the place of treaties in our constitutional jurisprudence. The petitioner in *Chinese Exclusion* was excluded pursuant to an act of Congress that conflicted with prior treaties between the United States and China. The Court acknowledged that “[i]t must be conceded that the act of 1888 is in contravention of express stipulations of the treaty of 1868 and of the supplemental treaty of 1880.”⁴⁹ Nevertheless, the Court held, the act was “not on that account invalid or to be restricted in its enforcement.”⁵⁰

The Court thus confirmed, for the third time in four years,⁵¹ that the courts will give effect to an act of Congress that is inconsistent with a prior treaty. A dozen years later, in opaque dictum in *The Paquete Habana*,⁵² the Court apparently extended this principle, without explanation or justification, from treaties to customary interna-

⁴⁸ One need not debate whether aliens abroad have constitutional rights; the United States government is subject to constitutional restraints wherever it acts. See *Reid*, 354 U.S. at 5-6, 7, quoted *supra* note 46. See generally Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY L. REV. 11 (1985).

⁴⁹ *The Chinese Exclusion Case*, 130 U.S. 581, 600 (1889).

⁵⁰ *Id.* at 600.

⁵¹ The Court's previous decisions to that effect were in *Head Money Cases*, 112 U.S. 580 (1884), and *Whitney v. Robertson*, 124 U.S. 190 (1888), which are discussed at pp. 870-72 below.

⁵² 175 U.S. 677, 700 (1900).

tional law.⁵³ That dictum has led to the recent assertion that not only Congress but also the President and lesser executive officials may disregard a treaty or a rule of international law. In 1986, the Court of Appeals for the Eleventh Circuit held that an action taken on the authority of the Attorney General, even if in a violation of international law, was binding on the courts.⁵⁴

A. Monism and Dualism

Issues arising out of the relation between international and domestic law have been with us from our national beginnings. Most of them have not been authoritatively resolved. Understanding the issues requires some theoretical exegesis and historical exploration of the relation between international law and the law of the United States.

The jurisprudence of international law has produced a division between schools commonly identified as "monist" and "dualist."⁵⁵ Monists view international and domestic law as together constituting a single legal system.⁵⁶ Each country's legislature is bound to respect international law in enacting its legislation. The national executive is obliged to take care that international law be faithfully executed. Domestic courts must give effect to international law, anything in the domestic constitution or laws to the contrary notwithstanding.

By contrast, dualists view international law as a discrete legal system. International law is law for nations and creates rights and obligations among them; it operates wholly on an inter-nation plane. A nation-state is responsible to other nation-states for carrying out its obligations to them. But each state determines for itself by what means and in what forms it will carry out its obligations. When a state's international obligation relates to persons, things, or interests inside its borders, carrying out the obligation effectively may require changes in domestic law. The state may make such changes by enacting domestic legislation; or it may incorporate international law into its domestic law and give effect to it as to other domestic law.

⁵³ See *infra* pp. 872-78, 883.

⁵⁴ See *Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir.), *cert. denied*, 107 S. Ct. 289 (1986). In that case, the culmination of a long series of proceedings, the two strands of *Chinese Exclusion* came together. The district court held and the appellate court confirmed that indefinite detention of undocumented aliens is not unconstitutional, because persons not lawfully admitted have no constitutional rights with respect to matters related to their admission. The courts, while accepting that detention violates international law, refused to enjoin the detention in this case, because it had been effected under the authority of the Attorney General. See *id.* at 1453-54.

⁵⁵ See, e.g., Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, 92 RECUEIL DES COURS 5, 70-85 (1957); Starke, *Monism and Dualism in the Theory of International Law*, 1936 BRIT. Y.B. INT'L L. 66. See generally 1 L. OPPENHEIM, INTERNATIONAL LAW 35-44 (H. Lauterpacht 8th ed. 1955).

⁵⁶ For one school of monists, international law is supreme, superior to the constitution and other domestic law. See Starke, *supra* note 55, at 69.

In the latter event, domestic law will also prescribe the place of international law in the domestic legal hierarchy. It will, for example, dictate whether international law is subject to constitutional limitations and whether it is equal, superior, or inferior in authority to strictly domestic law when the two conflict. For the dualist, these determinations reflect domestic constitutional arrangements and are of no concern to international law as long as international obligations are met.

A dualist state, then, will assign to various institutions of government responsibility for ensuring respect for international law, but it need not make any particular allocation of that responsibility. It may incorporate international law into its legal system, but it need not do so. It may determine that, as a matter of domestic constitutional jurisprudence, the legislature may not enact laws inconsistent with the country's international obligations, but it need not do so. It may require that domestic courts give effect to international law even in the face of inconsistent legislation or executive action, but it need not do so. Failure to incorporate international law into the domestic legal system, failure to make it binding on particular institutions including the legislature and the courts, or failure to make international law supreme may make it difficult and sometimes impossible for the state to carry out its international obligations, but ordinarily the failure to establish any particular hierarchical relation between international and domestic law for internal purposes is not itself a violation of international obligation. Internationally, the state is liable to others only for any resulting failure to meet its obligations under treaty or international law.

Few if any nations are either strictly monist or strictly dualist. In Great Britain, for example, although international law has long been accepted as part of the law of England and applied as such by the courts,⁵⁷ Parliament is supreme: the courts give effect to an act of Parliament even if it is inconsistent with Britain's obligations under international law.⁵⁸ Treaties are made under the authority of the Crown and are international acts rather than laws of the realm, and treaty obligations are enforced in court only as they are enacted or implemented by Parliament.⁵⁹ The American colonies, which derived their legal systems from England, similarly "incorporated" customary international law: because that law was part of the law of England, it also became part of the law of the colonies. After the colonies

⁵⁷ See *Triquet v. Bath*, 3 Burr. 1478, 1481, 97 Eng. Rep. 936, 938 (K.B. 1764); 4 W. BLACKSTONE, COMMENTARIES *67.

⁵⁸ See *The Walsingham Packet*, 2 C. Rob. 77 (H. Ct. Adm. 1799), reprinted in 165 Eng. Rep. 244 (1980); *Mortensen v. Peters*, 8 Sess. Cas. (J.) 93 (H.C.J. 1906).

⁵⁹ See C. PICCIOTTO, THE RELATION OF INTERNATIONAL LAW TO THE LAW OF ENGLAND AND OF THE UNITED STATES OF AMERICA 62-64, 75 (1915).

achieved independence, the United States continued to treat customary international law as domestic law to be applied by the courts;⁶⁰ unlike England, however, the United States also established that treaties are the law of the land.

B. *The Constitution and International Law*

When the Constitution was adopted, this country clearly constituted one state for international purposes⁶¹ and as such had status, rights, and obligations under international law.⁶² The Constitution neither notes that fact nor addresses all of its implications; it assumes them. It gives Congress the power to define and punish offenses against the law of nations,⁶³ and it gives the federal government (the President and Senate), not the states, the authority to make treaties.⁶⁴ Treaties, under the Constitution, are "the supreme Law of the Land," binding on the states, and federal courts have jurisdiction over cases and controversies arising under them.⁶⁵

⁶⁰ At least five different theories have been suggested to explain how international law became part of the law of the United States. See Sprout, *Theories as to the Applicability of International Law in the Federal Courts of the United States*, 26 AM. J. INT'L L. 280 (1932).

⁶¹ The prevailing view is that for international purposes the United States was a single sovereign state from 1776. See *United States v. Maine*, 420 U.S. 515, 520-21 (1975); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316 (1936); Morris, *The Forging of the Union Reconsidered: A Historical Refutation of State Sovereignty Over Seabeds*, 74 COLUM. L. REV. 1056 (1974). For my purposes it does not matter whether between 1776 and 1789 we were thirteen nations or one nation with thirteen parts; all were bound by international law. Either the individual state governments or the Continental Congress (representing "the United States") were responsible internationally. There being no federal or confederated judiciary, only state courts were available to decide questions of international law. See, e.g., *Republica v. De Longchamps*, 1 Dall. 111 (Pa. 1784).

