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## United States V. Ja Vino: Reconsidering The Relationship Of Customary International Law To Domestic Law

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# UNITED STATES V. JAVINO: RECONSIDERING THE RELATIONSHIP OF CUSTOMARY INTERNATIONAL LAW TO DOMESTIC LAW\*

## I. INTRODUCTION

A well-established principle of United States jurisprudence is that customary international law is a part of our domestic law.<sup>1</sup> The meaning of this principle, however, is far from clear.<sup>2</sup> Courts and legal scholars have been unable to agree upon the relationship of customary international law to other forms of federal law.<sup>3</sup> While virtually all scholars agree that, as a domestic matter, the United States Constitution is supreme over a conflicting customary international rule of law,<sup>4</sup> no such universal agreement exists for the notion that a federal statute supersedes an inconsistent international rule of custom.<sup>5</sup> Indeed, the controversy over revisions to the Restatement (Third) of Foreign Relations Law of the United States (Restatement (Third)) illuminates the sharp division of views regarding the status of customary international law in domestic courts.<sup>6</sup>

Despite the ongoing debate among legal scholars, neither the United States Supreme Court nor any federal court of appeals ever has suggested that a federal statute may not violate a customary international rule of

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1. See *The Paquete Habana*, 175 U.S. 677, 700 (1900) (standing for general proposition that customary international law is part of law of United States). See generally Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984) (discussing proposition that international law is part of United States domestic law).

2. See Henkin, *supra* note 1, at 1555 (stating that import of principle that international law is part of United States law is uncertain and controversial).

3. *Id.* at 1564 (stating that courts have not determined authoritatively relationship of customary international law to other forms of domestic law in United States); Frederic L. Kirgis, Jr., *Federal Statutes, Executive Orders and "Self-Executing Custom"*, 81 AM. J. INT'L L. 371, 371 (1987) (noting disagreement over relationship of international custom to other forms of domestic law).

4. See Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 870 (1987) (maintaining that history of Supreme Court's approach to treaty law implies that international law, including customary international law, is subordinate to Constitution).

5. See *infra* notes 31-76 and accompanying text (addressing debate over whether federal statute may supersede inconsistent rule of international custom).

6. See Kirgis, *supra* note 3, at 371 (stating that much heated debate occurred during drafting of Revised Restatement over whether customary international rule of law could supersede earlier federal statutory law); *infra* notes 147-50 and accompanying text (providing example of controversial proposal to Revised Restatement).

law.<sup>7</sup> Rather, the traditional rule in United States courts has been that, as a matter of domestic law, courts will uphold a statute that Congress has enacted in violation of customary international law if congressional intent is clear.<sup>8</sup>

A recent opinion of the United States Court of Appeals for the Second Circuit, *United States v. Javino*,<sup>9</sup> contains a dictum that challenges this longstanding rule. In *Javino*, the United States charged the defendant, Dale Javino, with the possession of an incendiary bomb made in violation of the National Firearms Act (Act).<sup>10</sup> On appeal of his conviction, Javino argued, *inter alia*, that the government failed to prove that Javino had manufactured

7. See Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1072 (1985) (stating that United States courts have consistently held that Congress may violate rules of customary international law at will). *But see* Jordan J. Paust, *Rediscovering the Relationship Between Congressional Power and International Law: Exceptions to the Last in Time Rule and the Primacy of Custom*, 28 VA. J. INT'L L. 393, 441-42 (1988) (stressing importance of three federal court of claims cases and two early opinions of Attorney Generals supporting proposition that international custom must prevail over inconsistent federal statutes). Although Professor Paust correctly notes the existence of some judicial history in the United States that supports a rule of primacy of international custom over conflicting federal statutory law, no Supreme Court or federal court of appeals case law supports such a rule. See *infra* note 8 and accompanying text (providing examples supporting traditional rule of primacy of legislation over customary international law).

8. See, e.g., *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 131 (1923) (upholding legislation that Congress enacted pursuant to Eighteenth Amendment that contravened international custom permitting ships to carry liquor as part of their stores); *Committee of United States Citizens in Nicar. v. Reagan*, 859 F.2d 929, 939 (D.C. Cir. 1988) (holding that no enactment of Congress is subject to challenge on basis of customary international law violation); *Garcia-Mir v. Meese*, 788 F.2d 1446, 1453 (11th Cir.) (construing *The Paquete Habana* to mean that customary international law will govern only when no controlling executive or legislative act exists, thus implying that international custom must yield to congressional legislation), *cert. denied*, 479 U.S. 889 (1986); *United States v. Howard-Arias*, 679 F.2d 363, 371-72 (4th Cir.) (holding that even if exercise of jurisdiction under Marijuana on the High Seas Act violated international law, international law must yield to conflicting federal statute), *cert. denied*, 459 U.S. 874 (1982); *Tag v. Rogers*, 267 F.2d 664, 666 (D.C. Cir. 1959) (construing *The Paquete Habana* to mean that courts must recognize congressional or executive acts as superior to customary international law, and courts have no authority to declare such acts null and void because acts violate international law), *cert. denied*, 362 U.S. 904 (1960); *The Over the Top*, 5 F.2d 838, 842 (D.C. Conn. 1925) (holding that customary international law is binding only to extent that court adopts it, and such law must give way to congressional will); *United States ex rel. Pfefer v. Bell*, 248 F. 992, 995 (D.C.N.Y. 1918) (holding that rules of customary international law are subject to express acts of Congress, and courts must give effect to constitutional acts of Congress even if acts violate customary international law); *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 115(1)(a)* (1987) [hereinafter *RESTATEMENT (THIRD)*] (stating that Congress may supersede earlier rule of international law if Congress expresses clear intent to do so). In construing statutes courts will presume that Congress did not intend to violate international law absent a clearly expressed intent to the contrary. *RESTATEMENT (THIRD)*, *supra*, § 114.

9. 960 F.2d 1137 (2d Cir.), *cert. denied*, 113 S.Ct. 447 (1992).

10. *United States v. Javino*, 960 F.2d 1137, 1140 (2d Cir.) (construing various provisions of National Firearms Act, 26 U.S.C. §§ 5801-5872 (1988)), *cert. denied*, 113 S.Ct. 447 (1992).

the bomb in the United States and that the Act prohibited only the possession of firearms "made" in the United States.<sup>11</sup> The government, on the other hand, contended that the Act extended to the construction of firearms outside of the United States as well.<sup>12</sup>

The Second Circuit held that Congress did not express a clear intent to extend the Act to the foreign manufacture of firearms.<sup>13</sup> The Second Circuit further noted in dictum that even if Congress had expressed in the Act a clear intent to regulate the manufacture of firearms outside of the United States, a "substantial question" existed as to whether Congress lawfully could have done so.<sup>14</sup> The *Javino* court explained that in light of sections 402 and 403 of the Restatement (Third), a court likely would rule such extraterritorial regulation unreasonable.<sup>15</sup> According to the Restatement (Third), the source of the reasonableness test is customary international law.<sup>16</sup> Thus, the *Javino* court suggested that Congress may not enact a statute in violation of customary international law.

*Javino* is the first federal court of appeals decision to suggest, even in dictum, that customary international law may override a federal statute as a matter of United States federal law. The primary focus of this Note is the resulting change in the relationship between customary international law and federal statutory law in United States jurisprudence should this dictum ever become the holding in other cases.

The first section of this Note defines customary international law and examines the background of customary international law in United States courts. Initially, this section distinguishes customary international law from treaty law and briefly discusses the different approaches that domestic courts have taken with respect to the two types of international law. This section then examines the various theories concerning the relationship of domestic law to international law that have influenced courts in their treatment of customary international law.

The second section of this Note analyzes the meaning as well as the jurisprudential implications of the *Javino* dictum. This section discusses the question of whether the Second Circuit actually focused on the issue of the

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11. *Id.* at 1141.

12. *Id.* at 1142.

13. *Id.* The *Javino* court noted that a well-established principle of United States law is the presumption that unless a contrary intent appears, Congress does not intend legislation to have extraterritorial application. *Id.* The Second Circuit contrasted the language of the National Firearms Act (Act) with the clear language mandating extraterritorial application in legislation prohibiting the manufacture and distribution of controlled substances. *Id.* The Second Circuit found no such intention of extraterritorial effect either in the language of the Act or in the legislative history of the Act. *Id.* Because the Act did not prohibit the mere possession of an incendiary device, but rather the possession of a firearm made in violation of some other provision of the Act, the *Javino* court upheld the defendant's claim that the government had failed to prove every element of the offense beyond a reasonable doubt. *Id.* at 1143.

14. *Id.*

15. *Id.* at 1142-43.

16. RESTATEMENT (THIRD), *supra* note 8, § 403 cmt. a.

relationship of federal statutes to customary international law when it stated its dictum. This section also addresses two possible implications, as well as related policy matters, should other courts adopt the principles delineated in the *Javino* dictum. The first possibility is that courts will deem customary international law superior to federal statutory law. Another possibility is that courts will apply the last-in-time rule which currently is applicable only with respect to treaty law. Finally, this Note questions whether the source of the Restatement (Third) 's reasonableness test lies in customary international law or domestic law, and, if so, whether the Restatement (Third) requires the result that the dictum in *Javino* appears to articulate.

## II. BACKGROUND

### A. Customary International Law Defined

International law consists of two principal types of law.<sup>17</sup> The first type, treaty or conventional law, refers to obligations that arise out of express agreements among states.<sup>18</sup> In the United States, the President makes treaties with foreign nations to which the Senate must give consent in order for them to become legally binding.<sup>19</sup> In *Reid v. Covert*,<sup>20</sup> Justice Black an-



17. See *infra* notes 18-30 and accompanying text (distinguishing two principal types of international law). Article 38(1) of the Statute of the International Court of Justice lists two other types of international law, both of which are secondary authority. The first of these are "general principles of law of civilized nations." I.C.J. Stat. Art. 38(1)(c). The key characteristic of the general principles is that these principles, such as the doctrine of *res judicata* or statute of limitations, are common to many of the major legal systems. RESTATEMENT (THIRD), *supra* note 8, § 102 cmt. 1. Although general principles may lack sufficient acceptance to constitute a customary international rule of law, such principles are a secondary source of international law that often develop international law interstitially. *Id.* Consistent state practice, moreover, may convert a general principle into a rule of international custom. *Id.* The second type of law consists of judicial decisions and teachings of highly qualified publicists. I.C.J. Stat. Art. 38(1)(d).

