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Dualistic Values in the Age of International Legisprudence

by

JONATHAN TURLEY*

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I. Introduction

Ever since this country was founded, lawyers and legislators in the United States have feared the gradual loss of our national jurisprudence to an international law of nations. Judicial suspicion of extrinsic legal sources has resulted in a sharp conceptual division between national (or municipal) law and the law of nations (or international law). Viewed as separate and distinct, these two legal systems are treated as related but independent parts of a “dualistic” system in which municipal law is generally superior to international law in domestic cases. The dualistic preference for municipal sources stems from a strong belief in legislative supremacy and thus naturally suits a Madisonian system that values deliberative and pluralistic decisionmaking.

In a Madisonian democracy, legislation is ideally the culmination of an open, deliberative process. This process is designed to force compromise among otherwise disparate factional groups. Whether viewed from a normative or an economic perspective, the passage and interpretation

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2. The reference to legislative supremacy is not meant to exclude possible dualistic preferences for judge-made common law. Although this Article focuses on conflicts between extrinsic legal sources and domestic legislation, there may be a strong dualistic basis for favoring municipal common law over some forms of international law. See infra text accompanying notes 399-400.

3. In developing a theory of legislation, most traditional legal scholars advocated “legal process” theories of legislation—theories that drew heavily from the Madisonian model of representative government. See, e.g., Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law (tentative ed. 1958). In the seminal 1950s work that gave birth to the legal process school of statutory interpretation, Professors Henry Hart and Albert Sacks attempted to reconcile the realities of
of legislation lies at the very heart of the representative democracy. The collective good is protected by institutional checks and balances, such as the bicameral system and the executive veto, that structure the enactment of domestic legislation. Before legislation becomes law, this delicate balance works to check both legislative opportunism and special interests. The strength of this system lies in its unflinching commitment to the participatory democratic process, a commitment most often enforced by the courts. When viewed in this context, it is easy to see why international law has traditionally held a precarious position in United States jurisprudence. International law is a system of treaties, agreements, and customs created in large part outside this representative system, untested by the pluralistic forces that drive the legislative and executive branches. The use of international sources introduces new

judicial interpretation with the Madisonian model. They accepted that much legislation is in fact sponsored by special interest groups, but argued that when certain procedural safeguards are followed, such group involvement does not skew the public purpose outcome. See Jonathan Turley, *Transnational Discrimination and the Economics of Extraterritorial Regulation*, 70 B.U. L. Rev. 339, 351-52 (1990) [hereinafter Turley, *Transnational Discrimination*]. The test for all legislation, therefore, was “whether it is the product of a sound process of enactment.” HART & SACKS, supra at 715.

4. Discarding traditional normative theories of legislation, public choice theorists apply microeconomic analysis to the legislative process, incorporating contemporary theories of market exchange. Under this theory, legislation is no longer viewed as some public-regarding compromise; rather, it is analyzed as a simple commodity. There is a market for legislation and, as in any other market, “legislative protection flows to those groups that derive the greatest value from it, regardless of the overall social welfare.” Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. Chi. L. Rev. 263, 265 (1982). Just as there is a “market equilibrium” point for the supply and demand of commodities, public choice views legislative outcomes as the equilibrium of private political power. Adopting or rejecting a legislative measure is a factor of simple market exchange. Legislators are no longer seen as willing vehicles of societal goals; instead, they are egoistic, rational utility maximizers. DENNIS C. MUELLER, PUBLIC CHOICE I (1979) (describing this societal view as “[t]he basic behavioral postulate of public choice, as for economics”).

5. See THE FEDERALIST No. 70, at 426-27 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“The differences of opinion, and the jarings of parties in [Congress]... often promote deliberation and circumspection, and serve to check excesses in the majority.”).

6. The Supreme Court has repeatedly interceded when it perceived a circumvention of legislative procedures. These procedures were designed in part to reduce the impact of factionalism. See generally Harold H. Bruff, *Legislative Formality, Administrative Rationality*, 63 Tex. L. Rev. 207, 218-22 (1984) (describing procedural checks on factionalism and how legislative veto can frustrate them); Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689 (1984) [hereinafter Sunstein, *Naked Preferences*] (arguing that the structure of government set up by the Constitution, as well as much of constitutional jurisprudence, reflects a purpose to root out discriminatory or redistributive legislation favoring special interest groups at the expense of the less powerful). For example, in INS v. Chadha, 462 U.S. 919 (1983), the Supreme Court struck down the legislative veto with reference to the dangers of factional power. The Court noted that the presentment and bicameralism requirements of Article I were meant to limit factional influence and that the judiciary bears responsibility for maintaining those limitations. See id. at 940-43, 946-51, 957-59.
players and new forms of "legislation" into the carefully balanced Madisonian system.