⁶² "[T]he United States," wrote the first Chief Justice, John Jay, "had, by taking a place among the nations of the earth, become amenable to the laws of nations . . ." *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793). "When the *United States* declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement." *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 281 (1796) (Wilson, J.) (emphasis in original). See RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) [hereinafter RESTATEMENT], pt. I, ch. 2, introductory note (Tent. Draft No. 6, 1985).

⁶³ See U.S. CONST. art. I, § 8, cl. 10.

⁶⁴ See *id.* art. I, § 10; art. II, § 2, cl. 2.

⁶⁵ *Id.* art. VI, cl. 2; art. III, § 2, cl. 1. Essentially, article VI establishes two principles with respect to treaties: first, treaties are law of the land without requiring an act of Congress to make them so (unlike their status in England, see *supra* p. 865); second, as part of the supreme law of the United States, treaties take precedence over state law.

Although the Constitution declares that treaties — presumably all treaties — are the law of the land, in 1829 the Court distinguished between what came to be known as self-executing and non-self-executing treaties. See *Foster & Elam v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829). The Court did not declare, however, that non-self-executing treaties are not law of the land; it stated only that if a treaty contains a promise by the United States to do something that only the political branches can do, then by hypothesis the courts cannot give effect to that treaty. The courts can and will, however, give effect to such a treaty after the political branches have

The Constitution, then, explicitly addresses the place of treaties in our jurisprudence. It says little, however, about customary international law. It does not declare expressly whether, and if so how, customary international law is part of our law;⁶⁶ it says nothing about how such law relates to the Constitution and to our political institutions; whether customary international law is federal or state law; whether it is supreme over state law; or whether the federal courts have jurisdiction over cases or controversies arising under international law. The Constitution expressly establishes neither the relation of treaties and customary law to each other nor that of either to the Constitution or to laws enacted by Congress. It provides no explicit direction to the courts as to what law should govern a case involving an act of Congress or an action of the President that is inconsistent with a provision in a treaty or with a principle of international law. Nor does it expressly declare that the President is obligated to respect treaties or customary law and to take care that they be faithfully executed.

For decades after the Constitution was established, these constitutional silences did not prove troubling.⁶⁷ The Constitution did not

acted or if the United States effectively fulfilled the promised act before the treaty was concluded. *See id.* at 315. Also, nothing in the *Foster & Elam* Court's statement suggests that such a treaty is not law in some other sense for other purposes. In fact, as an obligation of the United States, the treaty is law for the political branches, a binding obligation for the political branch that had the duty and the authority to carry it out on behalf of the United States. As national policy, it is law for the states and their governors, legislatures, and courts. And, where national public policy is relevant, it is law for all courts.

⁶⁶ At least one commentator has suggested, however, that the "defining offenses" clause of the Constitution evidences an implicit acceptance and incorporation of international law into domestic law. *See* W. WILLOUGHBY, *THE FUNDAMENTAL CONCEPTS OF PUBLIC LAW* 295 (1924); *cf.* Sprout, *supra* note 60, at 282 (arguing that the framers of the Constitution intended to grant the judiciary the authority "to apply rules drawn from international law, as they would municipal law," but noting that few courts have embraced the concept of the Constitution as implicitly incorporating international law "*en bloc*").

⁶⁷ The Supreme Court appears not to have considered possible conflict between international law or treaty and the Constitution at this time even as a hypothetical question. Although several times during the late eighteenth and early nineteenth centuries the Court upheld the supremacy of treaties over state law, *see* *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816); *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1813); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796), conflict and questions of "hierarchy" between international law or United States treaties and the Constitution or laws of the United States apparently did not arise. Nor was the Court asked to compel the executive to respect international law or a treaty obligation.

Early statements by Chief Justice Marshall can be read as suggesting the supremacy of an act of Congress over treaties or principles of customary international law. *See, e.g.,* *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815) ("Till such an act [of Congress] be passed, the Court is bound by the law of nations which is a part of the law of the land."); *see also* *Brown v. United States*, 12 U.S. (8 Cranch) 110, 128 (1814) ("The rule [of international law permitting seizure of enemy property], like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign; and although it cannot be disregarded by him without obloquy, yet it may be disregarded."); *Murray v. Schooner Charming Betsy*, 6 U.S. (2

address the status of the law of nations; thus, nothing in it clearly rejected the preconstitutional jurisprudence.⁶⁸ International law had been part of the law of the colonies; it was now part of the law of the United States. All — notably the courts — assumed that nothing needed to be done to make it so.⁶⁹ The federal government and the state governments were bound to respect international law. Although the Constitution did not indicate a predominantly monist disposition, early United States courts and legislators regarded customary international law and treaty obligations as part of the domestic legal system. International law *was* domestic law.⁷⁰

Cranch) 64, 118 (1804) (“[A]n act of congress ought never to be construed to violate the law of nations if any other possible construction remains . . .”). Read in isolation, these statements may support an assumption of congressional supremacy over international law; in context, however, none constitutes a general assertion to that effect. For example, in *The Nereide*, the Court was referring to a congressional act designed to retaliate against an alleged violation of a treaty by another party — an act that presumably would be permissible under international law. In *Brown*, the Court was supporting the authority of a state, as a matter of policy, to refrain from doing what international law might permit it to do. Other evidence from the nineteenth century suggests the supremacy of treaties over acts of Congress. See THE FEDERALIST No. 64, at 394 (J. Jay) (C. Rossiter ed. 1961) (“The proposed Constitution, therefore, has not in the least extended the obligation of treaties. They are just as binding and just as far beyond the lawful reach of legislative acts now as they will be at any future period, or under any form of government.”). For citation of authority to that effect, see L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 412 n.115 (1972).

⁶⁸ See *infra* note 67.

⁶⁹ Because neither the Constitution nor any act of Congress addressed the matter, international law remained, as before the Constitution, part of the “common law,” and state courts and federal courts gave it effect. Until *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), state and federal courts determined international law for themselves as part of the common law. See RESTATEMENT, *supra* note 62, § 131, reporters’ note 3; Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1558 (1984). A determination of international law by a state court was not reviewable by the Supreme Court of the United States. See *Oliver American Trading Co. v. Mexico*, 264 U.S. 440 (1924); *New York Life Ins. Co. v. Hendren*, 92 U.S. 286 (1876). But see *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793) (Jay, C.J.); THE FEDERALIST, *supra* note 67, No. 3, at 43 (J. Jay); *id.* No. 80, at 476 (A. Hamilton). Concerning the concept of international law as common law, see Dickinson, cited in note 2 above, at 34–46 and pp. 876–77 below.