18. See RESTATEMENT (THIRD), *supra* note 8, § 102 cmt. f (defining treaty law).

19. U.S. CONST. art. II, § 2; see also RESTATEMENT (THIRD), *supra* note 8, § 303 (defining types of international agreements President may make). In addition to treaties, which require the concurrence of two-thirds of the Senate, the President has the authority to enter into three other general types of international agreements. *Id.* Under the first type, "Congressional-Executive agreements," the President, pursuant to the authorization or approval of Congress, may make an agreement with other states dealing with any matter that falls within the constitutional powers of the President and Congress. *Id.* § 303(2). Common examples of Congressional-Executive agreements involve situations in which congressional legislation requires an international agreement to execute the legislation, or in which Congress authorizes the President to conclude an international agreement. *Id.* § 303 cmt. e. Because a Congressional-Executive agreement is merely an alternative to concluding a treaty, the agreement has the same authority in domestic law as a treaty. *Id.*

A second type of agreement, known as an "executive agreement pursuant to treaty," permits the President to make an international agreement that a United States treaty authorizes. *Id.* § 303(3). The President uses this type of agreement to implement the treaty, and the international agreement has the effect and validity of the treaty itself. *Id.* § 303 cmt. f. The

nounced the proposition that the Constitution is supreme over treaties and executive agreements.<sup>21</sup> Moreover, Article VI of the United States Constitution provides that treaties, along with federal statutes, are supreme over any inconsistent state law.<sup>22</sup> Generally, treaties are equal in status to federal statutes,<sup>23</sup> and if an inconsistency arises between a federal statute and a treaty, the "last-in-time" rule governs.<sup>24</sup> Thus, a treaty will supersede any

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final type, "sole executive agreements," involves international agreements that the President makes pursuant to the President's independent authority under the Constitution. *Id.* § 303(4). For instance, the Executive has the authority under its power as commander in chief to make armistice agreements during declared wars. *Id.* § 303 cmt. g. Sole executive agreements are law of the United States and, as with treaties, later congressional acts or treaties may supersede them. *Id.* § 303 cmt. j. However, courts have not determined authoritatively whether a sole executive agreement may override earlier federal statutes as a matter of domestic law. *Id.*

20. 354 U.S. 1 (1957).

21. *Reid v. Covert*, 354 U.S. 1, 15-41 (1957) (announcing supremacy of Constitution over treaty law). In *Reid*, the Supreme Court considered whether an executive agreement between the United States and Britain may violate the constitutional rights of American criminal defendants. *Id.* at 3. The executive agreement at issue granted the United States military courts exclusive jurisdiction over all crimes committed in Great Britain by U.S. servicemen or their dependents. *Id.* at 15. In *Reid*, Mrs. Covert killed her husband, a sergeant in the United States Air Force stationed at an airbase in England. *Id.* at 3. Under the treaty, Mrs. Covert received a court-martial trial and, despite evidence of insanity, the military tribunal found her guilty of murder and sentenced her to life imprisonment. *Id.* The Supreme Court held that Article III, Section 2 and the Fifth and Sixth Amendments of the Constitution forbade the nonjury military trial of a civilian. *Id.* at 15-41. In so doing, the Supreme Court reversed its prior decision which held that Congress could provide for the military trial of such civilian dependents provided that the procedures were not arbitrary and were consonant with due process. *Kinsella v. Krueger*, 351 U.S. 470, 477-78 (1956). The *Reid* Court further rejected that power of Congress "to make Rules for the Government and Regulation of the land and naval Forces" under Article I, Section 8, Clause 14 permitted a nonjury military trial of civilian dependents. *Reid*, 354 U.S. at 19-40. Accordingly, the Court held that Mrs. Covert's military conviction violated the Constitution and, therefore, could not stand. *Id.* at 41.

While *Reid* involved an executive agreement, courts have established firmly the supremacy of the Constitution over all international agreements, whether treaties or sole executive agreements. See Louis Henkin, *Foreign Affairs and the Constitution 137-40* (1972) (asserting that general agreement exists that Constitution is supreme over all international agreements); *RESTATEMENT (THIRD)*, *supra* note 8, § 302, Reporter's Note 1 (same).

22. U.S. CONST. art. VI. Article VI of the Constitution provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all *Treaties* made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

*Id.* (emphasis added).

23. See *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (establishing equality of federal statutes and treaties in domestic legal framework); *RESTATEMENT (THIRD)*, *supra* note 8, § 115, Reporter's Note 1 (stating that courts have inferred that Supremacy Clause establishes equality of treaties and statutes); *infra* note 25 and accompanying text (discussing equality of congressional acts and treaties in context of last-in-time rule).

24. See *RESTATEMENT (THIRD)*, *supra* note 8, § 115 (defining last-in-time rule).

prior inconsistent federal statute.<sup>25</sup> The last-in-time rule only applies, however, to self-executing treaties—treaties that need no further legislative enactment in order for courts to apply them as law.<sup>26</sup>

The second type of international law, customary international law, consists of unwritten obligations that courts infer from the general practice of states—a course of action or inaction that states habitually follow out of a sense of legal duty.<sup>27</sup> In the United States, customary international law

25. See, e.g., *Cook v. United States*, 288 U.S. 102, 118-19 (1933) (giving effect to treaty with Britain that modified earlier congressional act regarding territorial limits of searches of ships at sea); *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581, 602 (1889) (upholding congressional act controlling immigration in violation of prior treaties between China and United States); *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 621 (1870) (upholding Internal Revenue Act imposing taxes on liquor and tobacco in violation of prior treaty with Cherokee Indian nation); *Diggs v. Shultz*, 470 F.2d 461, 465-66 (D.C. Cir. 1972) (upholding congressional act allowing imports contrary to pre-existing United Nations Security Council trade embargo on Rhodesian exports), *cert. denied*, 411 U.S. 931 (1973); RESTATEMENT (THIRD), *supra* note 8, § 115 (providing definition of last-in-time rule). See generally Henkin, *supra* note 4, at 870-72 (discussing history of application of last-in-time rule); M. Erin Kelly, Comment, *Customary International Law in United States Courts*, 32 VILL. L. REV. 1089, 1092 (1987) (stating last-in-time rule); Paust, *supra* note 7, at 398-419 (1988) (discussing history of application and notable exceptions to application of last-in-time rule).

26. RESTATEMENT (THIRD), *supra* note 8, § 111(3) (distinguishing self-executing treaty from non-self-executing treaty). The Restatement (Third) provides that an international agreement is non-self-executing:

- (a) if the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation,
- (b) if the Senate in giving consent to a treaty, or Congress by resolution, requires implementing legislation, or
- (c) if implementing legislation is constitutionally required.

*Id.* § 111(4).

While a non-self-executing treaty is binding legally upon the United States as a matter of international law, courts may not apply a non-self-executing treaty as a matter of domestic law. See Henkin, *supra* note 1, at 1561 n.25 (stating that domestic courts may not apply non-self-executing treaties because they are not incorporated into domestic law). As such, a non-self-executing treaty cannot provide a basis for a private lawsuit. See *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 373 (7th Cir. 1985) (stating that only self-executing treaties can provide right to sue, and listing factors to consider in determining whether treaty is self-executing).

27. See Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 669 (1986) (providing definition of customary international law); RESTATEMENT (THIRD), *supra* note 8, § 102(2) (same). The Restatement (Third) emphasizes the two requisite elements before a practice can become binding as customary international law: (1) the practice must be consistent and general and (2) states must follow the practice out of a sense of legal duty, or *opinio juris sive necessitatis*. *Id.* While members of the international community need not universally follow a certain practice before it becomes a customary international rule of law, the general practice should reflect wide acceptance among a significant number of states that are involved in a relevant activity. *Id.* § 102 cmt. b. A consistent and general practice which is limited in scope to only a few states or a particular region can become a principle of customary international law that binds only those states involved. *Id.* § 102 cmt. e.

Furthermore, if states which follow the general practice do so only out of courtesy and not out of a sense of legal obligation, the practice is not binding as customary international

exists as an independent source of domestic law only as federal common law.<sup>28</sup> Moreover, unlike treaty law, no constitutional provision or Supreme Court case explicitly addresses the place of custom in the hierarchy of United States laws.<sup>29</sup> Therefore, whether the last-in-time rule would apply with respect to customary international law is unclear.<sup>30</sup>

## B. History of Controversy Over Relationship of Customary International Law to Domestic Law

### 1. The Meaning of *The Paquete Habana*

Much of the debate concerning the relationship of customary international law to domestic law centers on the meaning of the now-famous dictum from the Supreme Court's decision in *The Paquete Habana*:<sup>31</sup>

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law. *Id.* § 102 cmt. c. Such a practice, which courts and legal scholars often refer to as a principle of comity, may become binding as law if the states generally begin to believe that an international legal duty requires such action. *Id.*

28. See, e.g., RESTATEMENT (THIRD), *supra* note 8, § 111 cmt. d (supporting view that customary international law is federal common law); see also *infra* notes 57-76 and accompanying text (addressing debate over characterization of customary international law as federal common law).

