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International Law as Part of Our Law: A Constitutional Perspective

Michael D. Ramsey*

“International law is part of our law,” the U.S. Supreme Court declared some one hundred years ago in *The Paquete Habana*.¹ Conventional wisdom in modern scholarship assumed, at least until four years ago, that this meant international law in the U.S. legal system had a status akin to federal common law.² In a 1997 *Harvard Law Review* article, Professors Curtis Bradley and Jack Goldsmith ignited an academic firestorm by challenging this assumption.³ In particular, Bradley and Goldsmith argued primarily that international law did not (or should not) operate like federal common law in at least two key respects: it should not preempt inconsistent state law; and it should not form a basis for federal jurisdiction.⁴

* Professor of Law, University of San Diego Law School. Thanks to Curtis Bradley, William Dodge, Jack Goldsmith, Ernest Young, and the participants in the 2001 international law symposium at Pepperdine University School of Law, at which a version of these comments was first delivered.

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

2. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 111, 115 (1986); Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1561 (1984) [hereinafter Henkin, *International Law*]; Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295, 303 (1995); Michael J. Glennon, *Raising The Paquette Habana: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 NW. U. L. REV. 321, 348-58 (1985); Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1116-20 (1985); Jordan J. Paust, *The President Is Bound by International Law*, 81 AM. J. INT'L L. 377, 382 (1987); Frederic L. Kergis, Jr., *Federal Statutes, Executive Orders and "Self-Executing Custom,"* 81 AM. J. INT'L L. 371, 374-75 (1987).

3. Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) [hereinafter Bradley & Goldsmith, *Customary International Law*]. See also Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319 (1997) (elaborating the position) [hereinafter Bradley & Goldsmith, *Current Illegitimacy*]; Curtis A. Bradley & Jack L. Goldsmith, *The Incorporation of International Law into Federal Law: A Response*, 111 HARV. L. REV. 2260 (1998) [hereinafter Bradley & Goldsmith, *Incorporation of International Law*].

4. Bradley & Goldsmith, *Customary International Law*, *supra* note 3, at 870; Bradley & Goldsmith, *Current Illegitimacy*, *supra* note 3, at 319-331.

Although much debate erupted over these claims,⁵ little of it has cast itself primarily as constitutional interpretation, and none of it, so far as I am aware, has taken the Constitution's text as its central authority.⁶ This article offers a constitutional perspective on the continuing controversy, specifically in the context of international human rights litigation, and specifically addressed to the Constitution's text. I argue that the Bradley/Goldsmith position, rather than being a single claim about the status of international law, is properly viewed as a series of claims about particular parts of the Constitution, some of which are more persuasive than others.⁷

My observations proceed in three parts. Part I provides a summary of the international-law-as-federal-law debate.⁸ It also briefly addresses why this academic debate matters to practitioners of international human rights law: in sum, because in much international human rights litigation in federal court, federal jurisdiction is based upon international law, which Bradley and Goldsmith would not allow.⁹ Part II offers a constitutional perspective on Bradley and Goldsmith's central contentions, namely that international law is not federal law for purposes of supremacy or jurisdiction.¹⁰ First, I point out that these are two very different claims based on differently worded provisions of the Constitution: the supremacy claim depends on Article VI, while the jurisdictional claims arise from Article III.¹¹ As a result, the claims should be analyzed separately. In undertaking this separate analysis, I argue that the text, history, and structure of the Constitution strongly support the Bradley/Goldsmith view with respect to supremacy, but are much more ambiguous with respect to jurisdiction. I conclude,

5. For criticism of various aspects of the Bradley/Goldsmith position, see, e.g., Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 (1997) [hereinafter Neuman, *Sense and Nonsense*]; Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law after Erie*, 66 FORDHAM L. REV. 393 (1997) [hereinafter Stephens, *Law of Our Land*]; Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463 (1997).

6. Some recent scholarship has begun to tie the debate more explicitly to the Constitution's text. See Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. __ (forthcoming 2002); William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 VA. J. INT'L L. __ (forthcoming 2002).

7. In the ensuing discussion, following Bradley and Goldsmith and their critics, I consider only unwritten international law (sometimes called "customary" international law) and do not address international obligations imposed by treaty. Treaties are dealt with separately in the Constitution, see, e.g., U.S. CONST. arts. III, VI, and accordingly are appropriate for separate treatment. Thus in speaking of "international law" I mean international law not reflected in a treaty. See MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW (3d ed. 1999) (discussing sources of international law).

8. See *infra* pp. 103-07.

9. Bradley & Goldsmith, *Customary International Law*, *supra* note 3, at 847-48, 870.

10. See *infra* pp. 107-17.

11. See U.S. CONST. arts. III, VI.

therefore, that it may be possible to accept the more persuasive parts of the Bradley/Goldsmith position without fatally undermining international human rights litigation. Finally, in Part III, I outline some continuing constitutional objections to using international law to convey federal jurisdiction in international human rights litigation.¹²

I. INTERNATIONAL LAW AS FEDERAL LAW: THE RECENT DEBATE AND ITS IMPLICATIONS

A. *The Bradley/Goldsmith Position and the Academic Response*

The Bradley/Goldsmith position, simply stated, is that international law is not federal law,¹³ meaning primarily that it is not a basis for federal jurisdiction and does not preempt inconsistent state law.¹⁴ Bradley and Goldsmith argue, first, that in the nineteenth and early twentieth centuries no one thought international law was federal law.¹⁵ Rather, everyone thought that international law was part of something called “general law” or “general common law” that federal courts could apply in cases otherwise properly before them, but that international law did not have the jurisdictional and supremacy characteristics associated with federal law.¹⁶ Thus, when cases like *Paquete Habana* said that “international law is part of our law,” they meant that it was part of “general common law” as applied by U.S. courts, but not that it was preemptive of state law or supportive of federal

12. See *infra* pp. 117-18.

13. Bradley & Goldsmith, *Customary International Law*, *supra* note 3, at 817.

14. *Id.* at 870-873; Bradley & Goldsmith, *Current Illegitimacy*, *supra* note 3, at 319-331. Bradley and Goldsmith further argue against two less conventional implications of international law's supposed status as federal law: that international law might supersede prior inconsistent federal law and that it might bind presidential actions. See Bradley & Goldsmith, *Customary International Law*, *supra* note 3, at 842-46. For other critiques of various aspects of the international-law-as-federal-law position, see Ernest A. Young, *Sorting Out the Debate over Customary International Law*, 42 VA. J. INT'L L. — (forthcoming 2002); A.M. Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205 (1988) [hereinafter Weisburd, *Executive Branch*]; A.M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT'L L. 1 (1995) [hereinafter Weisburd, *State Courts*]; Philip Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665 (1986).