⁷⁰ Pursuant to article I, section 8 of the Constitution, Congress defined some offenses against the law of nations, not because the law of nations was not itself law of the land but because Congress wished to define offenses and to establish penalties for them. The Court early established that nothing could be punished as a federal crime except pursuant to statute. See *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812). On the other hand, Congress apparently accepted the law of nations as part of the law of the United States when, without defining any tort, it gave the federal courts jurisdiction over civil actions “where an alien sues for a tort only in violation of the law of nations.” Act of Sept. 24, 1789, ch. 20, 1 Stat. 73, 77 (current version at 28 U.S.C. § 1350 (1982)). For an interpretation and application of this statute, see *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), and *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

The states, under their common law, punished some offenses against the law of nations without defining them. See, e.g., *Respublica v. DeLongchamps*, 1 Dall. 111 (Pa. 1784). And

The Supreme Court has never considered the place of customary international law in the framework of the United States Constitution. The Court has addressed only the place of treaties and that only in part. Moreover, it has done so not in the light of some general conception of our legal system as monist, dualist, or some variation of either — a conception that might also apply to other questions about treaties and to international law generally — but rather on the basis of general constitutional principle and of a particular construction of the supremacy clause. In 1957, writing a plurality opinion in *Reid v. Covert*,⁷¹ Justice Black established the supremacy of the Constitution over treaties. He wrote that “no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.”⁷²

The Court has yet to declare that the Constitution is also supreme over the law of nations and principles of customary law. Arguably, the fact that treaties are subject to constitutional limitations does not conclude the issue with respect to customary law. Customary law is general law binding on all nations, and no country should be able to derogate from it because of that country’s particular constitutional dispositions. The law of nations antedated the Constitution, and the framers evinced no disposition to subordinate that law to the new Constitution.⁷³ Nevertheless, it is unlikely that the Court would sub-

state courts of appropriate jurisdiction were, and presumably still are, open to suits in tort for violations of international law.

⁷¹ 354 U.S. 1 (1957).

⁷² *Id.* at 16. Compare the Constitution of the Netherlands, which is discussed in note 78 below.

Earlier, in famous dictum, Justice Holmes had seemed to read the language of the supremacy clause as establishing that treaties are the law of the land even if they are not “in pursuance of” (that is, consistent with) the Constitution. Justice Holmes stated:

Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention.

Missouri v. Holland, 252 U.S. 416, 433 (1920).

Justice Black explained that the framers had avoided using the phrase “in pursuance of” in relation to treaties because they also had wished to declare supreme treaties that were made prior to the adoption of the Constitution. A principal purpose of the supremacy clause was to ensure state acceptance of the peace treaties that concluded the Revolutionary War. *See Reid*, 354 U.S. at 16–17.

As of 1986, the Supreme Court had yet to hold any treaty provision to be in violation of the Constitution. In 1978, the executive branch, in seeking consent to ratification of the International Covenant on Civil and Political Rights, found it necessary to propose a reservation to a treaty provision on constitutional grounds. *See Message from the President of the United States, Four Treaties Pertaining to Human Rights xi–xii*, Sen., 95th Cong., 2d Sess. (Feb. 23, 1978) (President’s Letter of Submittal).

⁷³ The treaty makers — the President and the Senate — are subject to constitutional limitations. *See Reid*, 354 U.S. at 17 (“The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive

ordinate the Constitution to the law of nations and give effect to a principle of international law without regard to constitutional constraints. The Court's jurisprudence about treaties inevitably reflects assumptions about the relation between international and United States law and, at least by implication, places the United States outside the strict monist camp. Thus we can assume that, like treaties, customary international law is inferior to the United States Constitution in the hierarchy of our domestic law.⁷⁴

C. Statutes and Treaties

The Court established the relation between statutes and treaties one hundred years ago. In three cases in the 1880s, the last of which was *Chinese Exclusion*, the Court declared that courts must give effect to an act of Congress that is inconsistent with a prior treaty obligation of the United States.⁷⁵ On the first occasion, in the *Head Money Cases*,⁷⁶ the Court stated:

The Constitution gives [a treaty] no superiority over an Act of Congress Nor is there anything, in its essential character or in the branches of the government by which the treaty is made, which gives it this superior sanctity.

A treaty is made by the President and the Senate. Statutes are made by the President, the Senate and the House of Representatives. . . . If there be any difference in this regard, it would seem to be in favor of an Act in which all three of the bodies participate.⁷⁷

Head Money held that a statute would be given effect even if it conflicted with an earlier treaty. The language quoted above might be construed as hinting that statutes also have supremacy over treaties generally, that an act of Congress would prevail over a treaty even if the treaty were later. The Court apparently perceived both treaties and statutes strictly as forms of legislation. It did not regard the treaty

or by the Executive and the Senate combined." The law of nations became United States law without any particular action by the political branches. See *infra* p. 874. Compare the Constitution of the Netherlands, which directs the courts to give effect to a treaty even if inconsistent with the Constitution. See *infra* note 78.

⁷⁴ The traditional law of nations in fact has raised no constitutional issues. Only one early case appears to have involved such issues. See *In re Dillon*, 7 F. Cas. 710 (C.C.N.D. Cal. 1854) (No. 3914).

⁷⁵ The progenitor of this doctrinal development was Justice Curtis's circuit court opinion in *Taylor v. Morton*, 23 F. Cas. 784 (C.C.D. Mass. 1855) (No. 13,799), *aff'd*, 67 U.S. (2 Black) 481 (1862). In *Taylor*, Justice Curtis essentially assumed the dualist position, stressing the prerogative of the United States not to carry out its international obligations. See *id.* at 785. The Supreme Court cited Justice Curtis's opinion with approval in both the *Head Money Cases*, 112 U.S. 580, 597-98 (1884), and the *Chinese Exclusion Case*, 130 U.S. 581, 602 (1889).

⁷⁶ 112 U.S. 580 (1884).

⁷⁷ *Id.* at 599.

as an international act, a source of independent international obligation for the United States. The Court's argument, comparing the branches of government involved in making treaties with those in the legislative process, is unconvincing. The question is not how many or which branches are involved; rather, the issue is the constitutional status of the two instruments. Although the Court asserted that nothing "in its essential character" gives a treaty "superior sanctity," treaties may indeed have superior sanctity because of their essential character as international obligations, a principal that other systems of law have accepted.⁷⁸ Unlike an act of Congress, under the law of nations a treaty is binding on the United States and therefore on all branches of the government. Neither the text nor the history of the Constitution suggests that the framers intended that Congress have authority to disregard the international obligations of the United States.

Four years after deciding *Head Money*, the Court redefined its dualist approach to treaties and placed it on different grounds. In *Whitney v. Robertson*,⁷⁹ the Court declared:

By the Constitution a Treaty is placed on the same footing, and made of like obligation, with an Act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. . . . [I]f the two are inconsistent, the one last in date will control the other, provided always the stipulation of the Treaty on the subject is self executing.⁸⁰

As in *Head Money*, the Court in *Whitney* failed to explore the relation of the law of nations, and of treaties that depend on that law, to the constitutional system. The Court merely adopted a particular — and unpersuasive — reading of the supremacy clause. The supremacy clause does not address the hierarchy of various forms of federal law; it only declares the supremacy of every kind of federal law over state law. That each kind of federal law is supreme over state law does not at all suggest that the different kinds of federal law are of equal stature. (Three and two are both supreme over one, but three does not equal two). In fact, our jurisprudence clearly negates the notion that all forms of federal law are of equal stature; although the supremacy clause lists the Constitution, laws, and treaties

⁷⁸ The Constitution that the Netherlands adopted in 1983 provides that "[s]tatutory regulations in force within the Kingdom shall not be applicable if . . . in conflict with provisions of treaties that are binding on all persons." STATUUT NED. art. 94 (Neth.). That Constitution further establishes that "provisions of a treaty that conflict with th[is] Constitution . . . may be approved," *id.* art. 91, § 3, and that "[t]he courts shall not be competent to pronounce on the constitutionality of [treaties]," *id.* art. 60. Similarly, the Constitution of France provides that duly ratified treaties "have an authority superior to that of laws." CONST. tit. VI, art. 55 (Fr.).

⁷⁹ 124 U.S. 190 (1888).

⁸⁰ *Id.* at 194.

all as law of the land and supreme to state law, in our jurisprudence the Constitution prevails over other federal law.