29. See Margaret Hartka, Note, *The Role of International Law in Domestic Courts: Will the Legal Procrastination End?*, 14 MD. J. INT'L L. & TRADE 99, 106 (1990) (stating that Constitution says little about place of customary international law in domestic jurisprudence); Henkin, *supra* note 4, at 867-69 (same). But see Jordan J. Paust, *Customary International Law: Its Nature, Sources and Status As Law of the United States*, 12 MICH. J. INT'L L. 59, 77-86 (arguing that constitutional basis exists for incorporation of customary international law into domestic legal framework); *infra* notes 44-54 and accompanying text (suggesting that one may read well-known passage from *The Paquete Habana* as addressing place of custom in hierarchy of United States domestic law). According to Professor Paust, Article I, Section 8, Clause 10 of the Constitution refers to the "law of nations" and, as such, customary international law is relevant to the powers of all three branches of government. Paust, *supra*, at 77-85. First, customary international law is relevant to the Executive branch's Article II, Section 3 duty to "take care that Laws be faithfully executed." *Id.* at 81. Second, customary international law may serve to limit congressional power in some circumstances, while enhancing congressional power in other circumstances, such as Congress' power under the Necessary and Proper Clause of Article I, Section 8, Clause 18. *Id.* at 83-84. Finally, under Article III, Section 2, Clause 1, the judiciary has the power to discover and apply customary international law as "the Laws of the United States." *Id.* at 84. Professor Paust also argues that many of the amendments to the Constitution, particularly the Ninth Amendment, have their source in longstanding human rights principles of customary international law. *Id.* at 80.

30. See *infra* notes 103-45 and accompanying text (addressing debate over whether courts may apply last-in-time rule to conflicts between federal statutes and customary international law).

31. *The Paquete Habana*, 175 U.S. 677 (1900) (establishing international law as law of United States). In *The Paquete Habana*, the Supreme Court considered whether private Spanish fishing vessels, which the United States captured as prizes of war, were properly subject to capture. *Id.* at 686. The owners of the ships argued that, because an ancient custom exempted such private vessels from capture as prizes of war, the capture was unlawful. *Id.* at 686. The Supreme Court considered the history of the doctrine and determined that the rule was binding as a customary rule of international law. *Id.* at 686-708. The Supreme Court accordingly held the capture unlawful and awarded the proceeds of the sale of the vessels to the ships' owners. *Id.* at 714.



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 nations. . . .<sup>32</sup>

Some courts and legal scholars have interpreted the phrase "controlling executive or legislative act" in *The Paquete Habana* dictum to mean that if any executive or legislative act applies to the issue at hand, that act should prevail over international custom without regard to which is later in time.<sup>33</sup> The two leading federal court of appeals opinions that have adopted this approach are *Tag v. Rogers*<sup>34</sup> and *Garcia-Mir v. Meese*.<sup>35</sup>

In *Tag*, the plaintiff, a German citizen, argued that the Trading with the Enemy Act,<sup>36</sup> under which his title to a New York trust fund vested in the Attorney General, violated customary international law.<sup>37</sup> The United States Court of Appeals for the District of Columbia declared that federal courts must recognize an applicable treaty, federal statute, or constitutional provision as superior to principles of customary international law.<sup>38</sup> The *Tag* court further explained that the courts have no authority to declare null and void a federal statute or treaty declaration merely because such provision violates a principle of customary international law.<sup>39</sup>

32. *Id.* at 700. The Supreme Court's basis for its conclusion in *The Paquete Habana* dictum was the holding of an earlier case, *Hilton v. Guyot*, 159 U.S. 113 (1894). In *Hilton*, the Court stated:

The most certain guide, no doubt, for the decision of such questions is a treaty or a statute of this country. But when . . . there is no written law upon the subject, the duty still rests upon the judicial tribunals of ascertaining and declaring what the law is . . . . In doing this, the courts must obtain such aid as they can from judicial decisions [and] . . . the acts and usages of civilized nations.

*Id.* at 163.

33. See *infra* notes 36-47 and accompanying text (discussing judicial cases and opinions of legal scholars supporting view that *The Paquete Habana* dictum requires consideration of customary international law only in complete absence of relevant executive or legislative act).

34. 267 F.2d 664 (D.C. Cir. 1959), *cert. denied*, 362 U.S. 904 (1960).

35. 788 F.2d 1446 (11th Cir.), *cert. denied*, 479 U.S. 889 (1986).

36. 40 Stat. 411 (1917) (codified as amended at 50 U.S.C. app. §§ 1-44 (1988)).

37. *Tag v. Rogers*, 267 F.2d 664, 666 (D.C. Cir. 1959), *cert. denied*, 362 U.S. 904 (1960). In addition to the plaintiff's customary international law claim, he also claimed that the 1923 Treaty of Friendship, Commerce and Consular Rights between the United States and Germany prevented the United States from lawfully confiscating the plaintiff's property. *Id.* at 667. This treaty provided, inter alia, that heirs in either country were entitled to succeed to property in the other country regardless of the heirs' nationality. *Id.* The *Tag* court, applying the last-in-time rule, held that the Trading with the Enemy Act superseded the prior inconsistent treaty with Germany. *Id.* at 667-68.

38. *Id.* at 668.

39. *Id.* The *Tag* court held that, because Congress had enacted the Trading with the Enemy Act, the court would not apply customary international law and, accordingly, denied the plaintiff's claim. *Id.*

*Garcia-Mir* involved the detention of two groups of Cuban refugees under the direction of the Attorney General.<sup>40</sup> The refugees filed suit alleging violations of the Due Process Clause and customary international law.<sup>41</sup> With respect to their claim that prolonged arbitrary detention violated customary international law, the United States Court of Appeals for the Eleventh Circuit found that a congressional statute allowed the detention of the "First Group" of refugees and that the Attorney General's act constituted a "controlling executive act" allowing the detention of the "Second Group" of refugees.<sup>42</sup> The Eleventh Circuit then construed the *The Paquete Habana* dictum to mean that customary international law controls only in the absence of a treaty or a controlling executive or legislative act or decision,<sup>43</sup> presumably without regard to whether international custom or federal law is later in time.

Some scholars have suggested that the language from *The Paquete Habana* requires courts to uphold congressional or executive acts over contrary international customs.<sup>44</sup> One argument, for example, maintains that the essential corollary to the *The Paquete Habana* rule is that the judicial and political branches of the United States government have the power, based upon a federal statute or a controlling executive act, to disregard

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40. *Garcia-Mir v. Meese*, 788 F.2d 1446, 1448 (11th Cir.), cert. denied, 479 U.S. 889 (1986). The refugees in *Garcia-Mir* were a class of Mariel Cuban refugees to whom the United States accorded a special immigration parole status under the 1980 Refugee Education Assistance Act, 18 U.S.C.A. § 1522 (West 1988). *Garcia-Mir*, 788 F.2d at 1448. For purposes of this suit, the United States District Court for the Northern District of Georgia divided the class of refugees into two subclasses. *Id.* The "First Group" of Cuban refugees consisted of those who were guilty of committing crimes in Cuba or those who were mentally incompetent. *Id.* The "Second Group" consisted of Cuban refugees who the United States paroled into this country under the general alien parole statute, but whose parole the government subsequently revoked. *Id.*

41. *Id.*

42. *Id.* at 1453-55.

43. *Id.* at 1453. Because the court found controlling executive and legislative acts, the *Garcia-Mir* court denied the plaintiff's customary international law claim. *Id.* at 1455. The court also denied the plaintiffs' claim that the Due Process Clause prevented their arbitrary detention. *Id.* at 1449-53.

The "controlling executive act" in *Garcia-Mir* also raises the related issue of whether the President can violate customary international law. The issue of the President's power to violate customary international law also involves a unique constitutional issue: whether the President must abide by customary international law in fulfilling the Executive's Article II obligation to faithfully execute all laws of the United States. For a general discussion of this issue, see Michael J. Glennon, *Can the President Do No Wrong?*, 80 AM. J. INT'L L. 923 (1986); Michael J. Glennon, *Raising The Paquete Habana: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 NW. U. L. REV. 321 (1985); Kirgis, *supra* note 3, at 373-75; Jordan J. Paust, *The President Is Bound by International Law*, 81 AM. J. INT'L L. 377 (1987); Arthur M. Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205 (1988).

44. See *infra* notes 45-47 (discussing view that *The Paquete Habana* stands for proposition that federal statutory law prevails over inconsistent international custom).

customary international law.<sup>45</sup> Similarly, Professor Phillip Trimble would construe the *The Paquete Habana* dictum as affirming the view that customary international law is not of the same status, but rather is inferior to federal law.<sup>46</sup> Accordingly, Professor Trimble asserts that a court should apply customary international law only pursuant to a clear direction of a political branch or, alternatively, when the political branches have not addressed the question and a court's application of customary international law poses no danger of complicating foreign policy.<sup>47</sup>

Other legal scholars argue that the language in *The Paquete Habana* does not compel courts to apply domestic law over international custom.<sup>48</sup> Professor Louis Henkin advances the view that courts should construe the phrase "controlling executive or legislative act" in the *The Paquete Habana* dictum to mean a subsequent executive or congressional act.<sup>49</sup> A customary international rule of law, therefore, will govern unless a subsequent federal statute contravenes the issue.<sup>50</sup> A customary rule of international law would have essentially the same status as a self-executing treaty and could override a prior legislative enactment.<sup>51</sup> Professor Jordan Paust similarly argues that the language of the dictum in *The Paquete Habana* is inconclusive and cannot support the proposition that an applicable federal statute should override a contrary custom.<sup>52</sup> Professor Paust, for example, states that the word "controlling" in the dictum is a qualifying word indicating only that some legislative acts might be controlling whereas others are not.<sup>53</sup> Therefore, the complete absence of relevant domestic law is not a prerequisite to the judicial application of customary international law.<sup>54</sup>

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45. Jack M. Goldklang, *Back on Board The Paquete Habana: Resolving the Conflict Between Statutes and Customary International Law*, 25 VA. J. INT'L L. 143, 145 (1984). Goldklang argues that if either an executive proclamation or congressional act expressly allowed for the capture of the Spanish fishing boats in *The Paquete Habana*, the Court could not have applied contrary customary international law to the case. *Id.* at 145-46.

46. Trimble, *supra* note 27, at 727-31; see also 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) (arguing that courts should regard customary international as inferior to statutory law).

47. Trimble, *supra* note 27, at 672.

48. See *infra* notes 49-54 and accompanying text (providing view that *The Paquete Habana* does not require absence of controlling executive or legislative act as requisite to courts applying customary international law).