15. Bradley & Goldsmith, *Customary International Law*, *supra*, note 3, at 860-70.

16. *Id.* at 822-26.

jurisdiction.¹⁷ Indeed, as Bradley and Goldsmith point out, no case during this period gave international law preemptive or jurisdictional effect.¹⁸

In *Erie Railroad Co. v. Tompkins*, the U.S. Supreme Court abolished the concept of “general common law” and said that on substantive matters, absent a relevant U.S. statute or constitutional provision, federal courts should apply the law of the state in which the court was sitting.¹⁹ This, Bradley and Goldsmith argue, altered the position of international law in the U.S. legal system: international law is not based on the Constitution or a federal statute, and per *Erie* it could no longer be applied as “general common law,” so its applicability depended upon whether it had been adopted as binding law by the relevant state.²⁰ In keeping with this view, Bradley and Goldsmith contend, for almost fifty years after *Erie* courts did not apply international law as federal law.²¹ Then, in 1980, in the well-known international human rights case *Filartiga v. Peña-Irala*, the Second Circuit wrongly said that international law was federal law on the basis of the pre-*Erie* holdings that international law was part of “our law.”²² As Bradley and Goldsmith argue, *Filartiga* misread the earlier cases, since the nineteenth century view was that international law was “general law,” not federal law.²³

Bradley and Goldsmith’s position has been disputed aggressively in the scholarly literature. The attack comes principally at two levels. The first asserts, with the *Filartiga* court, that the nineteenth century cases are valid precedent for the incorporation of international law into federal law,

17. *The Paquete Habana*, 175 U.S. 667 (1900); Bradley & Goldsmith, *Customary International Law*, *supra* note 3, at 845.

18. Bradley & Goldsmith, *Customary International Law*, *supra* note 3, at 822-26.

19. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (“Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied . . . is the law of the state.”). *Erie* relied, at least in the first instance, on the Federal Rules of Decision Act, which provides that federal courts should apply state law in the absence of federal law. See 28 U.S.C. § 1652 (2000). In this respect *Erie* overruled *Swift v. Tyson*, 41 U.S. 1 (1842), which had held that the Rules of Decision Act did not apply to matters covered by general common law. See Young, *Sorting Out the Debate*, *supra* note 14 (forthcoming).

20. Bradley & Goldsmith, *Customary International Law*, *supra* note 3, at 870.

If a state chooses to incorporate [customary international law] into state law, then the federal courts would be bound to apply the state interpretation of [customary international law] on issues not otherwise governed by federal law. If a state did not, in fact, incorporate [customary international law] into state law, the federal court would not be authorized to apply [customary international law] as state or federal law.

Id.

21. See *Bergman v. De Sieyes*, 170 F.2d 360, 361 (2d Cir. 1948) (finding that, with respect to an issue of ambassadorial immunity under customary international law, the state courts’ “interpretation of international law is binding upon us, and we are to follow them so far as they have declared themselves.”).

22. *Filartiga v. Peña-Irala*, 630 F.2d 876, 885 (2d Cir. 1980) (stating that “the law of nations . . . has always been part of the federal common law.”).

23. Bradley & Goldsmith, *Customary International Law*, *supra* note 3, at 833-34.

whatever the doctrinal machinations of *Erie*.²⁴ A second, more intricate response observes that, after *Erie*, federal courts evolved a body of federal common law in areas of particular federal concern.²⁵ For example, in *Banco Nacional de Cuba v. Sabbatino*, the Supreme Court applied the common-law based “act of state” doctrine as a matter of federal common law to prevent judicial review of the sovereign acts of foreign nations.²⁶ This federal common law, as exemplified by *Sabbatino*, had the jurisdictional and supremacy characteristics of federal law.²⁷ International law, the critics of Bradley and Goldsmith assert, should be viewed as part of that post-*Erie* federal common law.²⁸

B. Implications for International Human Rights Litigation

This seemingly abstract debate matters to practical litigation because it suggests that, if Bradley and Goldsmith are correct, federal courts may lack jurisdiction over many international human rights cases. The paradigm international human rights case is brought under the Alien Tort Statute (“ATS”), which declares that federal courts have jurisdiction over a suit by an alien for a tort committed in violation of international law.²⁹ This has been the posture of a number of leading cases: *Filartiga*, brought by the survivors of a Paraguayan citizen tortured to death by Paraguayan officials;³⁰ *Kadic v. Karadzic*, brought by victims of ethnic violence in the former Yugoslavia against Bosnian Serb leader Radovan Karadzic;³¹ and claims by Philippine citizens against former Philippine dictator Ferdinand Marcos, for human rights violations committed while in office.³²

24. See *Filartiga*, 630 F.2d at 885; Stephens, *Law of Our Land*, *supra* note 5, at 402-420.

25. Stephens, *Law of Our Land*, *supra* note 5, at 402-20.

26. 376 U.S. 398 (1964). See *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897) (stating the common-law act of state rule as “the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.”).

27. *Sabbatino*, 376 U.S. at 425-27 (concluding that federal court interpretations of the act of state doctrine, as a matter of federal common law, are supreme over state court interpretations). See also *Illinois v. Milwaukee*, 406 U.S. 91, 100 (1972) (concluding that federal “arising under” jurisdiction “will support claims founded upon federal common law as well as those of a statutory origin.”).

28. E.g., Neuman, *Sense and Nonsense*, *supra* note 5, at 375-76; Stephens, *Law of Our Land*, *supra* note 5, at 434-47.

29. 28 U.S.C. § 1350 (2000) (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”). This law is sometimes labelled the “Alien Tort Claims Act.”

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

31. *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1996).

32. *In re Estate of Marcos Human Rights Litigation*, 978 F.2d 493 (9th Cir. 1992).

Scholars and judges have raised various statutory and prudential objections to the use of the ATS as a basis for such suits, particularly when, as is often the case, neither the plaintiffs nor the defendants have much connection with the United States.³³ These objections have been met with more or less persuasive answers,³⁴ and federal appellate courts (including in *Filartiga*, *Karadzic* and *Marcos*) have allowed these claims to proceed.³⁵ Overshadowing this litigation, however, is a troubling constitutional objection, for if the Bradley/Goldsmith position is correct, the ATS is, as applied in these cases, very likely unconstitutional.

The reason is simple. In all of these cases the plaintiffs are aliens, and in most (including *Filartiga*, *Karadzic* and *Marcos*) the defendant is as well.³⁶ Indeed, the basic idea of this type of litigation is to bring to justice perpetrators of international human rights offenses – offenses usually committed by non-citizens against non-citizens in foreign nations.³⁷ Article III of the U.S. Constitution, which sets forth the maximum scope of the federal courts' jurisdiction, does not contain an obviously applicable category.³⁸ There is no general alien-against-alien jurisdiction in Article III; the claims do not arise under the U.S. Constitution or a federal statute; diversity jurisdiction is unavailing since it requires that, at minimum, one party be a U.S. citizen; and various special subjects of jurisdiction such as

33. John Rogers, *The Alien Tort Statute and How Individuals "Violate" International Law*, 21 VAND. J. TRANSNAT'L L. 47 (1988) (arguing that the statute should be limited to violations the United States is obligated to punish); Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT'L & COMP. L. REV. 445, 447 (1995) (arguing that the ATS was intended to apply only to certain admiralty claims); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (Bork, J., concurring) (arguing that the ATS should be limited to historical offenses such as assaults on ambassadors). See also Michael D. Ramsey, *Multinational Corporate Liability Under the Alien Tort Claims Act: Some Structural Concerns*, __ HASTINGS INT'L & COMP. L. REV. __ (2002) (suggesting caution in applying the ATS broadly on prudential grounds).