Whereas in *Head Money* the Court may have hinted at the supremacy of acts of Congress, in *Whitney* it established the equality of statutes and treaties. One year later, in *Chinese Exclusion*, the Court reaffirmed the *Whitney* doctrine.⁸¹ Since then, the courts have accepted the equality of statutes and treaties as an established principle. Usually they apply it to give effect to a later act of Congress inconsistent with an earlier treaty;⁸² less frequently they apply it to give effect to a later treaty inconsistent with an earlier act of Congress.⁸³

Although in my view the constitutional foundations of the "equality" doctrine are not sturdy, the consequences of that doctrine have not been disastrous. Application of the principle has not seriously troubled United States foreign relations, nor has it disturbed the balance of power between the treaty makers and the law makers. After the notorious instance of the Chinese exclusion acts, Congress has only infrequently disregarded treaty obligations, and courts have striven to interpret statutes to avoid inconsistency with treaty obligations.⁸⁴

D. Statutes and Customary International Law

A dozen years after *Chinese Exclusion*, the Court confronted a case involving the status of customary international law in United States law: *The Paquete Habana*.⁸⁵ During the Spanish American War, the United States Navy seized fishing vessels belonging to private Spanish citizens and condemned them as prize of war. In *The Paquete Habana*, the owners of those vessels challenged the seizure and sought

⁸¹ See 130 U.S. 581, 600, 602-03 (1889).

⁸² In addition to the three cases discussed here, see, for example, *Moser v. United States*, 341 U.S. 41 (1951), and *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616 (1870). Although in exercising its powers under the Constitution Congress may disregard the international treaty obligations of the United States, it cannot repudiate or "repeal" a treaty. The treaty remains in effect and binding on the United States, but the President and the courts will not enforce it as long as the act of Congress is in effect. Similarly, the President and Senate — the treaty makers — cannot repeal an act of Congress, but the executive and the courts will give effect to a treaty notwithstanding a prior inconsistent congressional act. See cases cited *infra* note 83.

⁸³ See, e.g., *Cook v. United States*, 288 U.S. 102, 118-19 (1933); *Vorhees v. Fischer & Krecke*, 697 F.2d 574 (4th Cir. 1983); *In re Fotochrome, Inc.*, 377 F. Supp. 26 (E.D.N.Y. 1974), *aff'd sub nom. Fotochrome, Inc. v. Copal Co.*, 517 F.2d 512 (2d Cir. 1975).

⁸⁴ The courts have followed Chief Justice Marshall's admonition that "an act of congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). The Court in *Whitney* reiterated this prescription, stating that "[w]hen [a treaty and an act of Congress] relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either." 124 U.S. 190, 194. Today such guidelines are an established principle of construction. See RESTATEMENT, *supra* note 62, § 134.

⁸⁵ 175 U.S. 677 (1900).

recovery of the ships, asserting that under international law private fishing vessels, even if belonging to enemy aliens, were not subject to seizure as war prize. The Supreme Court examined the state of international law, found that it indeed exempted such fishing vessels from seizure, and ordered that the proceeds of the sale of these vessels be paid to the original owners.⁸⁶

In supporting its conclusion, the Court made two oft-quoted statements:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations⁸⁷

And a few pages later:

This rule of international law is one which prize courts administering the law of nations are bound to take judicial notice of, and to give effect to, in the absence of any treaty or other public act of their own government in relation to the matter.⁸⁸

The statement that international law is law of the land was essential to support the judgment. The qualifying clause "where there is no treaty and no controlling executive or legislative act or judicial decision" was dictum: neither party in the case claimed that there was any relevant treaty,⁸⁹ any "controlling executive or legislative act or judicial decision," or any "other public act of their own government" requiring a different result. In the eighty-seven years since *The Paquete Habana*, the Court repeatedly has emphasized that international law is the law of the land, and it has given effect to principles of customary international law as the law of the United States.⁹⁰ Until

⁸⁶ See *id.* at 686, 708-09, 714.

⁸⁷ *Id.* at 700.

⁸⁸ *Id.* at 708.

⁸⁹ One can readily accept part of the dictum: that, for purposes of United States law, a valid treaty supersedes a principle of customary law. Except for the rare preemptory principle (*ius cogens*), see Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, arts. 53, 64, *reprinted in* UNITED NATIONS CONFERENCE ON THE LAW OF TREATIES: OFFICIAL RECORDS 287, 296-97 (U.N. 1971); RESTATEMENT, *supra* note 62, § 331(2) & comments e-f, international law recognizes the right of nations to modify principles of customary law by treaty *inter se*. See *id.* § 102 comment j & reporters' note 4. International law itself, then, gives effect to a treaty that conflicts with an earlier principle of customary law, and a United States court, considering both the treaty and the principle of customary law to be law of the United States, would also give effect to the treaty.

⁹⁰ See, e.g., *First Nat'l City Bank v. Banco Para el Comercio Exterior*, 462 U.S. 611, 623 (1983); *Banco Nacional v. Sabbatino*, 376 U.S. 398, 423 (1964); *Skiriotes v. Florida*, 313 U.S. 69, 72-73 (1941); *Berizzi Bros. Co. v. S.S. Pesaro*, 271 U.S. 562 (1926). The Court had, in

1986, however, apparently no court relied on the dictum of *The Paquete Habana* to subordinate customary international law to a "controlling" public act,⁹¹ and neither the Supreme Court nor any other court has purported to justify or explain that dictum.⁹²

The indication in *The Paquete Habana* that courts will subordinate customary international law to "a controlling legislative act" seems to be an extension of the *Chinese Exclusion* doctrine to customary law. But the Supreme Court has not justified such an application. The reasons provided in *Head Money*, *Whitney*, and *Chinese Exclusion* for subordinating a prior treaty — reasons that to me are unpersuasive even with respect to treaties⁹³ — are inapposite with respect to customary international law. The *Head Money* Court suggested that the number of branches of government that contribute to the formation of a particular type of law might determine the place of that law in

fact, asserted the principle prior to *The Paquete Habana*, in, for example, *The Nereide*, 13 U.S. (9 Cranch) 388, 418-21 (1815). For a famous recent case applying the Court's principle that international law is the law of the United States, see *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980).

⁹¹ In *Garcia-Mir v. Meese*, 788 F.2d 1446, 1453-54 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 289 (1986), discussed at pp. 883-85 below, the Eleventh Circuit appears to have revived *The Paquete Habana* dictum. *But cf.* *Tag v. Rogers*, 267 F.2d 664 (D.C. Cir. 1959), *cert. denied*, 362 U.S. 904 (1960) (stating that courts must accept the latest policy of Congress even if it is contrary to international law or treaty); *The Over the Top*, 5 F.2d 838, 842 (D. Conn. 1925) (stating that international law, like all common or statutory law, bends to the will of the Congress). *Tag* is discussed at note 121 below.

⁹² It may be significant that *The Paquete Habana* Court was sitting as a prize court. A prize court applies the international rules of war but does so as a domestic, not an international, tribunal. And long before 1900, the law of prize in time of war, like maritime and admiralty law with which it was associated, was becoming increasingly domesticated. What had once been seen as part of the law of nations had become domestic law — in contemporary terms, private rather than public international law. If so, it was wholly appropriate for the Court to indicate that prize courts apply general principles of law — maritime or prize — but that those principles were subject to modification by statute or treaty and perhaps also by some act that the President could take under his own constitutional authority or by some new determination of maritime law made by the courts. The *Paquete Habana* dictum tracks closely the statement by Justice Gray a few years earlier: "International law . . . is part of our law, and must be ascertained and administered by the courts of justice, as often as such questions are . . . duly submitted to their determination." *Hilton v. Guyot*, 159 U.S. 113, 163 (1895). In that case, the Court explicitly applied that principle to international law "in its widest and most comprehensive sense," including not only "the law of nations" but also questions under "private international law, or the conflict of laws." *Id.*

Since 1900, the scope of the law of nations for constitutional purposes has been narrowed as well as sharpened. Principles of admiralty law and principles of conflicts of law, denominated private international law by European and some other legal systems, are not ipso facto binding international law, although some of their principles have been the subject of treaties, and a few have become principles of customary public international law by state practice and acceptance as law. In light of this speculation, nothing the Court said in *The Paquete Habana* applied then, or necessarily applies now, to customary public international law.