Although international scholars have long claimed that the drafters consciously incorporated international law into the Constitution, early United States courts largely limited the application of international standards to such narrow areas as piracy cases and maritime matters. Recent events, however, have galvanized what was once a collateral role for international law. To put it simply, the world is shrinking. National boundaries are quickly losing their significance in both business and law. With these changes have come pressure to incorporate international principles into domestic litigation and increasing interest in international law as part of a unified, or "monistic," legal system with municipal law.


8. See, e.g., United States v. The Schooner Amistad, 40 U.S. (15 Pet.) 518, 592-94 (1841) (deciding that kidnapped Africans did not become "pirates or robbers" within the meaning of a treaty with Spain when they rose up and seized control of the Spanish ship on which they were illegally held); The Marianna Flora, 24 U.S. (11 Wheat.) 1, 39 (1826) (deciding that a mistaken attack on an American warship was not a piratical aggression); The Antelope, 23 U.S. (10 Wheat.) 66, 120-23 (1825) (holding that the international slave trade carried on outside the United States was neither piracy nor contrary to the law of nations, and thus could not be enjoined or punished by the United States); Thompson v. The Catharina, 23 F. Cas. 1028 (D. Pa. 1795) (No. 13,949) (reasoning that a court could look to the laws of other nations to decide a point in a maritime contract dispute on which U.S. law was silent). In Thompson v. The Catharina, the district court traced the history of maritime law from its Rhodian origins and warned courts "not to betray so much vanity, as to take it for granted, that we could establish more salutary and useful regulations than those which have, for ages, governed the most commercial and powerful nations, and led them to wealth and greatness." Id. at 1029.


10. Professor Louis Henkin offered a particularly powerful defense of monistic values in his work on the Chinese Exclusion Case. Notably, Professor Henkin viewed the historical trend as a move away from monistic roots and toward dualism:

International law is the law of the land, for the executive branch as well as the courts. . . . Two hundred years ago the framers of the Constitution were, I believe, comfortable with a monist approach to international law. If we are to maintain the respect that our nation has historically accorded to that law, we must press no further the move toward extreme dualism, which the Court began in Chinese Exclusion one hundred years ago; indeed, we must reverse it.

Henkin, United States Sovereignty, supra note 1, at 886.
The institutional differences between dualistic and monistic systems are most evident in cases of statutory construction in which municipal and international sources come into direct conflict.11 For example, in the United States, the Resource Conservation and Recovery Act (RCRA) regulates the containment, treatment, movement, and disposal of solid waste.12 Assume a state wishes to send its solid waste by barge to a developing nation.13 The shipment is opposed by environmental groups, who claim that the receiving nation has neither the expertise nor the facilities to handle the waste and only offers low-cost dumping because it needs a quick infusion of capital.14 Assume further that the statute is silent on the question of transnational shipment, but it endorses the creation of private markets to expand waste disposal capacity and, by anal-

11. Although interesting comparisons can be made, the distinction between monistic and dualistic conceptions of international law should not be confused with the similarly named distinction in constitutional law. Professor Bruce Ackerman has argued in favor of a “dualist democracy” in which decisions by the American people are accorded greater weight than decisions by their government. BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 33 (1991). Nevertheless, as will become evident later in this Article, the creation of a hierarchy of international sources based on their democratic procedural characteristics has an interesting analogue in dualist theory of democracy: under each of these doctrines, “only those initiatives that survive this specially onerous higher lawmaking system [can] earn the special kind of legitimacy the dualist accords to decisions made by the People.” BRUCE ACKERMAN, CONSTITUTIONAL POLITICS/CONSTITUTIONAL LAW, 99 YALE L.J. 453, 461 (1989).