34. William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 HASTINGS INT'L & COMP. L. REV. 221 (1996); Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461 (1989); Anthony D'Amato, *The Alien Tort Statute and the Founding of the Constitution*, 82 AM. J. INT'L L. 62 (1988); William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467 (1986).

35. *Filartiga*, 630 F.2d at 881; *Karadzic*, 70 F.3d at 238; *Marcos*, 978 F.2d at 493. See also *Abaebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996); *Hilao v. Estate of Marcos*, 25 F.3d 1467 (9th Cir. 1994); *Trajano v. Marcos*, 978 F.2d 493 (9th Cir. 1992). But see *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (dismissing human rights suit brought under the ATS).

36. *Filartiga*, 630 F.2d at 881; *Karadzic*, 70 F.3d at 238; *Marcos*, 978 F.2d at 493.

37. See, e.g., Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Pena-Irala*, 22 HARV. INT'L L.J. 53 (1981); Ralph G. Steinhardt, *Fulfilling the Promise of Filartiga: Litigating Human Rights Claims Against the Estate of Ferdinand Marcos*, 20 YALE J. INT'L L. 65 (1995); Beth Stephens, *The Civil Lawsuit as a Remedy for International Human Rights Violations Against Women*, 5 HASTINGS WOMEN'S L.J. 143 (1995) [hereinafter Stephens, *Violations Against Women*].

38. U.S. CONST. art. III. See CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 31-32 (5th ed. 1994) (noting that statutory grants of jurisdiction must fit within one of the jurisdictional categories of Article III).

admiralty are usually inapplicable.³⁹ Though on its face the ATS appears to give federal courts jurisdiction over alien-against-alien claims, it cannot extend federal jurisdiction beyond the limits of Article III.⁴⁰

This problem is solved by *Paquete Habana's* conclusion that international law is part of our law, together with modern scholarship's interpretation of that observation to mean that international law functions as federal common law.⁴¹ If international law is part of federal common law, then the ATS claims arise under federal common law, which is sufficient to establish federal jurisdiction under modern Supreme Court precedents.⁴² If, as Bradley and Goldsmith argue, international law is not federal common law, it is difficult to find an alternative Article III basis for jurisdiction over alien-against-alien ATS claims.⁴³ As a result, the academic debate over the Bradley/Goldsmith position has serious implications for the continuing validity of much international human rights litigation.⁴⁴

II. INTERNATIONAL LAW AND UNITED STATES LAW: A CONSTITUTIONAL PERSPECTIVE

From a constitutional perspective, there are two striking aspects of the debate over the Bradley/Goldsmith position. First, the Constitution's text

39. WRIGHT, *supra* note 38, at 31-32.

40. It is not sufficient to say that the claims arise under federal law simply because they arise under the ATS, a federal statute. The details of this argument are beyond the scope of this discussion, but it should be obvious that if Congress can make any body of law federal merely by passing a statute giving federal courts jurisdiction over it, then the Article III limits on jurisdiction are meaningless. See WRIGHT, *supra* note 38, at 27, 31-32. An alternative line of argument, discussed at length by Professors Bradley and Goldsmith, is that the ATS itself creates a cause of action (in addition to being a jurisdictional grant), either directly or by delegation to the federal courts. Bradley & Goldsmith, *Current Illegitimacy*, *supra* note 3, at 357-363. If true, this might support federal "arising under" jurisdiction even if international law, standing alone, does not. I express no view here on this line of reasoning, except to note that it is controversial. See Curtis A. Bradley, *Customary International Law and Private Rights of Action*, 1 CHI. J. INT'L L. 421, 425 (2000); William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 479 (1986).

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

42. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 885-86 (2d Cir. 1980); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(2) (1986); Henkin, *International Law*, *supra* note 2, at 1560-61. See also *Illinois v. Milwaukee*, 406 U.S. 91, 100 (1971) (concluding that federal jurisdiction is present in a case based on federal common law).

43. Bradley & Goldsmith, *Current Illegitimacy*, *supra* note 3, at 356-58. See also Burley, *supra* note 34, at 468 (suggesting this result). In ATS cases where the defendant is a U.S. citizen, these jurisdictional difficulties may not arise because ordinary diversity jurisdiction would often apply. See, e.g., *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997).

44. See Bradley & Goldsmith, *Current Illegitimacy*, *supra* note 3, at 330 ("What is at stake is the enforceability of international human rights law in the U.S. federal courts.").

has been underemphasized. At bottom, everyone understands that this is a question of constitutional law: federal courts are creatures of the Constitution; it is the Constitution that gives (or does not give) federal courts the power to adjudicate international law.⁴⁵ Yet, the widespread academic discussions arising from Bradley and Goldsmith's claim have been largely occupied with historical and doctrinal contentions in which constitutional text has played at best a secondary role.⁴⁶ Little extended textual analysis exists with respect to the matter.

Second, everyone treats the debate as centering upon a single question: whether international law is federal law.⁴⁷ Once focused on the Constitution's text, however, it is apparent that Bradley and Goldsmith are making at least two separate claims about two distinct and differently worded parts of the Constitution. The question of international law's supremacy over state law is governed by the supremacy clause of Article VI.⁴⁸ The question of international law as a basis for federal jurisdiction is governed by Article III.⁴⁹ These provisions are not identical nor even similarly worded.⁵⁰ Because most debate over the Bradley/Goldsmith position asks the single question whether international law is federal law, it assumes that Bradley and Goldsmith are either right on both points, or wrong on both points. Conceiving of the debate as two separate constitutional claims, as I suggest, raises the possibility that this is not an all-or-nothing battle: that is, Bradley and Goldsmith could be right on one claim and wrong on the other.

45. See Bradley & Goldsmith, *Customary International Law*, *supra* note 3, at 819 ("International law does not itself answer these questions. Rather, the answers must be found in U.S. law. In the first instance, that law is the U.S. Constitution."). See also Bradley & Goldsmith, *Current Illegitimacy*, *supra* note 3, at 321 (discussing constitutional implications); Weisburd, *State Courts*, *supra* note 14, at 28 (discussing "the argument that customary international law is federal common law").

46. See, e.g., Neuman, *Sense and Nonsense*, *supra* note 5, at 373-383 (emphasizing historical and doctrinal developments); *id.* at 383-88 (emphasizing democratic and international values); Stephens, *Law of Our Land*, *supra* note 5, at 399-448 (emphasizing historical developments).

47. See Bradley & Goldsmith, *Customary International Law*, *supra* note 3, at 817 ("We conclude that, contrary to conventional wisdom, [customary international law] should not have the status of federal common law."); Bradley & Goldsmith, *Current Illegitimacy*, *supra* note 3, at 319 ("We conclude[] that courts should not apply [customary international law] as federal law . . ."); Stephens, *Law of Our Land*, *supra* note 5, at 460 (framing the question as "the status of international law as federal common law").