49. Henkin, *supra* note 4, at 878. Professor Henkin argues that the clause in *The Paquete Habana* stating "where there is no treaty and no controlling executive or legislative act or judicial decision" was dictum because neither party contended that a relevant United States law required a contrary result. *Id.* at 873. The Supreme Court cited no authority for the qualifying clause and never has elaborated on the meaning of the clause. *Id.* at 874. Thus, Henkin suggests that the Court may well have meant that a "controlling" act is a subsequent act. *Id.* at 878.

50. Henkin, *supra* note 4, at 878.

51. *Id.* at 877-78.

52. Paust, *supra* note 7, at 435-37.

53. *Id.*

54. *Id.*

However popular the interpretations that Professor Henkin and Professor Paust espouse, courts simply have not construed the dictum in *The Paquete Habana* as requiring any further consideration of customary international law when an applicable legislative or executive act exists.<sup>55</sup> Rather, judicial decisions reflect the notion that executive and legislative acts are superior to customary international law in the domestic sphere, and that such acts always will prevail over an inconsistent rule of custom, regardless of which is later in time.<sup>56</sup>

## 2. The Characterization of Customary International Law as Federal Common Law

Another area of controversy concerning the status of customary international law in the United States centers on the characterization of customary international law as federal common law.<sup>57</sup> Given the locus of the rule-making authority within a democratic government, the legislature may enact legislation that modifies or completely supersedes any rule of common law, whether the rule originates before or after the legislative enactment.<sup>58</sup> Thus,

55. See *supra* notes 34-43 and accompanying text (discussing two leading cases construing *The Paquete Habana* dictum).

56. See Trimble, *supra* note 27, at 684 (stating that United States courts almost never have applied customary international law as direct restraint on governmental interests); *supra* note 8 (providing judicial decisions that reflect idea that federal statutes always prevail over inconsistent custom in domestic courts). But see Paust, *supra* note 7, at 439 n.91 (providing federal court of claims cases implying domestic law may be subordinate to customary international law).

A possible exception to the rule that congressional and executive acts are always superior to customary international law in the domestic framework is in the narrow field of peremptory international norms or *jus cogens*. See Committee of United States Citizens in Nicar. v. Reagan, 859 F.2d 929, 941-42 (D.C. Cir. 1988) (stating in dictum that courts recognize existence of limited class of peremptory norms that prevail over inconsistent statutory law); RESTATEMENT (THIRD), *supra* note 8, § 102 cmt. k (explaining that international community recognizes class of norms that are peremptory, allowing no derogation); *infra* notes 135-37 and accompanying text (discussing peremptory norms in context of debate over whether customary international law is self-executing). *Jus cogens* are basic moral norms, such as international human rights principles, that approximate a theory of international natural law. See David Klein, Comment, *A Theory for the Application of Customary International Law of Human Rights by Domestic Courts*, 13 YALE J. INT'L L. 332, 351-56 (1988) (defining *jus cogens*). States cannot derogate from such norms domestically, nor can states acting collectively preempt *jus cogens* by treaty law. *Id.* *Jus dispositivum*, by contrast, are norms that arise only because of consistent state practice and acquiescence. *Id.* at 351. States may abrogate *jus dispositivum* by treaty law. *Id.* Under the traditional United States rule, moreover, Congress is free to violate customary international law that is in the class of *jus dispositivum*. *Id.*

57. See *infra* notes 58-73 and accompanying text (addressing debate over characterization of customary international law as federal common law).

58. See Glennon, *Can the President Do No Wrong?*, *supra* note 43, at 923 (stating that federal common law is interstitial and fills gaps in congressional legislation, but must yield when Congress enacts inconsistent legislation); Kirgis, *supra* note 3, at 373 (stating that legislature may modify or supersede common law). The Supreme Court also has addressed the issue of the power of federal courts to make common law on a subject upon which Congress

if customary international law is only a part of federal common law, an international principle of custom never could prevail over an inconsistent legislative enactment.<sup>59</sup> On the other hand, if customary international law is an independent source of law that courts discover through use of the common-law method, then an argument exists that customary international law, at least under certain circumstances, may override a contrary federal statute.<sup>60</sup>

Professor Henkin is the leading scholar of the view that customary international law exists as a separate body of law. Professor Henkin asserts that customary international law, although similar to common law in that neither are formally promulgated, is not federal common law as such because judges do not create but, rather, discover principles of international law.<sup>61</sup> In effect, rules of international custom are binding without any action on the part of domestic institutions because courts discover a rule that some exterior source requires them to apply.<sup>62</sup> Consequently, constitutional doctrines according supremacy to the legislative branch as a rule-making body do not apply to courts in finding customary international law.<sup>63</sup>

Critics of Henkin's argument point to several weaknesses in his characterization of customary international law as a body of law apart from federal common law.<sup>64</sup> First, while Henkin correctly notes that federal common law and customary international law are both unwritten law, United States courts never have held that unwritten federal law is anything but federal common law.<sup>65</sup> Second, according to Henkin's critics, whether courts "make" or "find" law is irrelevant because courts use the same general approach when discerning and applying customary international law as with other common law.<sup>66</sup> Courts often discern customary international practice through judicial decisions of various states.<sup>67</sup> By the same token, the absence

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previously has legislated. *See, e.g., Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978) (addressing issue of federal courts' power to develop common law on subject upon which Congress has legislated). The Supreme Court has held that congressional legislation on a particular matter precludes federal courts from creating an inconsistent common law on the same matter. *Id.* While courts generally are free to supplement congressional enactments, courts may not do so to the extent that such congressional acts become meaningless. *Id.*

59. *See Kirgis, supra* note 3, at 373 (suggesting that customary international rule of law, like other common law, yields to statutes).

60. *See infra* text accompanying notes 61-63 (discussing argument that customary international law is independent of federal common law in United States domestic law).

61. Henkin, *supra* note 4, at 876-77.

62. *See Weisburd, supra* note 43, at 1237 (characterizing Professor Henkin's position).

63. *See Henkin, supra* note 4, at 876-77 (stating that traditional arguments supporting proposition that common law is inferior to legislation do not apply with respect to international law).

64. *See infra* notes 65-73 and accompanying text (criticizing Henkin's view of international custom as body of law independent of federal common law).

65. Kirgis, *supra* note 3, at 373 n.12.

66. *See Klein, supra* note 56, at 349-50 (stating that differences in application of customary international law and common law are not differences of general approach).

67. *Id.* at 347.

of judicial precedents on a given issue may compel courts to consult historical practice and scholarly resources to arrive at a common-law principle just as courts do in "finding" customary international law.<sup>68</sup> Therefore, the only difference in courts' approaches to customary international law and other federal common law is the availability of precedent.<sup>69</sup>

A third criticism of Professor Henkin's view of customary international law is that domestic law exists only to the extent that a court or a political institution promulgates the law.<sup>70</sup> According to this view, the seminal case of *Erie Railroad v. Tompkins*<sup>71</sup> stands for the proposition that a rule's authoritativeness can derive only from a constitutionally empowered source

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68. *Id.*

69. *Id.* at 350.

70. See Weisburd, *supra* note 43, at 1237 (criticizing Professor Henkin's view of customary international law as, *per se*, binding domestic law).

71. 304 U.S. 64 (1938). In *Erie R.R. Co. v Tompkins*, the Supreme Court reconsidered the longstanding notion that, with respect to questions of general law, federal courts sitting in diversity jurisdiction were free, in the absence of a local statute, to exercise their independent judgment as to what the common law of a state is or should be. *Id.* at 71. The plaintiff, Harry James Tompkins, suffered serious injury when a door protruding from the defendant's train struck the plaintiff as he walked adjacent to the defendant's railroad track. *Id.* at 69. The plaintiff filed a negligence suit in federal court on the basis of diversity jurisdiction. *Id.* The plaintiff argued that because no Pennsylvania statute addressed the issue, the court should apply federal common law. *Id.* at 70. The defendant, on the other hand, argued that the court must apply Pennsylvania common law which held that persons who walk along the railroad right of way were trespassers and that railroads were not liable for injuries to trespassers resulting from the railroad's negligence. *Id.* The United States District Court for the Southern District of New York agreed with the plaintiff and entered a judgment in favor of the plaintiff. *Id.* The United States Court of Appeals for the Second Circuit affirmed the district court's judgment. *Id.* The United States Supreme Court, however, reversed. *Id.* at 80. The Court held that federal courts exercising diversity jurisdiction were to apply the law of the state, whether the state law is statutory or common-law in origin. *Id.* at 79-80. In so holding, Justice Brandeis made the well known statement that "[t]here is no federal general common law." *Id.* at 78. Thus, *Erie* ended the belief in the existence of a transcendent unitary form of common law which applied equally to state, federal, and international jurisdictions. Klein, *supra* note 56, at 339.

The affect of *Erie* on courts' application of customary international law has received considerable attention in scholarly literature. Early concerns focused on the various problems should courts construe *Erie* to require federal courts in diversity cases to follow international law determinations of state courts. See, e.g., Philip Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM. J. INT'L L. 740, 743 (1939) (urging that *Erie* should not require federal courts to follow state court determinations of international law). The courts have embraced Judge Jessup's view of the effect of *Erie* on customary international law, and this is no longer an issue. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964) (adopting Judge Jessup's view that *Erie* holding did not apply to international law determinations); Henkin, *supra* note 1, at 1558-59 (stating that general agreement now exists that federal courts, and not state courts, have power to determine customary international law cases). Thus, courts have accepted the proposition that some room exists for the development of federal common law. *Id.* Nevertheless, a debate still exists as to whether *Erie* ended the notion that customary international law may be binding as federal common law without any action on the part of the courts. See *infra* notes 72-73 and accompanying text (discussing debate over whether courts must promulgate rules of international custom before such rules are binding as federal common law).

that promulgates the rule.<sup>72</sup> Thus, a rule of international law is not binding in the domestic realm merely because of some external international authority, but only because the court has applied the law.<sup>73</sup>

The Supreme Court never has addressed squarely the question of whether customary international law in the domestic realm is federal common law or some other type of law.<sup>74</sup> Nevertheless, if the Supreme Court confronts the issue, the Court likely would hold that customary international rules of law that are incorporated into the domestic laws of the United States are federal common law. Such a holding is consistent with the Court's treatment of other unwritten federal law.<sup>75</sup> Furthermore, a holding that customary international law is federal common law in the United States does not disturb the traditional rule that Congress may violate international custom without regard to whether the statute becomes effective before or after the custom has emerged.<sup>76</sup>

### C. *Theoretical Impediments to Judicial Application of Customary International Law*

In addition to the history of debate over the relationship of customary international law to domestic law, several theoretical problems lead to a general reluctance on the part of the judiciary to apply customary international law.<sup>77</sup> One such obstacle stems from the prevalence in the United States of the so-called "dualist" concept of international law.<sup>78</sup> The dualist

72. Weisburd, *supra* note 43, at 1237.

73. *Id.* at 1237-38.