13. This is not a fanciful assumption. See Laurie Garrett, The Toxic Trashing of Central America, NEWSDAY, Jan. 15, 1991, at 59 (“According to documents presented to the Salvadoran government, [a Texas company] offered to counter overcrowding and 1986 earthquake damage in the southern port town of La Union by shipping coal fly ash from municipal utilities in Houston, Philadelphia, Baltimore and Norfolk, Va., to El Salvador.”); Andrew Porterfield, Dumping a Love Canal on the Third World?, NEWSDAY, Feb. 1, 1988, at 49 (“Records from the U.S. Environmental Protection Agency . . . show that hazardous waste exports shot up from 30 notices of shipments in 1980 to more than 400 in 1986. . . . EPA officials warn that hundreds of additional shipments escape any documentation by slipping through regulatory loopholes . . . .”); West Shipping Waste Woes to Third World, CHI. TRIB., July 11, 1988, at Cl (noting that the cost of disposing waste in the United States is between $250 and $350 per ton, compared with $40 per ton in some developing countries).

14. The lengths to which developing nations will go to obtain capital are most evident in places like the Marshall Islands, where only 70 square miles of land are spread over one half million square miles of ocean. Even with this limited living space, local residents fought for the right to sell the use of their land as a dump for waste from California and Washington. Bob Drogin, Paradise Lost: Now It's A Dump, L.A. TIMES, Jan. 11, 1990, at A1 (describing “[the] 20 square miles of lagoons filled with millions of tons of trash [with collateral health effects on the residents]”). The small island of Majuro received $56 million a year for importing the trash. Id.
ogy, expressly authorizes interstate shipment for that purpose.\textsuperscript{15} In applying this statute, however, a court may also face a variety of international sources that oppose transnational shipment of solid waste.\textsuperscript{16} These sources may take the form of a United Nations resolution, an executive agreement, or customary international law.\textsuperscript{17} The court must then make a qualitative decision on the relative importance of municipal and international sources in statutory construction. A strict dualistic approach would bar or subordinate the consideration of all these international sources. Conversely, a classic monistic approach would treat some of the international sources as equal to the municipal sources in resolving the statutory gap or ambiguity. Theoretically, in a monistic system, it is even possible for international sources to override a direct statutory mandate—such as the RCRA permitting process for transnational waste shipment.

This Article explores the monistic model and the extent to which new forms of "international legislation" are compatible with a Madisonian system. Specifically, this Article addresses the conflict between municipal and international sources in the context of two principal canons of construction that lie on the borderland between national and international law: the presumption in favor of international law and the presumption against extraterritoriality. These two long-established canons, which once had much in common, have diverged in recent cases—the presumption in favor of international law assuming a more monistic meaning and the presumption against extraterritoriality developing strong dualistic characteristics. This divergence presents a unique oppor-

\textsuperscript{15} Congress faced this issue in 1984 when it amended RCRA to cover the exportation of hazardous waste. See HSWA § 245(a), 98 Stat. at 3262 (codified at 42 U.S.C. § 6938 (1988)). The statute now requires exporters to follow notification procedures for obtaining the consent of receiving nations before shipping any hazardous waste. See id. These changes, however, do not provide permit standards that would guarantee that the receiving nation has the capability of handling hazardous waste. The proposed Waste Export Control Act would require such permits but has, thus far, failed to garner sufficient support in Congress. See H.R. 2358, 102d Cong., 1st Sess. sec. 3, § 12003(b)(7)-(9) (1991).


\textsuperscript{17} In addition to international treaties, customs, and agreements, these sources may include decisions of international courts, such as the International Court of Justice or the European Court of Human Rights, opinions of preeminent jurists (as used to establish customary international law), and decisions of international organizations or conferences. While treaties and statutes are given equal weight under the Constitution, dualistic courts generally disfavor those other sources that conflict with statutory authority. See infra notes 346-349, 351-355 and accompanying text.
tunity to explore the continued validity of both dualism and its underly-
ing principles.

The first canon developed from a powerful judicial aversion to vio-
lating international norms, leaving such decisions to Congress and the
President. Under the presumption in favor of international law, the
courts will opt, whenever possible, for a statutory interpretation that con-
forms to rather than conflicts with international principles. The second
canon is an outgrowth of the first and, consequently, is more narrow in
focus. Under the presumption against extraterritoriality, courts resist the
application of United States laws beyond the territorial borders in order
to avoid international conflicts. "Extraterritorial" jurisdiction is ac-
tively minimized to avoid unnecessary international entanglements and
controversies. Because an international dispute is perceived as outside
the normal domain of United States courts, judges presume that laws do
not apply outside the country absent an express statement to the contrary
by Congress.