⁹³ See *supra* pp. 870-72.

our legal hierarchy. But much international law existed before the United States became a nation, and new customary law is made not by the United States alone but by the practice of many nations, with the United States contribution to that process being diffuse and including a myriad of activities by all parts of the government. The Court's reasoning in *Whitney* and in *Chinese Exclusion* that the supremacy clause grants equal status to treaties and congressional acts is equally inapposite: the supremacy clause does not mention customary international law; thus, the Court could not infer that it is equal to other forms of law listed therein. If customary international law is to be subordinated to a "controlling" public act, such subordination must be justified on grounds that have yet to be articulated by the Supreme Court.

Some indeed would construe the *The Paquete Habana* dictum as asserting that customary international law is not equal but rather is inferior to federal law.⁹⁴ They argue that unlike treaties, which the Court has held to be equal to acts of Congress, customary international law is subject to "repeal" by subsequent acts of Congress; indeed, it cannot be given effect in the face of even an earlier act of Congress. For support, this view relies on repeated references in legal literature to customary law as "common law"⁹⁵ which, it is argued, is inherently inferior to legislation.

I think that this argument is misconceived. International law as part of the law of the United States indeed is frequently described as common law but only because of a tendency to define all law that is not legislative in origin as common law. Supporting this definition of international law is an historical perception of our common law as the vehicle for incorporating international law, first, into the law of

⁹⁴ See, e.g., Goldklang, *Back on Board the Paquete Habana: Resolving the Conflict Between Statutes and Customary International Law*, 25 VA. J. INT'L L. 143, 148 n.26, 151 (1984); see also Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 727-31 (1986) (arguing that customary international law, unlike treaties, should be regarded as inferior to statutory law); Comment, *The Outward Limit of the Department of Interior's Authority over Submerged Lands — The Effect of Customary International Law on the Outer Continental Shelf Lands Act*, 60 WASH. L. REV. 673, 685-95 (1985) (same).

⁹⁵ References to international law as common law or part of the common law abound. See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 810-11 (D.C. Cir. 1984) (Bork, J., concurring); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 556 (1856) (McLean, J.); *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133, 161 (1795) (Iredell, J.); 4 W. BLACKSTONE, *supra* note 57, at 66-67; 1 J. MOORE, *DIGEST OF INTERNATIONAL LAW* 10-11 (1906) (quoting Alexander Hamilton); Glennon, *Can the President Do No Wrong?*, 80 AM. J. INT'L L. 923, 925-26 (1986); see also *Oliver American Trading Co. v. Mexico*, 264 U.S. 440, 442-43 (1924) (referring to customary international law as principles of "general law"); *New York Life Ins. Co. v. Hendren*, 92 U.S. 286, 286-87 (1876) (same). See generally Dickinson, *supra* note 2; Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM. J. INT'L L. 740 (1939); Sprout, *supra* note 51, at 282-85.

the colonies (by way of England), and second, into the law of the states.⁹⁶ The Supreme Court, however, eliminated this historic confusion of international with common law when it recognized in 1964 that international law is not state but federal law.⁹⁷

Of course, customary international law resembles common law: both are United States law that has not been enacted by Congress, and neither appears in a formal act or instrument. And when relevant to a judicial proceeding, international law is determined by the court, not by construction of an authoritative text. For the purposes that are relevant here, however, international law differs from the common law in important respects.⁹⁸ First, international law is the law of an international political system, not solely of the United States. Although courts in the United States sometimes apply international law to decide domestic cases, the principal applications of that law are in the international arena. Second, however one views the role of the courts in relation to the common law, courts do not *create* but rather find international law, generally by examining the practices and attitudes of foreign states. Even the practices and attitudes of the United States that contribute to international law do not emanate from and respond to life in this society, as does the common law. Rather, they are external, relating to other nations, to persons, things, acts, and events outside the United States.

Above all, the reasons that the common law bows to legislation are inapplicable to international law. Common law is "inferior" to legislation because, under prevailing theories of government — parliamentary supremacy in England, republican democratic principles here — the legislature is the principal lawmaking body; the courts, if they are to make law at all, do so only temporarily and interstitially. But when courts determine international law, they do not act as surrogates for the national legislature. Indeed, the legislature's role in determining international law is marginal,⁹⁹ whereas determining international law, for purposes of adjudication in a decentralized, international system, is inherently the role of domestic courts.

⁹⁶ See cases cited *supra* note 95; Dickinson, *supra* note 2, at 33-34; Sprout, *supra* note 60, at 282-85.

⁹⁷ See *Banco Nacional v. Sabatino*, 376 U.S. 398, 425 (1964); RESTATEMENT, *supra* note 62, § 131(1)-(2) comment d & reporters' note 3. See generally Henkin, *supra* note 69, at 1555-61.

⁹⁸ The differences between international and common law were also recognized, for other purposes, in *Tel-Oren*, 726 F.2d at 811 (Bork, J., concurring).

⁹⁹ Congress, of course, must determine international law if it is to "define . . . [o]ffenses" against it. U.S. CONST. art. I, § 8. See *supra* note 70. Sometimes it refrains from determining international law even for that purpose and instead incorporates such law by reference. See, for example, the act of Congress punishing "piracy, as defined by the law of nations." Act of Mar. 3, 1819, ch. 77, 3 Stat. 510, 513-14 (1819) (codified as amended at 18 U.S.C. § 1651 (1982)). This statute was upheld in *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820).

The relationship between international and United States law, then, cannot be determined by declaring international law to be common law and therefore inferior to legislation. It has to be determined by reference to some principle that would locate the United States on the monist-dualist spectrum. In fact, one could advance persuasive arguments that customary international law supersedes any United States law and should be given effect even when it conflicts with a subsequent act of Congress. The law of nations, including both treaties and customary international law, is binding on the United States. The framers of the Constitution respected the law of nations, and it is plausible that they expected the political branches as well as the courts to give effect to that law.¹⁰⁰ Other countries have accepted the supremacy of international law: their courts give effect to international law over domestic legislation.¹⁰¹ Our legal system subordinates treaties to subsequent congressional acts, because the Court has determined that the supremacy clause imposes that hierarchy. But no similar textual basis exists for subordinating customary international law. Customary international law is universal and lasting and has better claim to supremacy than do treaties, which govern only the parties and can be readily terminated or replaced by those parties.

Despite these arguments, it is unlikely that the Supreme Court will now distinguish customary international law from treaties and declare the former supreme over federal statutory law. I see no basis, however — either in principle, in text, in history, or in contemporary practice — for interpreting *The Paquete Habana* dictum as meaning that customary international law has a status lower than that of treaties. Both treaties and customary law are law of the United States because

¹⁰⁰ See *supra* note 62; see also Dickinson, *supra* note 2, at 36–38 (citing the framers' suggestions that review of infractions of international law be delegated to "a national judiciary").