48. See U.S. CONST. art. VI.

49. See U.S. CONST. art. III.

50. See U.S. CONST. art. III (giving federal jurisdiction to claims arising under "laws of the United States"); U.S. CONST. art. VI (giving preemptive effect to laws "made in pursuance [of the Constitution]"). With respect to the debate over the President's responsibility to uphold international law, see *supra* note 13, Bradley and Goldsmith also appear to be making a claim about Article II, Section 3 ("[The President] shall take Care that the laws be faithfully executed"). See Bradley & Goldsmith, *Customary International Law*, *supra* note 3, at 842-46.

In the ensuing sections, I separate Bradley and Goldsmith's constitutional claims and consider each of them with a close focus upon the Constitution's text. I argue that this approach enhances the Bradley/Goldsmith position with respect to supremacy and weakens their position with respect to jurisdiction. The supremacy claim is most clearly rooted in unambiguous constitutional text, most clearly supported by historical and structural considerations, and most evidently unaffected by *Erie*. The jurisdictional claim, however, is the one that threatens ATS cases. As a result, I conclude, it is possible to accept the stronger part of the Bradley/Goldsmith position without giving up on international human rights litigation.

A. International Law and Supremacy

Bradley and Goldsmith's first contention is that international law does not preempt inconsistent state law.⁵¹ Viewed as a question of constitutional law, the Constitution's text provides a relatively straightforward answer. Supremacy of federal law over state law arises from Article VI of the Constitution, which states that the Constitution, treaties, and "the laws of the United States which shall be made in Pursuance thereof shall be the supreme Law of the Land."⁵² The question Bradley and Goldsmith pose, therefore, is whether international law is part of the "laws" encompassed by this clause – that is, "laws of the United States made in pursuance" of the Constitution.

On this point, the plain language of the Constitution leaves little room for ambiguity. Whether or not international law is part of "the laws of the United States," it is in any event, not "made in Pursuance" of the Constitution, for the parochial U.S. Constitution is not within international law's contemplation. Much international law preexists the Constitution; that which does not has arisen independently and without regard to it. As Louis Henkin has written, international law is made "in a process to which the United States contributes only in an uncertain way and to an indeterminate degree."⁵³

51. Bradley & Goldsmith, *Current Illegitimacy*, *supra* note 3, at 327.

52. U.S. CONST. art. VI. On the importance of the Supremacy Clause to claims of preemption, see Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321 (2001); Michael D. Ramsey, *Executive Agreements and the (Non) Treaty Power* 77 N. CAR. L. REV. 133, 218-25 (1998).

53. LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 508 n.16 (2d ed. 1996). Henkin further concedes that Article VI "does not easily include international law." *Id.* He goes on to argue, in a way not always easy to follow, that international law is supreme and preemptive. Henkin, *International Law*, *supra* note 2, at 1560-62. Bradley and Goldsmith include some discussion of the textual point, but do not make it a central focus. See Bradley & Goldsmith,

As a result, the Constitution's plain language shows that international law's putative status as "federal law" is simply irrelevant. Whether or not international law is "part of our law," it is not *preemptive* law, because it does not fit within the language of Article VI.

There is no reason to think that the modern understanding of the phrase "made in pursuance" of the Constitution differs from the ordinary meaning of those words in 1789. Although much about international law has changed since 1789, we share the framers' view of international law as arising external to the United States, formed by the community of nations.⁵⁴ There is no reason to think that they would have understood international law (or, as it was then known, the "law of nations") as made in pursuance of the Constitution, so that our modern understanding would fail to honor their meaning,⁵⁵ nor is there any reason to think that they had in mind a fundamentally different and unrecognizable conception of international law, such that fundamentally changed circumstances would justify a modern departure from the text. Rather, they, like us, recognized a body of law arising outside the United States to which the United States owed an obligation, and they wrote the supremacy clause in a way that did not include that body of law.

The framers also understood that international law would likely come into conflict with the laws and actions of the states. Indeed, a leading concern at the Philadelphia convention was that states had violated international law during the Confederation period and the national government had lacked power to intervene.⁵⁶ This had occurred both with respect to treaties (whose obligations were confirmed by international law) and customary rules. Focusing on these problems, the framers deliberately wrote treaties into Article VI to assure a judicial remedy for treaty violations.⁵⁷ Yet they declined to provide a parallel remedy for violations of non-treaty international law, even though they spoke of the two problems in tandem.⁵⁸ Instead, they provided a different remedy for non-treaty violations

Current Illegitimacy, *supra* note 3, at 321 n.12.

54. See Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 821-28 (1989) (discussing the framers' conception of the law of nations); *id.* at 832-33 (specifically considering and rejecting the idea that the framers could have understood international law to be "made in pursuance" of the Constitution).

55. See Stephens, *Law of Our Land*, *supra* note 5, at 412 (affirming "the framers' understanding of the law of nations as existing independently of the United States"). As James Wilson said, "to pretend to define the law of nations which depended on the authority of all Civilized Nations of the World, would have a look of arrogance that would make us look ridiculous." 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 615 (Max Farrand ed. 1911).

56. See Michael D. Ramsey, *The Myth of Extraconstitutional Foreign Affairs Power*, 42 WM. & MARY L. REV. 379, 420-24 (2000); FREDERICK MARKS, INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION 52-95 (1973).

57. See *Ware v. Hylton*, 3 U.S. 199, 277 (1796) (opinion of Iredell, J.) (discussing the violations of treaties).

58. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 19 (Max Farrand ed., 1911)

by giving Congress the power to define and punish offenses against the law of nations⁵⁹ – a power Congress lacked under the Articles of Confederation.⁶⁰ These events strongly suggest a deliberate decision not to include customary international law as supreme law, and thus to give Congress (rather than the federal courts) the power to decide when state law must give way to international law.

Further, post-constitutional practice provides no basis for departing from the ordinary meaning of Article VI. If international law had been thought to preempt state statutes, that matter should have arisen directly, for states surely did not always comply with international law during this period.⁶¹ Yet, as Bradley and Goldsmith show,⁶² in the nation's early years no case applied international law to preempt state law under Article VI.⁶³ To be sure, it was often said that international law was part of United States law, but that is consistent with finding it not to be preemptive, for Article VI does not say that all "laws of the United States" are preemptive. Moreover, no one thought it was absurd that international law could be applied by federal courts in the absence of controlling state authority and yet not have preemptive effect; rather, it was understood that state and federal courts had concurrent authority in the interpretation of international law.⁶⁴ This simply would not have been possible if Article VI included international law, for, at minimum, Article VI would in that case require that federal court interpretations of international law be binding in later state court decisions.

(statement of Randolph describing the difficulties of the Articles of Confederation with respect to violations of treaties and the law of nations).

59. U.S. CONST. art. I, § 8.

60. See Ramsey, *Myth of Extraconstitutional Foreign Affairs Power*, *supra* note 56, at 420-24.

61. Curtis A. Bradley, *The Status of Customary International Law in U.S. Courts – Before and After Erie*, 26 DENV. J. INT'L L. & POL'Y 807, 815 (1998).

62. Bradley & Goldsmith, *Customary International Law*, *supra* note 3, at 822-26; Bradley & Goldsmith, *Current Illegitimacy*, *supra* note 3, at 331-36. For Bradley and Goldsmith, the lack of precedent or practice giving international law supremacy within the U.S. legal system is a critical component of their case. See *id.* at 323 ("Our critique . . . beg[ins] with history."). I would say, instead, that the history confirms that the ordinary reading of the text is the correct one.