The language of the canons, however, can deceive. The presum-
ption in favor of international law, for example, was written in a monistic
fashion but used for a dualistic purpose. While ostensibly incorporating
international law into the municipal system, the presumption has primar-
ily served to justify the refusal of jurisdiction in cases with international
dimensions. The increasing transnationalization of legal and economic
affairs, however, has increased the potential monistic applications of this
canon.

The possible use of international law or custom to interpret ambigu-
ous statutes, or "gap-fill," presents significant legal process and public
choice questions. The presumption in favor of international law may be
read to favor compliance with developing contemporary international
obligations as well as compliance with international obligations existing
at the time of a statute's enactment. The increasing reliance on interna-
tional sources in statutory interpretation often ignores the fact that these
sources are materially different in character from conventional legisla-

18. Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n
act of Congress ought never to be construed to violate the law of nations if any other possible
construction remains . . . .").
19. For a discussion of the historical and legal development of the presumption against
extraterritoriality, see Turley, When in Rome, supra note 9, at 603-38.
which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply
only within the territorial jurisdiction of the United States, is a valid approach whereby unex-
pressed congressional intent may be ascertained." (citation omitted)).
21. See infra Part III.A.
tion. This Article maintains that before courts use such sources (or modify dualistic canons to facilitate their use), it is important to consider the implications of these differences for a Madisonian system.

The "public choice school" offers a useful perspective on the differences between international and municipal legislation. In recent years, public choice scholars have applied economic theories to the legislative process, refuting some assumptions of the earlier, and still dominant, legal process school. While not necessarily rejecting legal process theory, public choice theory isolates weaknesses in the conventional legislative process—weaknesses that courts must consider in structuring their interpretative role. The public choice critique is most relevant here for its suggestion that the legislative process is more susceptible to special dealing and factional advantage than the legal process school has recognized. When analyzed as a form of legislation, international sources present a number of public choice difficulties associated with interest group activity. The point of this Article is not to offer a unified public choice theory for international law, but to suggest an alternative basis for

22. Courts and scholars have directed considerable effort to analyzing the dynamics of conventional legislation and the various barriers to legislative excess. The study of legislation—legisprudence—has sharpened and at times challenged traditional understandings of the legislative process. Though once considered a curiosity in school curricula, the study of legislation is gaining acceptance among law schools as a basic requirement for law students. For a splendid synthesis of legisprudential material, see William N. Eskridge, Jr. & Philip P. Frickey, Cases and Materials on Legislation: Statutes and the Creation of Public Policy (1988).

23. See generally Jonathan R. Macey, Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model, 86 Colum. L. Rev. 223, 227 (1986) [hereinafter Macey, Promoting Public-Regarding Legislation] (relying on economic theory of legislation in proposing that the "Constitution was designed to serve public rather than private interests"); Turley, Transnational Discrimination, supra note 3, at 370 (applying both economic and legal process theories to the enactment of employment discrimination legislation). One of the most valued contributions of the law and economics school from which public choice theories grew is its critique of traditional legisprudential concepts. There is a rich and expanding library of public choice scholarship. One of the better explications of this material can be found in Daniel A. Farber & Philip P. Frickey, Law and Public Choice: A Critical Introduction 12-37 (1991). See also Symposium on the Theory of Public Choice, 74 Va. L. Rev. 167 (1988); Macey, Promoting Public-Regarding Legislation, supra.

24. Public choice criticisms can strengthen legal process principles by recognizing legislative failures and altering interpretative approaches accordingly. See generally Turley, Transnational Discrimination, supra note 3, at 349-65 (discussing public choice scholars' importation of social science and economic theories of collective action and market efficiency into the public purpose-public choice debate).

dualistic values. Rather than regarding dualism as an outgrowth of international law principles, this Article explores dualism as an inherent value of a Madisonian system that favors particular forms of legislation—those tested by the deliberative pressures of the legislative process.