74. A debate exists as to whether the case of *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), stands for the proposition that customary international law is federal common law. See Weisburd, *supra* note 43, at 1240-41 (addressing debate over whether *Sabbatino* held that customary international law is federal common law). In *Sabbatino*, the Supreme Court held that the act of state doctrine, which, under certain circumstances, prevents United States courts from determining the legality of acts of foreign governments, is a matter of federal common law. *Sabbatino*, 376 U.S. at 425. Professor Weisburd argues that *Sabbatino* is, at best, suggestive, but clearly does not hold that international custom is federal common law. Weisburd, *supra* note 43, at 1240-41. Others argue that the language in *Sabbatino* urging the need for federal supremacy and uniformity in international law interpretations strongly implies that customary international law is federal common law. *E.g.*, Joan Hartman, "Un-usual" Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty, 52 U. CIN. L. REV. 655, 662 (1983).

75. See *supra* text accompanying note 65 (stating that no courts have ever held that unwritten federal law is anything but federal common law).

76. See *supra* notes 58-59 and accompanying text (stating that if customary international law is federal common law, Congress may supersede customary international law by statute whether such custom emerges before or after statute).

77. See *infra* notes 78-88 (discussing theoretical obstacles to judicial application of customary international law).

78. See Louis Henkin, *The President and International Law*, 80 AM. J. INT'L L. 930, 932 (1986) (stating that while Supreme Court never has addressed whether United States legal system is monist or dualist, Supreme Court has implied, through construction of Supremacy Clause, that United States is in dualist camp).

theory maintains that domestic law and international law are two distinct legal systems.<sup>79</sup> Domestic decisionmakers determine whether to give internal effect to international law and, if so, what status to give to international law in the hierarchy of domestic law.<sup>80</sup> The effect of the dualist approach is that Congress or the President may violate customary international law without being in violation of domestic law in the United States.<sup>81</sup> The "monist" theory, by contrast, holds that international law and domestic law are parts of a single legal system and that international law is supreme in the hierarchy of domestic law.<sup>82</sup> Under the monist approach, a congressional or executive act that violates a rule of customary international law also results in a violation of domestic law, and courts must give effect to international law over the contrary domestic law.<sup>83</sup>

An additional impediment to the courts' application of customary international law is a general lack of understanding of customary international law among United States courts.<sup>84</sup> Judges may believe that an international legal system simply does not exist.<sup>85</sup> Alternatively, because judges must first determine whether a customary norm exists before applying the norm as law, judges may be unwilling to infer that a principle has become customary law, especially when the principle would be inconsistent with an earlier congressional or executive act.<sup>86</sup> Judges also may believe that, even if customary international law exists and is capable of being extrapolated from the general practice of states, courts nevertheless are ill-equipped to determine the existence or effect of such law and, consequently, leave such questions to the political branches.<sup>87</sup> Thus, at least in practice, courts tend to relegate international custom to the realm of idealism.<sup>88</sup>

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79. Henkin, *supra* note 4, at 864.

80. *Id.* at 864-65.

81. *Id.*; *cf.* Lobel, *supra* note 7, at 1072-73 (1985) (suggesting that power of Congress and President to violate international law causes dichotomy between national and international legal systems).

82. Henkin, *supra* note 4, at 864.

83. *See id.* (stating that under monist system, courts must give effect to international law, notwithstanding contrary provisions in domestic constitution or laws); Richard B. Lillich, *The Proper Role of Domestic Courts in the International Legal Order*, 11 VA. J. INT'L L. 9, 12 (1970) (same).

84. *See infra* notes 84-88 (suggesting that courts lack understanding of customary international law); Frederic L. Kirgis, Jr., *Alien Tort Claims, Sovereign Immunity and International Law in U.S. Courts*, 82 AM. J. INT'L L. 323, 326 (1988) (stating that federal judges typically are not experts in field of international law).

85. *Cf.* Trimble, *supra* note 27, at 665-67 (providing views of national leaders concerning their doubts about international legal system).

86. Henkin, *supra* note 1, at 1566; *see also* Note, *Judicial Enforcement of International Law Against the Federal and State Governments*, 104 HARV. L. REV. 1269, 1276 (1991) (explaining that judges are reluctant to find that international custom creates binding obligations in absence of specific validation by political branch).

87. *See* Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 YALE L.J. 2277, 2291 (stating that judicial refusal to entertain international law claims reflects



### III. ANALYSIS

The *Javino* dictum,<sup>89</sup> which questions the lawfulness of an extraterritorial regulation within an international context, stands alone in the history of judicial application of customary international law in the United States.<sup>90</sup> The import of the language suggests that a customary international rule of law, at least in some instances, may impose constraints on congressional or executive actions.<sup>91</sup> However, the Second Circuit does not address the extent to which customary international law would limit a federal statute. Thus, the dictum leaves open to question whether customary international law is in some sense always superior to congressional law, or whether a court must uphold only that which is later in time.

Nevertheless, if other jurisdictions adopt the principles underlying the *Javino* dictum as the basis of future judicial opinions, these opinions could change significantly the relationship between international law and acts of Congress in United States jurisprudence. Specifically, two possible consequences may follow from courts' adopting the *Javino* dictum as the basis for holdings in future cases. First, courts eventually may regard customary international law as superior to other forms of domestic law. A second possible consequence is that courts may apply the last-in-time rule to conflicts between customary international law and domestic law.

#### A. Implications of the *Javino* Dictum

##### 1. Transformation from a Dualist to a Monist System

The first possible consequence of courts' adopting the *Javino* dictum as future holdings is a variation of the "monist" theory of international

concern that foreign policy is political function and that courts are ill-equipped to make such foreign policy determinations).

88. Cf. Trimble, *supra* note 27, at 667 (observing that "[i]n the popular view international law is a charade—governments obey it only if convenient to do so and disregard it whenever a contrary interest appears).

89. See *supra* text accompanying notes 14-15 (paraphrasing *Javino* dictum).

90. Compare *Timberlane Lumber Co. v. Bank of Am.*, 749 F.2d 1378 (9th Cir. 1984) (applying reasonableness test to extraterritorial application of antitrust legislation), *cert. denied*, 472 U.S. 1032 (1985) with RESTATEMENT (THIRD), *supra* note 8, § 403 (setting forth reasonableness test). Unlike the reasonableness test in the RESTATEMENT (THIRD), which purportedly has its source in customary international law, the *Timberlane* court neither implicitly nor expressly held that its reasonableness test emanates from rules of international custom. See generally *Timberlane*, 749 F.2d 1378 (9th Cir. 1984) (making no reference to customary international law). While the *Javino* court quite possibly may not have focused on the international law issue as such, the dictum's sole reliance on the RESTATEMENT (THIRD) suggests, by implication at least, that customary international law provides the reasonableness test which might proscribe the extraterritorial regulation in this case. See *United States v. Javino*, 960 F.2d 1137, 1142-43 (2d Cir.) (relying on sections 402 and 403 of RESTATEMENT (THIRD), which provide that customary international law is source of reasonableness test), *cert. denied*, 113 S. Ct. 447 (1992).

91. See *supra* text accompanying notes 14-16 (explaining that *Javino* dictum suggests that customary international law may limit certain congressional actions).

law in which courts would deem customary international law superior to federal statutory law.<sup>92</sup> However, little judicial or scholarly support exists for this proposition. The suggestion that courts must accord international custom a higher status than the other forms of law listed in the Supremacy Clause exists neither in the text of the United States Constitution nor in the evidence of the Framers' intent.<sup>93</sup> As Professor Harold Maier points out, no legal scholar successfully has shown that the people of the United States intended to bestow the government's decisionmaking authority subject to the confines of an international legal regime.<sup>94</sup>

Nevertheless, a somewhat persuasive argument exists that neither the Constitution nor the courts can limit the authority of customary international law in the United States by relegating custom to a status equivalent to or lower than that of federal statutory law.<sup>95</sup> According to this view, customary international law has a superior claim to treaty law because custom is universal and enduring whereas treaty law governs only the parties to the agreement and only as long as the agreement remains in effect.<sup>96</sup> Indeed, the constitutions of other countries have embraced the supremacy of customary international law over domestic legislation.<sup>97</sup> Some scholars even assert that common notions about customary international law in the era of the Constitution's inception suggest that the Framers may have intended a monist system in which federal statutory law is subordinate to customary international law.<sup>98</sup>

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92. See *supra* notes 82-83 and accompanying text (defining monist system). A strict monist system would subordinate the Constitution to customary international law as well. See Henkin, *supra* note 4, at 864 n.56 (noting that one school of monists treat international law as supreme to *all* domestic law).

93. Henkin, *supra* note 4, at 866-67.

94. Harold G. Maier, *The Authoritative Sources of Customary International Law in the United States*, 10 MICH. J. INT'L L. 450, 460 (1989); see also Trimble, *supra* note 27, at 682 (arguing that location of law-making authority beyond American political institutions is inconsistent with American political philosophy); *cf.*, Goldklang, *supra* note 45, at 146-47 (maintaining that notion of customary international law superseding constitutional acts is not compatible with system of representative democracy in United States).