63. That is, it was not thought, by operation of Article VI, to preempt state statutory law. However, state interpretations of "general common law" (which included international law) were not thought (at least by some) to control federal court interpretations of the general common law. See *Swift v. Tyson*, 41 U.S. 1 (1842). This, however, did not arise as a matter of Article VI preemption, for while the state interpretations did not control the federal courts, the federal interpretations also did not control state courts. Rather, state and federal courts "considered themselves free to exercise independent judgment in cases arising under the law of nations." Bradford R. Clark, *Federal Common Law; A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1283 (1996) [hereinafter Clark, *Federal Common Law*].

64. Clark, *Federal Common Law*, *supra* note 57, at 1283.

The textual focus I propose also undermines what at first seems to be the strongest argument against the Bradley/Goldsmith position on supremacy. As illustrated by *Paquete Habana*, for many years judges and commentators have said (albeit somewhat loosely) that “[i]nternational law is part of our law.”⁶⁵ A quick look at the Bradley/Goldsmith position might suppose that Bradley and Goldsmith contend that international law is *not* part of our law, flatly contrary to *Paquete Habana*. However, the focus on Article VI shows that, with respect to issues of supremacy, Bradley and Goldsmith argue more precisely that international law is not “made in Pursuance” of the Constitution. Not only does that seem self-evidently correct as a textual matter, but it also exhibits no tension with *Paquete Habana*. It could be true that international law is part of our law but not made in pursuance of the Constitution. *Paquete Habana*, and all the other authorities declaring that “international law is part of our law,” did not say that international law is part of *preemptive* law.⁶⁶

Close attention to the Constitution’s text also shows the irrelevance of *Erie*, and the development of post-*Erie* federal common law, to the supremacy question. Whether or not the federal courts redesignated international law as federal law after *Erie*, they could not change international law into something it is not, namely something made in pursuance of the Constitution. Whether international law is part of federal law is little more than a question of legal categories, which we (or the Court) can alter by changing the contours of the categories. Whether international law is made in pursuance of the Constitution is a matter of fact, not subject to judicial re-interpretation: international law is and always has been something that arises and evolves outside the control of the domestic legal system. Relatedly, the development of preemptive federal common law in the wake of *Erie* does no violence to the language of Article VI, so long as one believes that federal common law is made by federal courts pursuant to their constitutional authority.⁶⁷ International law, not made by federal courts,

65. *The Paquete Habana*, 175 U.S. 677, 700 (1900). *Paquete Habana* itself, having been decided 111 years after the Constitution was ratified, may not be thought especially persuasive evidence of the Constitution’s meaning. But similar phrasing can be found in sources chronologically much closer to the founding. See, e.g., 1 Op. Att’y Gen. 26, 27 (1792) (opinion of Edmund Randolph) (stating that the law of nations “is essentially a part of the law of the land.”). See *infra* Part II.B.

66. See *The Paquete Habana*, 175 U.S. at 700 (applying international law in the absence of controlling legislative, executive or judicial authority). Relatedly, separation of the supremacy and jurisdictional aspects of the Bradley and Goldsmith position reinforces their supremacy claims in another respect. As Bradley and Goldsmith concede, their view with respect to jurisdiction is contrary to established precedent, such as *Filartiga*, in the court of appeals. But this court of appeals precedent, which turns on the proposition that international law is part of our law, per *Paquete Habana*, has nothing to do with the language of Article VI (which was not at issue in *Filartiga* and like cases). No appellate case has ever held that international law preempts state law.

67. See generally Clark, *Federal Common Law*, *supra* note 57. See also Stephen B. Burbank, *Federal Judgments Law: Sources and Authorities and Sources of Rules*, 70 TEX. L. REV. 1551, 1577

is for supremacy purposes not analogous to the post-*Erie* federal common law.

Focusing on Article VI highlights a further constitutional argument in favor of the Bradley/Goldsmith position. Central to the thinking of the Constitution's framers was the idea of a federal system. As Professor Bradford Clark has recently argued, Article VI is an often-overlooked but critical linchpin of federalism.⁶⁸ It assures that laws achieve preemptive status through a process involving input from the states: the Constitution, ratified by the states; treaties, approved by a supermajority of the Senate; and laws made under the Constitution, approved by Congress, in which states have some element of representation.⁶⁹ As Professor Clark argues, this system provides that state laws are not displaced except through processes that involve the states.⁷⁰ Awarding international law preemptive status subverts this process, for it would displace state laws without state input.⁷¹ Accordingly, there are sound structural reasons to give Article VI its natural reading to exclude international law.⁷²

(1992) ("*Sabbatino* is best regarded . . . as authority . . . for the power of the federal judiciary to make uniformly applicable rules . . .") (emphasis added).

68. Clark, *Separation of Powers*, *supra* note 52.

69. As discussed above, and as Professor Clark acknowledges, in limited circumstances federal courts may fashion rules of federal common law that have preemptive status as "laws made in pursuance" of the Constitution. Clark, *Separation of Powers*, *supra* note 63. To be laws made in pursuance of the Constitution, however, these need to be in areas the Constitution can be read to grant lawmaking authority to the courts, as in admiralty, or in areas where Congress by statute has constitutionally invited federal court lawmaking. *Id.* It is hard to see how either category can be expanded to encompass all of international law. In any event, since federal courts have *not* adopted international law as preemptive federal common law, the most that can be said is that federal courts *may* (but are not required to) adopt specific common laws rules that parallel international law rules, if and when the traditional grounds for creation of federal common law are satisfied. For federal courts to adopt *all* of international law, prospectively, as preemptive law would, however, essentially read the "made in pursuance of" language out of Article VI.

70. Clark, *Separation of Powers*, *supra* note 52.

71. Nor does such a reading of Article VI leave gaps in the federal government's authority over international law, for international law may be given preemptive force if codified in a treaty pursuant to Article II, section 2, or codified in a statute through Congress' power to "define and punish . . . offenses against the law of nations," in Article I, section 8.

72. Bradley and Goldsmith make a related argument framed in terms of democratic values. In their view international law as conceived by many modern authorities is increasingly focused on the way a nation treats its own citizens, and as a result, "since the new [customary international law] now regulates many of the same topics as domestic law, it conflicts more frequently with domestic law." Bradley & Goldsmith, *Current Illegitimacy*, *supra* note 3, at 329. Democratic values suggest, they say, that in a case of conflict domestic, democratically-achieved law should prevail, until the political branches of U.S. government have indicated a preference for the international standard. *Id.* at 328-331. As a constitutional argument, however, this suffers from its lack of connection to identifiable constitutional values. Even if we agree that democratic theory supports the structure Bradley and Goldsmith propose, there is no basis for saying that such a democratic theory is

I conclude, therefore, that Bradley and Goldsmith's claims about supremacy have a solid basis in the text of Article VI, and that the structure and history of the Constitution provide no ground for departing from the text's ordinary meaning.