The judicial introduction of a source created wholly outside the Madisonian system poses a number of challenges to the delicate balance set up by the drafters of the Constitution.26 Perhaps the greatest challenge is to the fundamental belief in legislative supremacy that underlies both the traditional legal process school of statutory interpretation and the developing public choice school. The conflict between municipal and international sources is in this sense a classic conflict between legislative supremacy and judicial discretion. Another challenge arises from the potential role of international sources as a new avenue for special dealing, or rent-seeking,27 outside of the legislative branch. To date, public choice scholarship has focused on the contemporary viability of institutional procedures designed to inhibit rent-seeking in domestic legislation. This emphasis on domestic rather than international legislation is readily understandable given the limited conflict between domestic and international sources in the past. An examination of international legislation, however, reveals that the creation and application of international sources present wholly different public choice implications for a representative system. Applying theories of legislation to international sources is not an attempt to "legitimate" international law but rather an attempt to translate international sources into a common context for comparison. Absent such a comparison, the domestic application of international sources will remain problematic for traditional judges and academics steeped in the Madisonian tradition.

Part II of this Article explores the foundations of both dualism and monism. Dualism is traditionally linked with a narrow definition of public international law that confines international law to relations between and among sovereign nations. Under this view, individuals are excluded from the "legislative process" of international law and are only secondary beneficiaries of its results. This approach suggests that dualism is the product of external, or "exogenous," values. Part II then addresses several deficiencies with this approach and advances an alternative basis for dualism that reflects the internal, or "endogenous," values of a Madisonian democracy. Specifically, this Part suggests that dualism's

26. See infra Part II.B.
27. "Rent-seeking" refers to the use of government forces to achieve an advantage or to obtain a good on terms more favorable than those available under a prevailing market rate. For a discussion of rent-seeking, see infra Part IV.
mistrust of extrinsic sources is a product of pluralistic values. Next, Part III discusses the various justifications for dualism in the context of the two principal canons of construction.\textsuperscript{28} Although these canons are often used in modern cases, their common origins in the early nineteenth century have escaped close scrutiny. The dualistic applications of these canons are examined in conjunction with two related doctrines, the last-in-time doctrine\textsuperscript{29} and the political question doctrine.\textsuperscript{30} These two doctrines are offered as examples of restrictive institutional rules that courts have created to avoid the “constitutional periphery”—the uncertain constitutional area between the judicial, legislative, and executive branches.\textsuperscript{31} Part III suggests that the dualistic canons originally served a similar institutional function.\textsuperscript{32} Faced with uncertain authority in the area of foreign relations, courts developed “clear statement” rules that deferred such questions to Congress and the executive branch. Motivated by concerns of institutional legitimacy, courts unnecessarily limited their own interpretative role even as regulatory and market conditions became increasingly transnational.

Part IV challenges these institutional legitimacy arguments as overbroad and anachronistic in contemporary cases. Assuming that extrinsic sources are problematic because they circumvent the conventional legislative process, this Part considers the various possible forms of international law from both traditional and economic theories of legisprudence. A public choice analysis indicates that the presumption against extraterritoriality actually increases the dangers of rent-seeking in the legislative branch. By requiring a “clear statement” of congressional intent, the presumption restricts courts from using statutory interpretation to force hidden deals into open legislative debate.\textsuperscript{33} Conversely, the impact of rent-seeking in the executive branch upon international legisprudence is less clear, particularly with regard to the use of the presumption in favor of international law.\textsuperscript{34} This comparison of international and municipal legislation leads in Part V to the reexamination, and ultimately the rejection, of the presumption in favor of international law. The “decanonization” of the presumption would allow courts to deal directly with the institutional tensions produced by source conflicts. Although the presumption is but one limited example, it offers a provocative microcosm of

\begin{itemize}
  \item \textsuperscript{28} See infra Part III.A-B.
  \item \textsuperscript{29} See infra Part III.C and text accompanying note 208.
  \item \textsuperscript{30} See infra notes 248-257 and accompanying text.
  \item \textsuperscript{31} See infra Part III.D.
  \item \textsuperscript{32} See infra notes 237-241, 258-273 and accompanying text.
  \item \textsuperscript{33} See infra Part IV.A and text accompanying notes 362-364.
  \item \textsuperscript{34} See infra Part IV.B.
\end{itemize}
the tensions along the borderland of international and municipal law. It demonstrates that any transnational role for United States courts must stand on a conceptual foundation rooted in the Madisonian tradition.