95. See *infra* notes 96-98 and accompanying text (discussing argument for monist system).

96. Henkin, *supra* note 4, at 877.

97. See *id.* at 877 n.101 (discussing constitutions of Italy, Greece and of Federal Republic of Germany, all of which generally recognize supremacy of customary international law over domestic legislation); Antonio La Pergola & Patrick Del Duca, *Community Law, International Law and the Italian Constitution*, 79 AM. J. INT'L L. 598, 601 (1985) (explaining that incorporation of customary international law is common to constitutions of European states).

98. See Henkin, *supra* note 78, at 933 (asserting that plausible arguments exist that Framers intended customary international law to be of higher status in hierarchy of domestic laws than congressional acts); Lobel, *supra* note 7, at 1078 (arguing that American Revolutionary leadership strongly supported notion that fundamental principles of international law limited government's power). Professor Lobel asserts that the Framers believed that domestic law and international law were simply two different branches of natural law. Lobel, *supra* note 7, at 1078-79. Furthermore, notions of the English common law in that period reflected the belief that universal principles were at the foundation of common law and the law of the nations. *Id.* at 1081-83. Thus, the Framers accepted the notion that the universal principles

If the Supreme Court ever addresses the issue, however, the Court would not likely give effect to a rule of customary international law without regard to constitutional constraints.<sup>99</sup> Rather, given the status of customary international law in the international realm<sup>100</sup> and the role of treaty law under the Constitution,<sup>101</sup> the Court likely would place customary international on the same level in the hierarchy of United States laws as treaty law.<sup>102</sup>

## 2. Application of the Last-in-Time Rule to Customary International Law

A second implication of courts' adopting the *Javino* dictum as the basis for future decisions is that courts will apply the last-in-time rule applicable to treaty law to customary international law. Indeed, application of the last-in-time rule is a more likely possibility than a judicial transformation into a monist system.<sup>103</sup> Although Congress still could enact legislation in violation of customary international law, the rule would require a court to determine which is later in time in deciding to give one law effect over another.<sup>104</sup> Moreover, considerable support exists in legal literature for the proposition that courts should apply the last-in-time rule to conflicts between domestic and international law.<sup>105</sup>

Professor Henkin, for instance, argues that no reason exists to prevent the application of the last-in-time rule to customary international law.<sup>106</sup> Henkin maintains that treaties and custom are of equal authority in the international realm and that custom will override a prior contrary treaty if

embodied in customary international law were supreme to municipal law and provided a limit to governments' authority. *Id.*

99. See Henkin, *supra* note 4, at 869-70 (stating that Supreme Court likely would subordinate customary international law to Constitution).

100. See Henkin, *supra* note 1, at 1564 (stating that customary international law and treaty law have same status in international realm).

101. See *supra* note 20 and accompanying text (discussing supremacy of Constitution over treaty law).

102. See Henkin, *supra* note 78, at 933 (stating that courts likely will conclude that customary international law has status of treaty law in hierarchy of domestic laws). An arguable exception to a rule placing customary international law and treaty law on the same plane would be in the narrow field of preemptory norms. See *supra* note 56 (discussing possible exception for preemptory norms). The Supreme Court likely would provide that preemptory norms, such as international human rights law, override legislation that violates a preemptory norm of international law. See *supra* note 56 (observing that courts recognize preemptory norms that prevail over inconsistent statutory law).

103. See *supra* notes 93-94 and accompanying text (suggesting that transformation into monist system is unlikely because of lack of constitutional support).

104. See Henkin, *supra* note 4, at 1566 (stating that, as with treaty law, Congress may supersede customary international law for domestic purposes, but that courts may give effect to customary international law in face of earlier statute).

105. See *infra* notes 106-10 (stating view that courts should apply last-in-time rule to unavoidable clashes between international custom and federal statutory law).

106. Henkin, *supra* note 1, at 1564-65.

the parties so intend.<sup>107</sup> Because treaties are equal in status to federal statutes,<sup>108</sup> customary international law also should be equal in status to federal statutes.<sup>109</sup> Therefore, courts should apply similar rules with respect to both forms of international law.<sup>110</sup>

While significant similarities exist between the two types of international law,<sup>111</sup> customary international law is, by its very nature, inescapably different from treaty law.<sup>112</sup> As a consequence, courts could not apply the last-in-time rule to customary law in the same manner as courts do with respect to treaty law.<sup>113</sup> Legal literature on this issue reveals several considerations

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107. *Id.*; see also RESTATEMENT (THIRD), *supra* note 8, introductory note, pt. V (providing example of international custom superseding prior inconsistent treaty). A good example of customary international law overriding a prior inconsistent treaty in the international realm is in the law of the sea. RESTATEMENT (THIRD), *supra* note 8, Introductory Note, pt. V. The conventions which the First United Nations Law of the Sea Conference adopted in 1958 have never terminated. *Id.* However, much state practice exists reflecting provisions of the 1982 Convention on the Law of the Sea that is inconsistent with the 1958 conventions. *Id.* Although the 1982 Convention has not yet entered into force, states generally have accepted most of the substantive provisions of the 1982 Conventions as rules of customary law binding upon them independent of the Convention. *Id.* But see CLIVE PARRY, THE SOURCES AND EVIDENCES OF INTERNATIONAL LAW 33-37 (1965) (stating that treaty law is more authoritative than customary law); Trimble, *supra* note 27, at 669 (arguing that customary international law and treaty law cannot be equally authoritative because they do not rest on same political foundations).

108. See *supra* note 23 and accompanying text (discussing equality of treaties and federal statutes).

109. See Henkin, *supra* note 1, at 1565 (arguing that no authority nor reason in principle exists for giving less weight to rules of customary international law than to treaty law in relation to prior congressional enactment).

110. *Id.* But see Goldklang, *supra* note 45, at 148-49 (arguing that whether customary international law will supersede treaty law in international realm is doubtful and, even if custom can supersede treaty in international law, whether such rule would apply in domestic law is doubtful). Goldklang points out that the RESTATEMENT (THIRD) contains no convincing authority supporting the assertion that customary law would supersede a prior treaty in international law. *Id.* at 148 n.30. However, assuming that the international law recognized the last-in-time rule with respect to custom, the United States' legal hierarchy is not particularly conducive to the application of the last-in-time rule to customary international law. *Id.* at 149.

111. See Henkin, *supra* note 1, at 1565 (noting similarities between customary international law and treaty law). As Professor Henkin points out, customary international law, like treaty law, is a multilateral creation of the political processes of the members of the international community. *Id.* Indeed, a principle of international custom is essentially a tacit agreement among states. *Id.* Furthermore, in the United States, an infraction of either type of international law (for instance, a court upholding a federal statute over a conflicting international law under the last-in-time rule) may give rise to international responsibility for the United States. See RESTATEMENT (THIRD), *supra* note 8, § 115 cmt. b (stating that, although Congress may supersede rule of international custom, international legal obligation continues).

112. See *supra* notes 18-30 and accompanying text (differentiating between nature of treaty law and customary international law).

113. See Trimble, *supra* note 27, at 676-82 (suggesting that because of fundamental differences between treaty law and customary international law, courts could not apply last-in-time rule to conflicts between federal statutes and custom in same fashion as they could to conflicts between statutes and treaties).

that courts should take into account in deciding whether to apply the last-in-time rule to customary international law.<sup>114</sup>

First, an argument exists that the application of the last-in-time rule to conflicts between federal statutes and international custom would be, in essence, a transformation into a monist system.<sup>115</sup> The basis of this argument is that customary international law will always necessarily be later in time because consistent state practice and recognition continually re-enacts a customary international principle.<sup>116</sup> If state practice does not constantly reenact a rule of international custom, the custom loses its force as law.<sup>117</sup> Because a valid rule of custom always would be last in time and always would prevail over inconsistent statutes, customary international law must be paramount to federal statutory law.<sup>118</sup>

The basis of this argument, however, is an improper characterization of customary international law. Although the existence of consistent state practice and legal obligation is necessary to the continued validity and force of an international custom,<sup>119</sup> it does not follow that such state practice constantly *re-enacts* customary international law, nor that the date of purported re-enactment is the relevant point in time. Rather, the relevant point in time, at least for purposes of the last-in-time rule, is the point when the norm initially emerges as a rule of customary international law.<sup>120</sup> Therefore, the application of the last-in-time rule to clashes between international custom and domestic law is not the equivalent of a transformation into a monist system.

A second consideration is that, in light of the widely held belief that customary international law is a part of federal common law, the application of the last-in-time rule to customary international principles might require the courts or Congress to recognize a difference between principles of international custom and other federal common law.<sup>121</sup> Because application of the last-in-time rule would permit a customary international rule of law to modify or supersede a prior statute, a principle inconsistent with notions of a democratic government,<sup>122</sup> a need may arise to redefine customary

114. See *infra* notes 115-45 and accompanying text (explaining variables that affect application of last-in-time rule to conflicts between customary international law and federal statutes).

115. Cf. Paust, *supra* note 7, at 418 (arguing that last-in-time rule applied to conflicts between international custom and federal statutory law supports primacy of customary international law over domestic law).

116. *Id.*

117. *Id.*

118. *Id.*

119. See *supra* note 27 (discussing requirements for international norm to be rule of customary international law).

120. Cf. RESTATEMENT (THIRD), *supra* note 8, § 102 cmt. c (suggesting that relevant point in time is when states begin to follow practice out of legal obligation or *opinio juris*).

121. See *supra* notes 57-73 and accompanying text (describing debate over characterization of customary international law as federal common law).

122. See Goldklang, *supra* note 45, at 147 n.20 (arguing that system of representative democracy in United States allows last-in-time rule only for acts that have same constitutional status, such as statutory law and treaty law).

international law as a sort of independent law that courts must find and interpret.