¹⁰¹ The constitutions of both the Federal Republic of Germany and of Greece declare the general rules of international law to be an integral part of domestic law. In Greece, international law "shall prevail over any contrary provision of [Greek domestic] law," SYNTAGMA DES HELLADOS (Constitution) art. 28 (Greece); in Germany, international law "shall take precedence over the laws and create rights and duties," GRUNDGESETZ [GG] art. 25 (W. Ger.). Italy's Constitution declares that "Italy's legal system conforms with the generally recognized principles of international law," COSTITUZIONE [COST.] art. 10 (Italy), and has been construed as giving precedence to international law over domestic legislation, see Cassese, *Modern Constitutions and International Law*, 192 RECUEIL DES COURS 331, 370–73 (1985–III). Compare the practice of some countries of according treaties superiority over their statutes or constitutions. See *supra* note 78.

In some countries, for example England, international law has bowed to acts of Parliament because the courts, committed to dualism, see fit to extend the constitutional doctrine of parliamentary supremacy to apply to international law. See *Mortensen v. Peters*, 8 Sess. Cas. (J.) 93 (H.C.J. 1906). In the United States, however, there is no such doctrine of supremacy. The Constitution expressly rejects legislative supremacy, see U.S. CONST. art. VI (stating that only laws pursuant to the Constitution are law of the land), as does the Bill of Rights, see U.S. CONST. amend. 1 ("Congress shall make no law respecting an establishment of religion . . .").

they constitute binding international obligations of the United States.¹⁰² Like treaties, customary law has now been declared to be United States law within the meaning of both article III and the supremacy clause.¹⁰³ If an act of Congress can modify customary law for domestic purposes, it is not because customary law is like federal common law but rather because, like treaties, customary law is equal in status to legislation, and the more recent of the two governs.¹⁰⁴

This statement of the status of customary international law is not inconsistent with the dictum in *The Paquete Habana*.¹⁰⁵ In 1900, when the Supreme Court decided that case, it apparently was prepared to extend *Chinese Exclusion* to treat customary law and treaties alike, to declare customary international law equal in status to concurrent acts of Congress. *The Paquete Habana* dictum means, or should mean, that a principle of customary international law will not govern if a “controlling” — that is, a subsequent — act of Congress conflicts with its mandate.¹⁰⁶

E. Presidential Authority and International Law

The *Paquete Habana* dictum also includes a reference to presidential authority in relation to international law. The Court said that domestic courts will apply international law in the absence of a “controlling executive act.”¹⁰⁷ The Court pointed to no constitutional provision granting the President the power to derogate from extant principles of international law. Nor did it suggest *why* the courts should not apply international law in the presence of a “controlling” presidential act, nor did it indicate which presidential acts are con-

¹⁰² Treaties derive their international status from a principle of customary law, *pacta sunt servanda* (agreements are to be kept). Although the law of treaties has now been codified by the Vienna Convention on the Law of Treaties, cited in note 89 above, some nations — including the United States — have not yet ratified it. They accept the convention’s provisions generally as codifications of customary law. See RESTATEMENT, *supra* note 62, introductory note to pt. III.

¹⁰³ See RESTATEMENT, *supra* note 62, § 131 comments d–e & reporters’ notes 2–4. I believe that the Court would have held treaties to be federal law, supreme over state law, even without mention in the supremacy clause. The Court has accepted the supremacy of customary international law over state law, although customary law is not explicitly mentioned in the supremacy clause. See *supra* p. 876. Because we have agreed to view treaties and statutes as on the same plane, no persuasive argument exists for not putting customary law on that plane as well.

¹⁰⁴ The recently revised *Restatement* states that “[w]hether a rule of customary international law that developed after, and is inconsistent with, an earlier statute or international agreement of the United States should be given effect as the law of the United States, has . . . not been authoritatively determined.” RESTATEMENT, *supra* note 62, § 135 comment d. In regard to the law of the sea, the United States has accepted principles of customary international law that modify both earlier treaties and United States statutes. See *id.*

¹⁰⁵ See *supra* p. 873.

¹⁰⁶ I would also so interpret Justice Marshall’s statements quoted at note 67 above.

¹⁰⁷ *The Paquete Habana*, 175 U.S. 677, 700 (1900).

trolling for this purpose. *The Paquete Habana* dictum is opaque and ambiguous, but if it is sound, it must reflect a coherent conception of the place of international law in the hierarchy of United States law and, in particular, of the President's powers and duties in relation to international law.

Like the reference to acts of Congress, *The Paquete Habana's* reference to presidential power no doubt reflects the dualist spirit of *Chinese Exclusion*. It may also reflect the Court's desire to preserve the "prerogative" of the United States to violate international law, a power affirmed by the Court in *Chinese Exclusion*.¹⁰⁸ If so, the reference to acts of Congress and to controlling acts of the President represents an assertion of that prerogative; it implies that Congress and the President maintain constitutional authority, in some cases, to act without regard to the nation's obligations under customary international law as well as under treaties. I have indicated that, if we grant equal status to international law and United States statutes in our jurisprudence, it should follow that a constitutional act of Congress supersedes prior conflicting international law. But surely the principle that international law has status equal to that of an act of Congress does not give the President authority to violate international law. If the suggestion that an executive act may supersede international law is valid, it must have special justification, and it must be carefully defined.

Unlike Congress, the President has no general authority to make law that might compete with international law as law of the United States. The President's duty is to "take Care that the Laws be faithfully executed,"¹⁰⁹ a duty that applies to international law as well as to other law of the land. With respect to a treaty, however, this duty ceases if the treaty is superseded as law of the United States by later law. That, we have seen, is the effect of a later statute. In addition, the President can, with the consent of the Senate, make a subsequent treaty that would be later law; by so doing, he replaces his duty to execute the earlier treaty with a duty to execute the later one. The President also has constitutional authority — as sole organ or as commander-in-chief — that may imply some power to make law on his own authority, by executive agreement or executive order;¹¹⁰ that law, too, may supersede an earlier treaty.¹¹¹ The courts probably

¹⁰⁸ See *supra* p. 863.

¹⁰⁹ U.S. CONST. art. II, § 3.

¹¹⁰ See *United States v. Pink*, 315 U.S. 203, 229 (1942) (emphasizing the status of the President's agreements as law of the land); *United States v. Belmont*, 301 U.S. 324, 330 (1937) (affirming the power of the President as "sole organ" to negotiate an "international compact"); see also *Dames & Moore v. Regan*, 453 U.S. 654, 679-83; 686-88 (1981) (upholding the President's power to settle private claims against foreign governments when Congress had long acquiesced in the President's exercise of such power).

¹¹¹ In addition to his expressed powers to make treaties and appoint and receive ambassadors,

would give effect, for example, to a presidential "suggestion" that they deny sovereign or diplomatic immunity, even in the face of a treaty granting such immunity.¹¹² The courts also might well give effect to a presidential agreement incidental to recognizing a foreign state or government, or an agreement within the President's power as commander-in-chief, even if such an agreement is inconsistent with a treaty obligation of the United States.

In foreign affairs, the President's special constitutional powers also give him authority not to execute certain international obligations of the United States. Consistent with the Constitution, the President may void a treaty that is voidable by the United States¹¹³ and may terminate a treaty that permits termination by the United States.¹¹⁴ In addition, if another party has breached a treaty in essential respects, the President can suspend or terminate it for the United States.¹¹⁵

The President's role in respect of treaties results in an important anomaly. As long as a treaty binds the United States, the President must take care that the treaty be faithfully executed. If, however, the President as sole organ voids or terminates a treaty, he renders it no longer law of the land and terminates his duty to execute it.

This power of the President to escape his duty to execute international treaty obligations has no parallel where customary interna-

and the powers that may be implied in his authority as commander-in-chief, *see* U.S. CONST. art. II, § 2, the President has asserted powers derived from his "Executive Power," *id.* art. II, § 1, and his role as "the sole organ of the nation in its external relations," *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (quoting 10 ANNALS, 6th Cong., 1st Sess., col. 613 (Mar. 7, 1800) (statement of Rep. John Marshall)). *See generally* L. HENKIN, *supra* note 21, at 44-65.