B. International Law and Federal Jurisdiction.

The part of the Bradley/Goldsmith claim that threatens ATS litigation turns not upon Article VI, but upon Article III. As a general matter, in ATS litigation there is no need to establish that international law overrides state, presidential or congressional action. Article VI simply is not relevant. The constitutional text instead is Article III, which establishes the jurisdiction of the federal courts.⁷³ In contrast to their claim under Article VI, the Bradley/Goldsmith claim that Article III does not encompass international law seems weaker on at least four grounds.

First, the relevant constitutional language is ambiguous, because Article VI and Article III do not use parallel language. Under Article III, federal courts have jurisdiction over claims "arising under . . . the laws of the United States."⁷⁴ While international law is plainly not "made in pursuance" of the Constitution, as required by Article VI, it might be part of the "laws of the United States," if one thought (as *Paquete Habana* said) that international law is "part of our law."⁷⁵ "Laws of the United States" might mean laws created by the authority of the United States (which would not include international law), or it might mean laws to which the United States is subject (which would include international law). The text of Article III, standing alone, can bear either reading.

Moreover, when combined with the language of Article VI, there is some textual reason to prefer the more expansive reading of Article III. The Bradley/Goldsmith position would read the relevant language of Article VI and Article III to encompass the same set of laws (laws made in pursuance of the Constitution), even though the phrasing of Article VI and Article III is quite distinct. Other things being equal, constitutional interpretation should favor a reading that gives full meaning to each phrase, rather than assuming that different locutions mean the same thing. The broader reading of Article III finds a set of laws – namely, international law – that is included in Article III but not Article VI, and thus accounts for the difference in phrasing. The Bradley/Goldsmith position has no similar solution.

embraced by the Constitution simply because we like it. Reorienting the argument toward the structural values of Article VI shows why this is a constitutional preference, as opposed to merely a good one.

73. See *supra* Part I (discussing the relationship of the Bradley/Goldsmith position to international human rights litigation).

74. U.S. CONST. art. III.

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

As a result, specific focus on the constitutional text, which I have urged is the appropriate starting point in this debate, reveals that Bradley and Goldsmith do not have as powerful a basis for their jurisdictional claims as they do for their supremacy claims.⁷⁶ Unlike Article VI, Article III is ambiguous; it remains to ask which reading of “the laws of the United States” should be preferred. Moreover, the burden of persuasion is now differently allocated. In consulting history and structure in evaluating the Article VI claim, we were seeking to confirm an apparently unambiguous textual provision. Under such circumstances, only powerful contrary evidence should prevail. In contrast, under Article III the text is ambiguous, so there is no textual presumption to overcome.

Second, near-contemporaneous statements suggest that, in other contexts, some members of the constitutional generation included international law within their understanding of the laws of the United States. For example, U.S. Attorney General Edmund Randolph, a member of the Philadelphia Convention, opined that “the law of nations, although not specially adopted by the Constitution or any municipal act, is essentially a part of the law of the land.”⁷⁷ Alexander Hamilton referred to the law of nations as within “the laws of the land” which the President was charged with enforcing.⁷⁸ Thus *Paquete Habana*’s idea that “international law is part of our law” has antecedents dating to the constitutional generation. These observations are, of course, not decisive, and none was made in the specific context of the jurisdictional status of international law. They are, however, much more troubling to the Bradley/Goldsmith jurisdictional claim than to the supremacy claim. As discussed above, such observations are perfectly consistent with Bradley and Goldsmith’s supremacy claim: one may easily say that, while international law is part of our law, it is not law made pursuant to the Constitution, and thus is not included in Article VI. It is more difficult to say that, while international law is part of the law of the land, it is not included among the “laws of the United States” in the meaning of Article III. The constitutional question is what the framers meant by the phrase “laws of the United States,” and it seems clear that at least some

76. Although Bradley and Goldsmith place some reliance on the plain language of Article VI, they do not discuss Article III’s distinct language in much detail. See Bradley & Goldsmith, *Customary International Law*, *supra* note 3.

77. 1 Op. Att’y Gen. 26, 27 (1792) (opinion of Edmund Randolph). See also 1 Op. Att’y Gen. 57 (1795) (opinion of William Bradford); 1 Op. Att’y Gen. 68 (1797) (opinion of Charles Lee).

78. Alexander Hamilton, *Letters of Pacificus, No. 1* (1793), reprinted in 15 ALEXANDER HAMILTON, PAPERS OF ALEXANDER HAMILTON 34 (H. Syrett ed., 1969).

members of the constitutional generation in some contexts used “laws of the United States” to include international law.⁷⁹

Relatedly, a number of the leading members of the constitutional generation, in describing the jurisdictional aspects of the Constitution, stated that the federal courts would have jurisdiction over all cases arising under the law of nations. John Jay wrote in the *Federalist* that “the national Government, treaties, and articles of treaties, as well as the law of nations, will *always* be expound in one sense, and executed in the same manner – whereas adjudications on the same points and questions, in thirteen States . . . will not always accord or be consistent”⁸⁰ Plainly, though, that would not “always” have been true unless the law of nations was itself a basis for federal jurisdiction. Similarly, George Mason said of the Convention: “[t]he most prevalent idea [was] to establish . . . a judiciary system with cognizance of all such matters as depend on the law of nations”⁸¹ These observations might simply be mistaken as to the nature of the Philadelphia Convention’s final product, but they do show that the idea of unified national jurisdiction over all matters arising under the law of nations was well within the framers’ contemplation.⁸²

Third, the early historical record is not nearly so favorable to Bradley and Goldsmith with respect to jurisdiction as it is with respect to supremacy. True, there are apparently no cases in the early years of the Constitution finding Article III “arising under” jurisdiction on the basis of international law. However, unlike supremacy, it is much more likely that these cases simply did not arise during that period. The lower federal courts as a statutory matter lacked federal “arising under” jurisdiction until after the Civil War.⁸³ Moreover, the most common international law cases to arise in

79. U.S. CONST. art. III, § 2. The separation of the jurisdictional argument and the supremacy argument works against Bradley and Goldsmith here. They argue in part that, whatever the “international law is part of our law” formulation meant, it did not mean that international law was U.S. law because no one thought international law was preemptive. See Bradley & Goldsmith, *Current Illegitimacy*, *supra* note 3. But this argument assumes that there cannot be any law that is part of “the laws of the United States” that is not preemptive. That is not necessarily so, and indeed the distinct phrasing of Article III and Article VI suggests otherwise. See U.S. CONST. arts. III, VI.

80. THE FEDERALIST No. 3, at 95 (John Jay) (Isaac Kramnick ed., 1987) (emphasis added). *But see* THE FEDERALIST No. 80, at 445-50 (Alexander Hamilton) (Isaac Kramnick ed., 1987) (providing a detailed description of the bases of federal jurisdiction in Article III, without asserting that the law of nations was part of federal “arising under” jurisdiction.”).

81. Stewart Jay, *supra* note 54, at 830 (quoting letter from George Mason to Arthur Lee, (May 21, 1787), reprinted in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 24 (Max Farrand ed., 1911).

82. As Professor Jay points out, one way of understanding these statements is that the framers thought that the specific enumerations in Article III – admiralty, ambassadors, etc. – covered all of the aspects of the law of nations that might reasonably be expected to arise. Stewart Jay, *supra* note 54, at 830-31.