II. The Importance of Being Dualist: Alternative International and Institutional Theories of Dualism

Dualism is strictly defined as a doctrine that treats international and municipal law as separate and distinct legal systems. Traditionally, dualism is linked to a narrow conception of international law that confines its operations to the realm of sovereign relations. This "horizontal" theory of international law was introduced by Jeremy Bentham. In 1789, Bentham coined the term "international law," defining it as a legal system operating horizontally on a single plane between nation-states alone. Specifically, this approach rejects a "vertical" theory of international law that recognizes a single system of law operating on the planes of both sovereign powers and individual citizens. In this sense, horizontal theory is "sovereign-centric," treating international law as the prod-

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35. Lord Alfred Denning and other English judges have referred to dualism as a doctrine of "transformation" under which international law can become municipal law only through an independent municipal act. See Trendtex Trading Corp. v. Central Bank of Nig., 1977 Q.B. 529, 533-54 (C.A.); see also J.G. Collier, Is International Law Really Part of the Law of England?, 38 Int'l & Comp. L.Q. 924, 925 (1989) ("Dualism is associated with positivist theories and with the notion that States, not individuals, are the primary subjects of international law.").

36. Bentham observed: "The word international, it must be acknowledged, is a new one; though, it is hoped, sufficiently analogous and intelligible. It is calculated to express, in a more significant way, the branch of law which goes commonly under the name of the law of nations . . . ." JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 296 (J.H. Burns & H.L.A. Hart eds., Athlone Press 1970) (1789).


38. This fixation on national borders has become increasingly irrelevant in areas such as endangered species protection:

It is difficult to overstate the extent to which international environmental cooperation has become integrated with economic, trade, science, and technology issues, and the panoply of other forces that bear on sound environmental practices and enhance living conditions. . . . Improved scientific understanding of complex ecological interrelationships has helped to blur the distinction between international and domestic concerns. It is now understood that local or regional economic activities may have serious international consequences from direct, indirect, or cumulative environmental effects. For example, economic development that contributes to a loss of species, even within a relatively small region of the world, may have broad international implications.


Horizontal theory is strikingly similar to the traditional autonomous concepts underlying torts and other domestic liability systems. In torts, for example, the traditional approach
uct of relations among sovereign nations and rejecting any other legal authority that transcends national borders. The linkage of horizontalism and dualism is implicit in the works of two early proponents of dualism, Heinrich Triepel and Dionisio Anzilotti, who saw international and municipal law as inherently distinct and incompatible.

The traditional Benthamite definition of dualism is also evident in works by Professors Louis Henkin and Harold Koh. Professor Henkin reduced dualism to the view that international law is "a discrete legal system . . . [that] is law for nations and creates rights and obligations among them; it operates wholly on an inter-nation plane." Professor Koh defined dualism in a similar fashion:

A strictly dualistic view denies a meaningful role to both individuals and domestic courts in the making of international law. In a dualistic system, individuals injured by foreign states would have no right to pursue claims directly against those states in either domestic or international fora. Instead, their states would pursue those claims for them.

views legal responsibility as a function of individual, atomistic actions. Feminists like Professor Leslie Bender have argued for an alternative definition based on collective responsibility and interconnectedness. See Leslie Bender, A Lawyer's Primer on Feminist Theory and Tort, 38 J. LEGAL EDUC. 3, 33 (1989); see also Martha Minow, The Supreme Court, 1986 Term—Foreword: Justice Engendered, 101 HARV. L. REV. 10, 61-62 (1987) (describing feminist critique of autonomous individualism as a male construct). Just as feminists have challenged the atomistic or self-autonomy view in municipal law, critical legal scholars have begun to question sovereign-centricity, offering instead a more global or collective understanding of international law. See, e.g., Nigel Purvis, Critical Legal Studies in Public International Law, 32 HARV. INT'L L.J. 81, 98 (1991).


40. Triepel argued that international and municipal law govern different populations and thus are not legitimately applied in a unified or monistic system. As Professor John Starke explained,

[Triepel] contends first that they differ in the particular social relations they govern; state law deals with individuals, international law regulates the relations between states, who alone are subject to it. Secondly, he argues, their juridical origins are different; the source of municipal law is the will of the state itself, the source of international law is the common will (Gemeinwille) of states.