A related argument that courts eventually may have to address is that according customary international law a status equivalent to treaty law will upset the constitutional framework for the balance of powers.<sup>123</sup> Professor Trimble, for instance, asserts that courts are neither constitutionally empowered nor properly equipped to make the foreign policy determinations that customary international law embodies.<sup>124</sup> Rather, permitting courts to apply customary international law to invalidate legislation or otherwise to limit the authority of the political branches essentially grants to courts the same power to use international law as the power of courts to use constitutional law as a check on government authority.<sup>125</sup> Unlike a court's application of treaty law—law which popularly elected officials have made—a court's application of customary international law would impose upon the people a norm that they had no voice in making through the political processes.<sup>126</sup> Such a result would cause a significant redistribution of political powers and create a threat to the fundamental majoritarian philosophy of a democratic government.<sup>127</sup>

Critics of Trimble's view counter that the courts' application of customary international law does not present the threat of redistribution of political powers that he anticipates.<sup>128</sup> First, according to Trimble's critics, courts are sufficiently equipped to ascertain and apply customary international law.<sup>129</sup> Second, Trimble's critics argue that both the countermajoritarian problem as well as the distinction between treaty law and international custom are exaggerations because customary law arises through state consent and the political processes of the various states.<sup>130</sup> The fact that many

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123. See *infra* notes 124-27 and accompanying text (discussing argument that courts using customary international rule of law as check on governmental power will upset balance of powers).

124. Trimble, *supra* note 27, at 709-16.

125. See *id.* at 684 (stating that judicial application of customary international law to limit congressional acts will elevate status of international custom to constitutional common law).

126. *Id.* at 727-28.

127. *Id.* at 678-84.

128. See Klein, *supra* note 56, at 362 (suggesting that courts' application of customary international law would not redistribute political power any more than common-law adjudications already do). Klein argues that although Congress never has had the authority to violate fundamental customary norms, for example, a court's acknowledgement of this fact would not cause a redistribution of powers within the domestic constitutional framework. *Id.* at 363.

129. See Kelly, *supra* note 25, at 1125-26 (arguing that courts are equipped to ascertain existence of customary international law and should apply controlling norms to contribute to enforcement and development of international law); Note, *supra* note 86, at 1279 (stating that just as common-law courts are capable of giving content to broad constitutional doctrines of Due Process and Equal Protection, courts are equipped to give specific content to vague concepts of customary international legal principles).

130. See Brilmayer, *supra* note 87, at 2310 (stating that to extent that customary international law arises through state consent, custom poses no more of countermajoritarian threat than treaty law).

international norms are evidenced in treaties and other international agreements also tends to undermine any concern of excessive judicial activism.<sup>131</sup> Thus, the application of the last-in-time rule to conflicts between international custom and congressional acts would not cause a significant reorganization of governmental powers and the concomitant threat to democracy. Nevertheless, if domestic courts actively begin to discern and apply rules of customary international law, courts will have a broader role in making domestic law than traditionally has been the case in our legal framework. The constitutionality and propriety of such practice undoubtedly will come into question.

An additional problem with the theory that courts should apply the last-in-time rule in every case involving an unavoidable conflict between international custom and a federal statute is that the argument necessarily assumes that custom is always self-executing.<sup>132</sup> Although Professor Henkin argues that customary law is self-executing and courts may apply such law without need for further congressional enactment or implementation,<sup>133</sup> other scholars maintain that some types of norms may not be self-executing.<sup>134</sup> Professor Frederic Kirgis, for instance, asserts that certain rules of customary international law, such as human rights principles prohibiting torture, need no implementing legislation before courts may apply such law.<sup>135</sup> This is so because the norms are specific and the international community universally recognizes that these principles vest basic rights in every individual.<sup>136</sup> One could fairly characterize these norms as self-executing.<sup>137</sup> On the other hand, international norms involving highly politicized issues, such as norms regarding territorial limits, likely would require further implementing legislation for domestic courts to apply them as customary international law.<sup>138</sup>

Furthermore, assuming that courts could surmount the jurisprudential obstacles to applying the last-in-time rule to customary international law,

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131. Cf. Kelly, *supra* note 25, at 1122 (stating that one response to Professor Trimble's argument that customary international law has weaker political foundation than treaty law and cannot be equally authoritative is that statutes or treaties often evidence international custom).

132. See Kirgis, *supra* note 3, at 372 (suggesting that as last-in-time rule applies only with respect to *self-executing* treaties, any argument that last-in-time rule should apply to every conflict between federal statutes and international custom presupposes that custom is self-executing).

133. Henkin, *supra* note 1, at 1561.

134. See *infra* notes 135-38 (differentiating between self-executing and non-self-executing rules of customary international law).

135. Kirgis, *supra* note 3, at 372-73; see also Klein, *supra* note 56, at 350-56 (explaining that norms involving fundamental human rights are self-executing). Early international theory, drawing heavily on natural law theory, made a distinction between international practices that were *jus cogens* and those that were *jus dispositivum*. See *supra* note 56 (distinguishing *jus cogens* from *jus dispositivum*). In contemporary theory, Klein asserts, the classifications aid in distinguishing a self-executing from a non-self-executing rule of customary international law. Klein, *supra* note 56, at 356.

136. Kirgis, *supra* note 3, at 372.

137. *Id.*

138. *Id.*

many practical problems may arise out of the rule's implementation.<sup>139</sup> First, courts would confront considerable difficulty in determining the existence of a rule of customary international law.<sup>140</sup> Second, as a result of the amorphous nature of customary international law, courts would face extreme difficulty in determining the critically important moment in time when a customary international rule of law changes or initially emerges.<sup>141</sup> Indeed, because international custom evolves gradually over time, no precise moment of inception may exist.<sup>142</sup> Federal statutes would be subject continually to a judicial determination that customary international law had changed or emerged after the statutory enactment.<sup>143</sup> Furthermore, longstanding international customs would never have primacy over later congressional enactments.<sup>144</sup> The net effect of the last-in-time rule applied to custom is that the status of federal statutory law vis-a-vis international custom would be subject to continual uncertainty.<sup>145</sup>

The application of the last-in-time rule to unavoidable conflicts between customary international law and federal statutory law is neither impossible nor without support in legal literature. Nevertheless, such treatment of customary international law undoubtedly will require a re-evaluation of the characteristics of international legal principles. Furthermore, according international custom such status certainly will require courts to become increasingly adept at finding and applying such law.

In sum, the preceding analysis suggests that if courts adopt the principles underlying the *Javino* dictum as the holding in other cases, courts eventually may have to decide upon one of two possible approaches to customary international law, either of which substantially would alter the traditional judicial approach to customary international law. Because of the *Javino* dictum's sole reliance on sections 402 and 403 of the Restatement (Third)

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139. See *infra* notes 140-45 and accompanying text (discussing practical problems in application of last-in-time rule to conflicts between international custom and congressional legislation).

140. See ANTHONY CASSESE, *INTERNATIONAL LAW IN A DIVIDED WORLD* 181 (1986) (arguing that unavailability of enormous body of evidence makes ascertaining existence of newly emerged customary rule of international law exceedingly difficult).

141. See Maier, *supra* note 94, at 470 (observing difficulty in determination of precise point in time when customary international rule of law evolves).

142. See Note, *supra* note 86, at 1276 (explaining that customary international principles become legally binding only gradually as states begin to tailor their practice to prevailing custom).

143. *Id.*

144. *Id.*

145. *Id.*; see also Trimble, *supra* note 27, at 684 (discussing confusion of applying last-in-time rule to customary international law). Professor Trimble hypothesizes a "bouncing ball effect" in which a customary international rule of law supersedes existing legislation. Congress subsequently may re-enact the superseded legislation to give it effect over the customary rule. *Id.* Years later, however, an activist court might find that the customary international rule of law had re-emerged and superseded the re-enacted legislation. *Id.* This "bouncing ball effect," Trimble argues, could continue indefinitely. *Id.*



and the importance of the principles that underlie those sections, an examination of the position of the Restatement is relevant to the analysis.

### B. *The Position of the Restatement (Third)*

The Restatement (Third), which the American Law Institute (ALI) adopted in 1987, does not state a clear position with respect to the status of customary international law in relation to other forms of domestic law.<sup>146</sup> However, in drafting the current Restatement, the Reporters thoroughly considered and, indeed, adopted a provision that essentially accorded customary international law a status equivalent to treaties in United States law.<sup>147</sup> Specifically, section 135(1) of Tentative Draft No. 1 of the Restatement provided that a newly emerged principle of customary international law would supersede an inconsistent, pre-existing congressional statute.<sup>148</sup> The Reporters conceded, however, that the courts had not authoritatively determined this proposition<sup>149</sup> and, after considerable controversy, the Reporters abandoned section 135.<sup>150</sup> The only vestige of section 135 that remains in the Restatement (Third) is a suggestion in Reporter's Note (4) of section 115 that, arguably, courts should give later customary international law effect over an earlier statute.<sup>151</sup>

Although the Restatement (Third) leaves intact the traditional notion that Congress may violate customary international law, the Restatement (Third) nevertheless asserts that a new rule of customary international law has emerged that may proscribe certain congressional acts.<sup>152</sup> Section 403 provides that an international principle of reasonableness of extraterritorial jurisdiction has emerged which may limit the authority of Congress to regulate affairs beyond United States borders in some circumstances.<sup>153</sup>

146. See generally RESTATEMENT (THIRD), *supra* note 8 (evinced no clear statement on relationship of customary international law to domestic law).

147. RESTATEMENT (THIRD), *supra* note 8, § 135 (Tentative Draft No. 1, 1980).

148. *Id.*

149. *Id.* § 135 cmt. b.

150. See Maier, *supra* note 94, at 471 (noting that Reporters removed section 135 after much controversy).

151. RESTATEMENT (THIRD), *supra* note 8, § 115 Reporter's Note 4.

152. *Id.* § 403 cmt. a.