83. The U.S. Supreme Court did have jurisdiction to review decisions of state courts “repugnant to the Constitution, treaties or laws of the United States” under the 1789 act, but apparently no case raising the international law question arose until 1875. See Weisburd, *State Courts*, *supra* note 14, at

the early years of the Constitution fell within another grant of federal jurisdiction, typically admiralty or cases affecting ambassadors. Thus, the lack of precedent linking international law to “arising under” jurisdiction is not persuasive evidence that this was not intended as a constitutional matter.⁸⁴

Further, the precedent of the ATS itself is troubling to the Bradley/Goldsmith position. The original version of the ATS was passed as part of the Judiciary Act of 1789, written by framer and future Supreme Court Justice Oliver Ellsworth.⁸⁵ Other things being equal, this may be taken as some evidence of the original reading of the Constitution. Yet, neither Ellsworth nor any of his fellow legislators thought the ATS was unconstitutional.⁸⁶ If international law is part of the “laws of the United States” mentioned in Article III, Ellsworth was right; if not, Ellsworth’s handiwork was, in part, unconstitutional. This is not, of course, decisive,⁸⁷

39. To be sure, as Bradley and Goldsmith show, once that question did arise, federal courts held that this grant did not include international law. See *Ker v. Illinois*, 119 U.S. 436, 444 (1886); *City and County of San Francisco v. Scott*, 111 U.S. 768, 769 (1884); *New York Life Ins. Co. v. Hendren*, 92 U.S. 286, 286-87 (1875). But these cases were far removed from the drafting of the Constitution and may simply have misinterpreted its meaning. Moreover, these cases were decided as a statutory matter, so technically they were not even addressed to Article III (although the language they were interpreting was parallel).

84. Bradley and Goldsmith cite only one case from before the Civil War that bears on the question. See Bradley & Goldsmith, *Current Illegitimacy*, *supra* note 3, at 324 n.28; Bradley & Goldsmith, *Customary International Law*, *supra* note 3, at 824 n.53. In *American Ins. Co. v. Canter*, 26 U.S. 511, 545-46 (1828), the Court held that the Florida Superior Court, a territorial court created by Congress, lacked jurisdiction over a claim of maritime salvage, since this was not a claim arising under federal law. *Id.* (The Florida court had as a statutory matter been given “arising under” jurisdiction but, unlike the Article III courts, had not been giving admiralty and maritime jurisdiction). Bradley and Goldsmith interpret this case as demonstrating that claims under international law (or, as it was then called, the law of nations) did not arise under federal law. See also Weisburd, *State Courts*, *supra* note 14, at 30 (reaching a similar conclusion). It is not so clear that the maritime law in *Canter* was understood as a claim under the law of nations. Nowhere in the *Canter* opinion is the claim said to arise under the law of nations. The events in question occurred entirely within Florida. It seems that the matter was one that Florida could have legislated, had it wished, but in the absence of a Florida law the court applied general common law. Thus *Canter* may be precedent that the general common law did not convey federal jurisdiction, but it is not self-evidently a precedent that the law of nations did not convey federal jurisdiction.

85. See generally Burley, *supra* note 34 (arguing that the ATS and the Judiciary Act were a response to the Founders’ beliefs that the nation should implement international law rules that directly regulate individual conduct); Casto, *supra* note 34 (reviewing the legislative history of the statute).

86. Casto, *supra* note 34, at 515.

87. Another part of the Judiciary Act was famously declared unconstitutional. *Marbury v. Madison*, 5 U.S. 137 (1803) (invalidating Section 13 of the Judiciary Act of 1789, 1 Stat. 173).

but it should give some pause to those who would read Article III's "laws of the United States" narrowly.⁸⁸

Fourth, the structure of constitutional government is less clearly in Bradley and Goldsmith's favor with respect to their Article III claim. Federalism advises against non-Article VI preemption⁸⁹ but has little to say about permitting federal jurisdiction over nonpreemptive suits. No serious interests of the states appear to be at stake if a federal court hears a human rights suit between two non-citizens that does not implicate state law. As a result, the structural reasons for reading Article VI narrowly do not exist with respect to Article III.

In sum, it may be possible to argue that international law is nonpreemptive U.S. law – i.e., it is encompassed by Article III but not by Article VI. Such a view accepts Bradley and Goldsmith's strongest points while maintaining a constitutional basis for ATS litigation. It has a number of advantages over a complete rejection of the Bradley/Goldsmith position (the approach taken by many human rights litigators who feel threatened by it). A complete rejection has difficulty circumventing the plain language of Article VI and explaining almost two centuries of contrary practice. The approach I suggest, in contrast, fits comfortably within constitutional text, structure, and practice. This view also most closely conforms with existing precedent, as the federal courts of appeal have accepted international law as a basis for federal jurisdiction in ATS cases such as *Filartiga* and *Karadzic* but have not given international law preemptive status.⁹⁰

Significantly, separating the supremacy claim and the jurisdictional claim eliminates one of the strongest arguments against Article III jurisdiction over international human rights cases. The argument runs as follows: (i) federal courts have jurisdiction over ATS cases only if international law is part of federal common law; (ii) if international law is part of federal common law, it must be preemptive; (iii) making international law preemptive of state law is untenable structurally, historically and precedentially; (iv) therefore international law is not part of federal law and no federal jurisdiction exists in ATS cases.⁹¹ This argument

88. One view is that Ellsworth mistakenly thought that the Constitution conveyed diversity jurisdiction over suits between aliens. See Casto, *supra* note 30. That, however, seems a greater departure from the text than reading "laws of the United States" to include international law. Another view is that the ATS should be subject to the implicit limitation that one party must be a U.S. citizen. See Bradley, *Alien Tort Statute and Article III*, *supra* note 6 (forthcoming). This is also a textual stretch, in this case of the language of the ATS, but probably one that John Marshall, at least, would have accepted. See *Mossman v. Higginson*, 4 U.S. 12 (1800) (per Marshall, C.J.) (construing Section 11 of the Judiciary Act, which gave diversity jurisdiction to suits involving aliens, to require at least one U.S. party in order to preserve its constitutionality).

89. See *supra* Part II.A.; Clark, *Separation of Powers*, *supra* note 52, at 1283.

90. See Brilmayer, *supra* note 2, at 303 (acknowledging the practice while arguing that it is mistaken).

91. See *Petition for Writ of Certiorari, Royal Dutch Petroleum Co. v. Wiwa* (filed January 19,

errs in assuming that the jurisdictional and supremacy arguments are identical – that is, that international law must be preemptive *and* jurisdiction, or neither. This simply does not follow from the constitutional language.

III. INTERNATIONAL LAW AND FEDERAL JURISDICTION: CONTINUING CONSTITUTIONAL OBJECTIONS

In the preceding sections, I have argued that it is possible to view international law as nonpreemptive U.S. law. This arises from the difference in the wording of Article III (relating to federal jurisdiction) and Article VI (relating to preemption). As a result, one can embrace much of the Bradley/Goldsmith position yet accept the continuing validity of most international human rights litigation in U.S. court.