¹¹² *Cf.* *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35-36 (1945) (giving effect to an executive suggestion of sovereign immunity); *Ex parte Republic of Peru*, 318 U.S. 578, 588 (1943) (giving effect to an executive denial of immunity). *See generally* L. HENKIN, *supra* note 21, at 56-65.

¹¹³ *See* RESTATEMENT, *supra* note 62, § 339 comment a & reporters' note 1. A treaty is not — or it ceases to be — a binding international instrument for the United States under any of several circumstances: if under the international law of treaties it is void; if it is voidable by either party, and either party has voided it; if it is subject to termination by either the United States or the other party, and the treaty has been terminated; if either party denounces or repudiates the treaty, or if either party breaches it in an essential respect, and the aggrieved party elects to regard the treaty as broken. Under any of these circumstances, the treaty ceases to impose any legal obligations on the United States. *See generally* The Vienna Convention on the Law of Treaties, *supra* note 89, arts. 48-53, at 295-96; RESTATEMENT, *supra* note 62, §§ 331-336.

¹¹⁴ *See* RESTATEMENT, *supra* note 62, § 339; *see also* *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir.) (upholding the President's power to terminate a defense treaty with the Taiwan regime), *vacated on other grounds*, 444 U.S. 996 (1979).

¹¹⁵ *See* *Charlton v. Kelly*, 229 U.S. 447, 473-75 (1913); *cf.* *The Nereide*, 13 U.S. (9 Cranch) 388, 422-23 (1815) (stating that whether the United States should retaliate for a violation of international law is a political rather than a judicial decision).

tional law is concerned. A treaty may be void, or voidable, may be denounced or repudiated; but no principle of international law is void¹¹⁶ or voidable, and a nation cannot denounce or repudiate a principle of international law. A country sometimes may be warranted in refusing to carry out a customary obligation to another country when that country is in default on the same or another international obligation.¹¹⁷ But by so doing, it does not terminate the international principle under which that obligation arose. The United States, if it violates a principle of international law, still retains that principle as law of the land, and the President remains bound to execute it in the future. Only new international law or a new treaty will repeal, or modify, a principle of customary law¹¹⁸ or terminate its status as law of the United States and relieve the President of his duty to take care that it be faithfully executed.

If, however, our dualist conception is extended to sever from domestic law not only treaties but also customary international law, the President may have authority to derogate from customary principles in limited circumstances. Those who assume, as *The Paquete Habana* Court apparently did,¹¹⁹ that Congress can create domestic law that will supersede not only prior treaties but also existing principles of customary international law, may be disposed to afford the President some parallel power: that is, the President as sole organ or as commander-in-chief may take some actions, by executive agreement or by executive order, that have legislative effect in the United States and supersede conflicting principles of customary international law.¹²⁰

Some would extend our dualist conception even further than *The Paquete Habana* Court apparently did. It has been suggested that the President has the power to disregard a rule of customary international law or a treaty even when it has not been terminated or superseded by other law.¹²¹ According to this view, the prerogative of the United

¹¹⁶ A principle of customary law presumably would have no validity if it were inconsistent with another principle of international law that had the quality of *jus cogens*. See *supra* note 89.

¹¹⁷ See RESTATEMENT, *supra* note 62, § 905.

¹¹⁸ See *id.* §102 comments j, k.

¹¹⁹ As is perhaps implied in the *Paquete Habana* dictum, if Congress enacts a statute inconsistent with a principle of international law, the President and the courts are required to give effect to the later act of Congress. See *supra* p. 878.

¹²⁰ See *supra* pp. 879-80. Analogously, the President and Senate together can make a treaty that, as between the United States and the other party, supersedes a principle of international law and therefore supersedes that principle as law of the United States.

¹²¹ See L. HENKIN, *supra* note 21, at 188, 221-22 (stating that the courts will give effect to this conception of presidential authority); RESTATEMENT, *supra* note 62, § 135, reporters' note 3. Two lower court cases, *Tag v. Rogers*, 267 F.2d 664 (D.C. Cir. 1959), *cert. denied*, 362 U.S. 904 (1960), and *The Over the Top*, 5 F.2d 838 (D. Conn. 1925), sometimes are cited as support for the existence of such presidential authority. See L. HENKIN, *supra* note 21, at 461

States to violate its international obligations, which the Court recognized in *Chinese Exclusion*, justifies more than giving effect to an act of Congress that is inconsistent with a treaty. This prerogative also authorizes the President, independently of a congressional or executive act having legislative effect in the United States, to take actions that derogate from principles either of treaties or of customary international law.¹²² Thus, a domestic court espousing this view would not, for example, enjoin the President from directing United States officers to overfly another country's territory without that country's consent, to bring down a foreign airplane, to violate a diplomat's immunity, or to kidnap a wanted criminal from a foreign country. Instead, the courts would have to accept such directives as an exercise by the President — presumably in his role as sole organ or commander-in-chief — of the prerogative of the United States to take such measures regardless of its international obligations.

The argument in favor of this extreme dualist position does not, I stress, assert that the President has unrestrained power to violate international law. Rather, its claim is that the President may *exercise his constitutional powers in foreign affairs* without regard to international law. The argument holds that the President may act in derogation of a principle of international law that is law in the United States only when his act is within the confines of his role as sole organ or as commander-in-chief. In effect, the argument would establish a principle that the courts may not enjoin the President from taking an action in relation to another country, ordinarily outside the United States, on the ground that the action violates international law or an international agreement of the United States. Nothing in the argument suggests that the courts may refuse to order the executive branch to execute faithfully an international legal obligation of the United States designed for the benefit of private persons in the United States and incorporated and operative as law in the United States.¹²³ Thus,

n.61; RESTATEMENT, *supra* note 62, § 135, reporters' note 3. Both cases involved an act of Congress that was claimed to be inconsistent with an earlier treaty, and the courts addressed only that issue. In *Tag* the court stated that "[w]hen . . . a constitutional agency adopts a policy contrary to a trend in international law or to a treaty or prior statute, the courts must accept the latest act of that agency." 267 F.2d at 668. Clearly, the court used "constitutional agency" to refer to Congress; the powers of the President were not in issue, and the President is not a constitutional agency that could adopt a policy contrary to a prior statute.

¹²² Some might call these nonjusticiable political questions. I think it more accurate to recognize that if a court were to affirm the President's power in these circumstances, it would be passing on his constitutional authority; it would not be dismissing the case as nonjusticiable. See generally Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976).

¹²³ The President should order an act that derogates from international law only if, although recognizing that the act will put the United States in default internationally, he has determined that the advantage of the act for the national interest outweighs the cost of international violation. In general, only the President or under his authority an official at the highest level of the executive branch, such as the Secretary of State, could make such a determination and

even this extreme position supports the conclusion that the President can disregard international law only when he acts within the scope of his constitutional authority.

Even as so limited, however, the argument that the President unilaterally may order acts that clearly derogate from treaty obligations of the United States or basic principles of customary international law requires taking a step deeper into dualism than this nation has ever taken. It is one thing to treat international and domestic law as equal in our jurisprudential hierarchy; it is quite another to say that customary international law or treaty not only can be superseded by later law adopted by those having legislative power but also can be violated by executive fiat.