153. *Id.* According to § 403, even when a state has a basis under § 402 for exercising extraterritorial jurisdiction, a state may not exercise such jurisdiction when it would be unreasonable to do so. *Id.* § 403(1). In determining whether the exercise of such jurisdiction is unreasonable, a court must consider all relevant factors, including:

- (a) the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
- (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
- (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the

Under the Restatement (Third) approach, courts will not interpret general language in a statute to extend beyond what the reasonableness test would allow.<sup>154</sup>

The Restatement (Third)'s reasonableness test has generated considerable controversy.<sup>155</sup> The practical aspect of the debate centers on whether the judiciary is the proper forum to engage in the interest balancing and foreign policy determinations that the reasonableness test requires.<sup>156</sup> Some scholarly literature<sup>157</sup> and judicial opinions<sup>158</sup> reflect the idea that the political branches, and not the courts, should decide such matters. The jurisprudential aspect of the debate focuses on whether the reasonableness test really has support in customary international law or domestic law.<sup>159</sup> An argument exists that the source of the reasonableness test is not in customary international law<sup>160</sup>

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- degree to which the desirability of such regulation is generally accepted;
  - (d) the existence of justified expectations that might be protected or hurt by the regulation;
  - (e) the importance of the regulation to the international political, legal, or economic system;
  - (f) the extent to which the regulation is consistent with the traditions of the international system;
  - (g) the extent to which another state may have an interest in regulating the activity; and
  - (h) the likelihood of conflict with regulation by another state.

*Id.* § 403(2).

154. *Id.*

155. See Brilmayer, *supra* note 87, at 2288 (stating that RESTATEMENT reasonableness test has provoked much controversy); *infra* notes 156-63 and accompanying text (discussing debate over reasonableness test).

156. See Trimble, *supra* note 27, at 704 (arguing that courts are not properly equipped and are institutionally unsuited to engage in interests balancing). *But see* Brilmayer, *supra* note 87, at 2288 (suggesting that courts are equipped to use international law to resolve questions of extraterritorial scope). Apart from the question of whether the judiciary is the appropriate branch to balance the interests of competing states, another problem concerns the practicality of any domestic branch of government applying an all-encompassing balancing test. See Karl M. Meessen, *Antitrust Jurisdiction Under Customary International Law*, 78 AM. J. INT'L L. 783, 802 (1984) (questioning propriety of balancing test). One author has suggested that while a balancing test may be suitable for resolving questions of conflict of laws in the domestic context, the balancing test may not be appropriate in the international framework. *Id.* In international law, domestic decisionmakers must make reference to how the multitude of states perceive reasonableness of an extraterritorial exercise of jurisdiction. *Id.* In applying the reasonableness test, a domestic court of one state likely may reach a different conclusion than a domestic court of another. *Id.*

157. See, e.g., Trimble, *supra* note 27, at 704-06 (arguing that issues of extraterritorial regulation reflect fundamental economic, social, and political differences among states and that such issue is political one, ill-suited for judiciary).

158. See, e.g., *Laker Airways Ltd. v. Sabena Belgian World Airlines*, 731 F.2d 909, 948-56 (D.C. Cir. 1984) (stating that courts should not engage in interest balancing and criticizing appropriateness of reasonableness test).

159. See *infra* notes 160-63 and accompanying text (addressing issue of whether reasonableness test has its basis in international custom or domestic law).

160. See *Laker Airways*, 731 F.2d at 950 (stating that no evidence exists that balancing test represents rule of customary international law); Harold G. Maier, *Resolving Extraterritorial*

but, rather, that the drafters extracted the reasonableness test from international principles of comity<sup>161</sup> and elevated the test to the status of customary international law.<sup>162</sup> Furthermore, some scholars have suggested that the reasonableness test is without support in domestic law and that, indeed, many courts flatly have rejected the test.<sup>163</sup>

Regardless of whether the Restatement (Third) correctly states a current rule of international custom or domestic law, courts nevertheless may believe that the Restatement (Third) rules are authoritative and, as Professor Trimble asserts, the rules could become self-fulfilling prophecies.<sup>164</sup> Whether courts base their decisions on a supposed or actual rule of customary international law would seem to make little difference in the ultimate effect on the relationship of customary international law to domestic law in United States courts. As the *Javino* dictum clearly suggests, courts may construe and adopt a Restatement rule to invalidate legislation that purportedly violates a principle of customary international law. Once case law firmly establishes a limit that customary international law imposes on congressional authority, courts likely will face the difficult questions regarding the relationship of international custom to domestic law.<sup>165</sup>

The preceding argument assumes that the *Javino* court correctly interpreted the position of the Restatement (Third). A closer analysis, however,

*Conflicts, or "There and Back Again"*, 25 VA. J. INT'L L. 7, 9-10 (1984) (stating that prior to original draft of § 403, little, if any, support in international law suggested customary international principle of reasonableness of extraterritorial jurisdiction).

161. Compare RESTATEMENT (THIRD) *supra* note 8, § 403 (providing reasonableness test based on customary international law) with RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 [hereinafter RESTATEMENT (SECOND)] (providing rule for jurisdictional conflicts on basis of international principles of comity). See generally Maier, *supra* note 160 (discussing journey of ALI Reporters from comity principles underlying RESTATEMENT (SECOND) § 40 to customary international law principles underlying RESTATEMENT (THIRD) § 403). Professor Maier asserts that in spite of the Reporters' apparent rejection of the principles of comity in the RESTATEMENT (THIRD), most of the authority for the § 403 reasonableness test consists of United States cases in which courts have balanced competing state interests to ascertain whether the comity principle suggested a restraint of the extraterritorial application of regulatory legislation. *Id.* at 9; see also Trimble, *supra* note 27, at 698 (stating that courts that have engaged in interest balancing generally have not framed analysis in terms of international law, but in terms of comity, congressional intent, or to precedent and RESTATEMENT rules).

162. See Trimble, *supra* note 27, at 702 (stating that Draft RESTATEMENT elevates balancing test to status of customary international law).

163. *Id.* But see *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597 (9th Cir. 1976) (holding that courts should apply balancing test to determine whether interests of United States are sufficiently strong in relation to those of other states to justify assertion of extraterritorial authority). Professor Trimble argues that the problem with the *Timberlane* line of cases is that most courts have rejected this approach. Trimble, *supra* note 27, at 702.

164. Trimble, *supra* note 27, at 678. Professor Trimble notes that courts often rely on the Restatements for authoritative statements of rules of law. See *id.* at 678 n.54 (providing examples of cases relying on RESTATEMENT rules).

165. See *supra* notes 57-145 and accompanying text (addressing controversial issues with respect to relationship of customary international law to domestic law).

reveals that the *Javino* court misconstrued the Restatement (Third) when it suggested that Congress may not have the authority to enact a statute in violation of the customary international law of reasonableness.<sup>166</sup> The Restatement (Third)'s position falls short of requiring courts to refuse to give effect to a clear statutory command because the act violates the customary international law of reasonableness.<sup>167</sup> The black letter rule of section 403 states that courts should not interpret *general* language in a statute to extend beyond the limits of the reasonableness test.<sup>168</sup> However, if congressional intent is clear, courts must give effect to that intent even if such a construction results in a violation of international law.<sup>169</sup> Thus, the Restatement (Third) does not require the result that the dictum in *Javino* suggests.<sup>170</sup>

Nevertheless, the judiciary, and not the ALI, is the institution that creates the common law.<sup>171</sup> Even though a court might interpret a Restatement rule incorrectly, the court's interpretation may become firmly entrenched in judicial precedent. Thus, if a subsequent court adopts the *Javino* court's interpretation of sections 402 and 403 of the Restatement (Third) as a basis of a judicial opinion, the law of at least one jurisdiction will require any extraterritorial exercise of jurisdiction to conform with the customary international law of reasonableness before giving effect to the statute. Of course, the implications of adopting such a rule of law extend far beyond questions of jurisdictional limitations, and courts likely will face the difficult and more fundamental questions regarding the relationship of customary international law to domestic law.<sup>172</sup>

#### IV. CONCLUSION

In light of the significant consequences of adopting the approach that the *Javino* dictum suggests as well as the *Javino* court's failure to elaborate

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166. Compare *United States v. Javino*, 960 F.2d 1137, 1142-43 (2d Cir.) (suggesting that court may not uphold congressional enactment that violates customary international law of reasonableness), *cert. denied* 113 S. Ct. 447 (1992) with RESTATEMENT (THIRD), *supra* note 8, § 403 cmt. g (stating that courts must give effect to clear intent of Congress despite violation of customary international law).

167. See RESTATEMENT (THIRD), *supra* note 8, § 403, cmt. g (stating that act of Congress is valid even though construction of statute that accommodates congressional intent within confines of international law is not fairly possible).

168. *Id.*

169. *Id.* Professor Maier states that the original versions of § 403 appeared to challenge the traditional notion that, when congressional intent was clear, courts must give effect to that intent even if such effect would violate international law. Maier, *supra* note 94, at 466. After much controversy, however, the Reporters made clear that § 403 did not require courts to refuse to give effect to clear statutory commands. *Id.* In effect, Professor Maier argues, the current § 403 returned to the "functional comity principle" of the RESTATEMENT (SECOND) § 40 without using the term. *Id.* at 468.

170. See *supra* notes 166-69 and accompanying text (explaining that *Javino* court misconstrued rule of RESTATEMENT (THIRD)).

171. See BLACK'S LAW DICTIONARY 276-77 (6th ed. 1990) (stating that common law comprises body of rules which derive their authority from judgments and decrees of courts).

172. See *supra* notes 57-145 and accompanying text (addressing difficult questions concerning relationship of domestic law to customary international law).

upon its interpretation of Restatement (Third), section 403, the court most likely was not mindful of the underlying customary international law issue. Nevertheless, the *Javino* dictum suggests a landmark judicial position on the relationship of customary international law to domestic law. If judicial opinions ever reflect the principles underlying the *Javino* dictum, the decisionmakers of this country undoubtedly will face difficult and controversial questions concerning the status of customary international law and how courts should integrate that body of law into the existing domestic legal framework.

Future courts should be wary of adopting a customary international rule of law as a limitation on congressional power without giving full consideration both to the numerous consequences as well as to the propriety of the judicial application of customary international law in this fashion. As this Note suggests, the most likely result of such an approach would be the eventual recognition of customary international law as equivalent in authority to treaty law in the domestic realm and the application of the last-in-time rule to unavoidable conflicts between federal statutory law and international custom. While application of the last-in-time rule to custom appears workable, courts should be prepared to confront the inevitable practical and jurisprudential difficulties should judicial precedent ever support the application of customary international law as a limitation on domestic governmental authority.

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