This position is not without its difficulties, however, and resolving these difficulties seems an important task for international human rights scholarship. That resolution is beyond the scope of this article, but having raised the possibility of international law as nonpreemptive federal law, it seems appropriate at least to lay out the challenges for that position.⁹²

Most importantly, the proposed interpretation of Article III raises the possibility of serious redundancy. If Article III's grant of jurisdiction over claims "arising under" federal law includes claims arising under international law, several of the other grants of jurisdiction in Article III may seem superfluous.⁹³ For example, Article III also gives federal jurisdiction over cases arising in admiralty.⁹⁴ Particularly in the eighteenth century, nonstatutory admiralty claims would have been, as a general matter, governed by international law. If admiralty jurisdiction was already covered by "arising under" jurisdiction, what was the point of the admiralty clause?⁹⁵

The proposed interpretation is also in some tension with the drafting history of Article III. In one early draft federal jurisdiction specifically

2001), at 28 ("*Filartiga* also has radical implications for domestic governance. . . . If *Filartiga* were correct, then norms of international law . . . would preempt inconsistent state laws and practices. Wholesale federal court supervision of the several states for compliance with unwritten principles of international law would follow."); Weisburd, *State Courts*, *supra* note 14, at 4 ("Nor does [*Filartiga*] consider the potentially sweeping effect of the rule it applies. . . . [I]f customary international law is federal law, it must displace state law in the event of a conflict.").

92. For a series of forthcoming articles exploring this issue in greater detail, see Bradley, *The Alien Tort Statute and Article III*, *supra* note 6 (forthcoming); Dodge, *The Constitutionality of the Alien Tort Statute*, *supra* note 6 (forthcoming).

93. See, e.g., Weisburd, *Executive Branch*, *supra* note 14, at 1223 (making this point); but see Stewart Jay, *supra* note 54, at 831 (discounting it).

94. U.S. CONST. art. III.

95. Relatedly, the proposed interpretation must accommodate the clause in Article I, section 8 granting to Congress the power to define and punish offenses against the law of nations.

included claims “which may arise . . . on the Law of Nations.”⁹⁶ The drafters subsequently added more specific references to particular aspects of the law of nations, such as admiralty and cases affecting ambassadors, and deleted the reference to the law of nations. Some explanation must be provided as to why the drafters made this change.⁹⁷

In addition, a number of leading scholars of the early history of U.S. common law conclude that legal theorists of the time did not conceive of the law of nations as “federal law.” Speaking of the early nineteenth century, for example, Professor Clark argues:

The law of nations was not “law” as we usually think of it today – that is, a sovereign command In essence, the law of nations operated as a set of background rules that courts applied in the absence of any binding sovereign command to the contrary. Because of the character of such law, federal and state courts had no occasion to characterize the various branches of the law of nations as either federal or state law. At the time, it was thought to be neither.⁹⁸

Such comments generally are not made specifically in the context of assessing Article III jurisdiction, and, as I have argued, there is a difference between finding that international law is not “federal law” (a term with no constitutional significance) and finding that international law is not part of the “laws of the United States” (the relevant question under Article III). Nonetheless, these commentaries give some reason to doubt whether the constitutional generation understood the law of nations to be part of “the laws of the United States.”

Finally, as Bradley and Goldsmith point out,⁹⁹ the judicial practice of the late nineteenth century seems squarely against the proposed interpretation.¹⁰⁰ Indeed, cases of this period treat the matter not as a controverted question, but as a self-evident legal maxim.¹⁰¹ This was, moreover, a period in which

96. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 136 (Max Farrand ed., 1911). See Weisburd, *State Courts*, *supra* note 14, at 4 (relying on this development to argue against general federal jurisdiction over the law of nations).

97. One explanation, of course, might be that they thought the law of nations was part of the “laws of the United States,” and thus deleted the specific reference to the law of nations because they thought it was redundant. I am not aware of any drafting history actually supporting this hypothesis, however.

98. Clark, *Federal Common Law*, *supra* note 4, at 1279-80. See also Stewart Jay, *supra* note 54, at 832. But see Edwin Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26 (1952) (taking the opposing view).

99. Bradley & Goldsmith, *Customary International Law*, *supra* note 3, at 824 n.53; Bradley & Goldsmith, *Current Illegitimacy*, *supra* note 3, at 332 n.64.

100. See e.g., *Ker v. Illinois*, 119 U.S. 436, 444 (1886); *City and County of San Francisco v. Scott*, 111 U.S. 768, 769 (1884); *New York Life Ins. Co. v. Hendren*, 92 U.S. 286, 287 (1875).

101. See e.g., *Ker*, 119 U.S. at 444 (stating briefly and without citation that “though we might or

federal courts, including the *Paquete Habana* decision, repeated the mantra “international law is part of our law.”¹⁰² Thus, at least in the late nineteenth century, federal courts thought international law did not establish federal “arising under” jurisdiction even though international law was “part of our law.” That, of course, is not decisive as to the correct understanding of the constitutional text, either as an original matter or today, but at minimum it seems a matter that calls for some explanation.

IV. CONCLUSION

This article seeks to make three observations about the international-law-as-federal-law debate. First, this is a question of constitutional law. As such, it should be approached using the ordinary tools of constitutional interpretation. In particular, the text of the Constitution should be the starting point, and analysis of the text in light of its structure and history should play a central role in reaching the correct interpretation.

Second, close attention to the text reveals that this matter cannot be reduced to the single question, “Is international law federal law?” The matter instead involves at least two distinct questions: whether international law is preemptive (governed by Article VI); and whether international law is the basis for federal jurisdiction (governed by Article III). Because the language and structural implications of these constitutional provisions are different, they should be analyzed separately. Although the commentary has generally assumed that international law has either both characteristics or neither, separating the analysis shows that it is at least possible that international law might have one characteristic but not the other.

Third, examining the two questions separately and with close attention to the text reveals that the argument against the supremacy of international law is quite strong, while the argument against the jurisdictional status of international law is weaker. Article VI requires that, for a law to be supreme, the law must be “made in Pursuance” of the Constitution.¹⁰³ International law cannot fit that description, for international law is made entirely outside the U.S. legal system. Structural and historical considerations bear out this natural reading of the text.¹⁰⁴ On the other hand, Article III requires for federal “arising under” jurisdiction only that a law be

might not differ with the Illinois court on [a matter of the law of nations], it is one in which we have no right to review their decision.”)

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

103. U.S. CONST. art. VI.

104. *See supra* Part II.A.

part of “the laws of the United States.”¹⁰⁵ Whether this includes international law is a difficult question, particularly in light of founding-era statements to the effect that international law “is part of the law of the land.” Further, much of the structural and historical evidence against international law supremacy is weaker or simply does not apply against the jurisdictional claim. For example, making international law preemptive over state law has substantial federalism effects, but making international law jurisdictional, and thus permitting alien-against-alien suits such as those based on the ATS, has less impact upon the relative power of the states.¹⁰⁶ I do not argue that international law is clearly included within the jurisdictional grants of Article III, and indeed I have noted above some serious objections to that position,¹⁰⁷ but I do conclude that a definitive case against inclusion of international law in Article III has yet to be made.

105. U.S. CONST. art. III.

106. *See supra* Part II.B.

107. *See supra* Part III.