The Supreme Court has never addressed the validity of any claim of presidential power to order deviations from customary international law. Recently, a lower court misconceived the principles that should define any such power. In *Garcia-Mir v. Meese*,¹²⁴ the district court found that the detention of certain undocumented aliens was arbitrary and in violation of international law¹²⁵ but that the Attorney General's decision to detain them was nonetheless binding on the courts.¹²⁶ The Court of Appeals for the Eleventh Circuit affirmed.¹²⁷ In concluding that the courts should not compel the executive branch to comply with international law, both the district court and the court of appeals failed to examine the place of customary international law in United States jurisprudence. Neither developed any theory according to which the Attorney General's action should be given effect in the face of binding international law. Both courts relied wholly on the Supreme Court's dictum in *The Paquete Habana*, as they interpreted it, and held it dispositive.¹²⁸

Both the district court and the court of appeals in *Garcia-Mir*, I believe, misinterpreted and misapplied *The Paquete Habana's* reference to "controlling executive acts." Their conclusion might have been

issue such an order. And the prescription that Chief Justice Marshall applied to Congress in *The Schooner Charming Betsy*, see *supra* note 84, should apply to any such order: when fairly possible, the order must be construed narrowly so as not to warrant measures that would put the United States in violation of its international obligations.

¹²⁴ 788 F.2d 1446 (11th Cir.), cert. denied, 107 S. Ct. 289 (1986).

¹²⁵ *Fernandez-Roque v. Smith*, 622 F. Supp. 887, 903 (N.D. Ga. 1985).

¹²⁶ See *id.* at 903-04. The executive branch did not seek certiorari to challenge the conclusion that detention in the circumstances was a violation of international law. Indeed, it opposed the petition for certiorari. Thus, the ruling of the lower court, accepted by the court of appeals, that continued detention was a violation of international law is presumably the law of the case. One might expect, then, that since the courts had held the action of the United States to be in violation of international law, the executive branch would proceed to take care that international law be faithfully executed.

¹²⁷ See *Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir.), cert. denied, 107 S. Ct. 289 (1986).

¹²⁸ See 788 F.2d at 1454-55; 622 F. Supp. at 902-03.

justified had they found that the detention of the aliens was permissible because there was no principle of international law against arbitrary detention and that therefore such a principle was not law in the United States; or because Congress had authorized the detention even in the face of the principle of international law prohibiting it,¹²⁹ or because the President, by executive agreement or executive order within his constitutional power, had made law that superseded the international legal proscription against arbitrary detention as domestic law. The courts made no such findings, however, and on the facts of the case, they could have made none of them. The courts purported to adopt the extreme dualist conception described above, but they failed to attend to its essential qualification: that the President may derogate from principles of international law only when he is acting within his constitutional powers.¹³⁰ The courts identified no constitutional authority for the President to detain the aliens.¹³¹ The courts apparently read *The Paquete Habana* dictum as declaring *any* act of the President to be "controlling."¹³² They extended that proposition

¹²⁹ Both courts in *Garcia-Mir* found that there is no statutory authority for such detention. See 788 F.2d at 1454; 622 F. Supp. at 902; cf. *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981) (invoking constitutional principles to limit the statutory authority to detain).

¹³⁰ The court of appeals quoted and relied on a reporters' note in the *Restatement*, but failed to appreciate the qualification in that note, which states that the President, "acting within his constitutional authority, may have the power . . . to act in ways that constitute violations of international law by the United States." *Garcia-Mir*, 788 F.2d at 1454-55 (quoting RESTATEMENT, *supra* note 62, § 131 (Tent. Draft No. 1, 1980)) (emphasis added). For a statement similar to that of the *Restatement* reporters' note, see L. HENKIN, cited in note 21 above, at 221-22.

¹³¹ Even the broadest principles declared by the Supreme Court, see *supra* pp. 859-61, would provide no constitutional authority to detain the persons in question. In 1950 the Court stated that "the power of exclusion of aliens is also inherent in the executive department of the sovereign." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950). That case, however, has received severe criticism, see, e.g., Aleinikoff, *Aliens, Due Process and "Community Ties": A Response to Martin*, 44 U. PITT. L. REV. 237, 258-59 (1983); Hart, *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1389-96 (1953); more importantly, an executive power to exclude is not an executive power to detain arbitrarily. In *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), the Court upheld detention of excludable aliens not on the President's own authority but under authority granted by Congress.

The courts in *Garcia-Mir* did not suggest that the President had acted within his constitutional authority in ordering the detention of the aliens in question. In fact, in *Garcia-Mir* the executive branch claimed no such authority for the President either as sole organ or as commander-in-chief. The Department of Justice had claimed that it was acting under congressional authorization, an authorization that the courts have since held was not in fact given. The executive branch later argued that the detention was not arbitrary and therefore not in violation of international law. The decision to detain, then, could not have represented a purposeful, "controlling" decision under the President's powers as sole organ or as commander-in-chief to act in defiance of international law.

¹³² See 788 F.2d at 1454-55; 622 F. Supp. at 903. This reading renders redundant the word "controlling."

to include an act by the Attorney General and declared that both the President and the Attorney General had power "to disregard international law in service of domestic needs."¹³³ There is no such principle; neither precedent nor plausible argument supports it. The President cannot disregard international law "in service of domestic needs" any more than he can disregard any other law.¹³⁴

III. CONCLUSION

As applied to public international law, the statement of the Court in *The Paquete Habana* needs to be reexamined, restated, and amplified. I suggest language less succinct than that of the Court but more comprehensive and more precise:

International law is the law of the land to be faithfully executed by the President. It is to be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. There can be no derogation from the duty of the President to execute the principles of international law, or of the courts to give them effect, except where an act of Congress, or an act of the President having legislative effect, supervenes and is inconsistent with the principle of international law and where no other construction of the act of Congress or of the act of the President is fairly possible.

Some might insist that a full statement should acknowledge the permissibility of the President's exercising the prerogative of the United States to violate international law. If so, they would add:

The courts will give effect to an act of the President done deliberately and purposefully in violation of international law when authority to do so has been knowingly delegated to the President by Congress or when the President does so by an act that is within his constitutional authority as sole organ in foreign affairs or as commander-in-chief.

The two principal doctrines announced in *Chinese Exclusion* have come back to haunt us one hundred years later. The courts, because they deem themselves confined by *Chinese Exclusion* and its progeny, still hold that the Constitution provides no protection against abuses in the regulation of immigration — abuses that include arbitrary detention depriving thousands of their liberty without due process of

¹³³ *Garcia-Mir*, 788 F.2d at 1455.

¹³⁴ The court's statement in *Garcia-Mir* would be unsound even if international law were seen as a kind of federal common law. The President is bound to take care that the federal common law is faithfully executed. He can supersede a principle of the common law only by an exercise of his limited "legislative" authority, when he makes law by treaty, executive agreement, or executive order within his constitutional powers or by authority delegated by Congress.

law. International human rights law has developed to help prevent such harms, but the executive branch has not seen fit to respect this law, and the courts have not yet ordered the executive to do so.

It is time to limit *Chinese Exclusion* to its facts and its narrow issues. The power of the United States to control immigration, whatever the source of that power, is subject to the Constitution, which includes due process protections for life, liberty, and property and provides for the equal protection of the laws.

International law is the law of the land, for the executive branch as well as the courts. It is to be faithfully executed by the executive branch and enforced by the courts. The power to derogate from it is — and ought to be — strictly limited. Two hundred years ago the framers of the Constitution were, I believe, comfortable with a monist approach to international law. If we are to maintain the respect that our nation has historically accorded to that law, we must press no further the move toward extreme dualism, which the Court began in *Chinese Exclusion* one hundred years ago; indeed, we must reverse it. Other free countries increasingly have subordinated domestic institutions and parochial ways to help achieve greater effect for agreed international norms. Now is hardly the time for the United States, aspiring to lead the struggle for the rule of law in a disorderly world, to retreat further into unilateralism by distorting our jurisprudence and encouraging our institutions to pay less, rather than more, respect to the law of nations.