J.G. Starke, Monism and Dualism in the Theory of International Law, 1936 BRIT. Y.B. INT'L L. 66, 70 (citing HEINRICH TRIEPEL, VOLKERRECHT UND LANDESRECHT (Leipzig, C.L. Hirschfeld 1899)).

41. Anzilotti distinguished international from municipal law in a fashion similar to Triepel:

[International laws] are binding by reason of the principle 'pacta sunt servanda,' and cannot be repealed except as laid down by international law. [Municipal laws] are binding by reason of the rule which enjoins obedience to the legislature's prescriptions, and can only be repealed in the manner provided by the public law of the particular community concerned.

Id. at 73 (quoting 1 DIONISIO ANZILOTTI, CORSO DI DIRITTO INTERNAZIONALE 51 (1900)).

42. For a discussion of the dualistic theories of Triepel and Anzilotti, see id. at 70-74.

43. Henkin, United States Sovereignty, supra note 1, at 864.
on a discretionary basis in international fora, and subsequently determine the rights of those injured individuals to redress as a matter of domestic law.44

The traditional definition of dualism in horizontal, sovereign-centric terms suggests that the continued viability of dualistic interpretation is largely dependent on the outcome of the ongoing debate over the definition of international law. Horizontalism would confine international law to what is commonly termed public international law, and specifically exclude private international law.45 Under the traditional definition of dualism, courts treat the systems as distinct because municipal courts cannot regulate or punish the behavior of sovereign powers. Although this argument has compelling historical support in the United States, this Article ultimately suggests an alternative justification for dualism based on the intrinsic values of Madisonian democracy. Before considering any alternative, however, it is important to establish the historical meaning and possible deficiencies of the traditional horizontal model.

A. Dualism as an Exogenous Value: A Sovereign-Centric (Horizontal) Model

Jurists have questioned the legitimacy of vertical international law in municipal disputes since the early second century. Like many nations, the Roman Republic faced this question as the inevitable result of economic and political growth. In the early Roman Republic, Roman law was only for Romans—foreigners were excluded from the protections of the Civil Law. Since the early republican economy consisted primarily of domestic trade, this legal exclusion was probably insignificant and uncontroversial at the time. As Rome evolved into a commercial and military world center, however, the old republican assumptions threatened future international trade in the capital city. By A.D. 138, after the reign of Augustus, the Roman Empire was thriving and Rome itself bustled with foreigners and international commerce.46 While foreign trade was the Empire's lifeblood, foreign traders presented a legal dilemma. The Roman jurists attempted to solve this problem by creating a special law for disputes between foreigners or between a foreigner and a Roman citizen. This law was a primitive form of jus gentium, or a law common

44. Koh, supra note 1, at 2349 n.10.
45. The division of international law into "public" and "private" realms obviously remains quite controversial in some academic circles. Many scholars have argued that such a distinction is artificial at best. See, e.g., M.W. Janis, Individuals as Subjects of International Law, 17 CORNELL INT'L L.J. 61, 75 (1984); see also infra text accompanying note 67.
46. 1 ANZILOTTI, supra note 41, at 51.
among nations. Thus, foreigners were no longer expected to "do as the Romans do." Rather, Roman judges attempted a compromise by developing a law that was neither purely Roman nor foreign.

*Jus gentium* was a striking example of a "vertical" system of international law. The Romans recognized an international law that transcended the formal relations of states to include the claims and privileges of individuals under a law "common to all men." This system worked vertically between the planes of both sovereign powers and citizens.

Dualistic values often reflect the horizontal theory that limits the scope of international law to the inter-nation plane. Theoretically, international principles may be applied within a dualistic system, but any application is wholly a matter of domestic discretion. Conversely, monistic values often reflect a vertical theory of international law in which both domestic and international law are part of a single system of justice that binds a country's legislature and courts. A monistic court recognizes international law as a legal authority independent of domestic legislative authority—an authority fully "legitimated" without any municipal act.

Under the horizontal definition of international law, dualism is based on "exogenous values"—values derived from outside the municipal system. More specifically, dualism is viewed as a reflection of the belief that international law is legitimate only on the level of inter-state relations. This traditional linkage between dualism and horizontalism implicitly rejects a possible endogenous conception of dualism as the product of values inherent to the municipal system itself. Later sections of this Article discuss such an alternative, endogenous basis for dualism, but there are a number of other deficiencies in linking dualism to either a vertical or a horizontal definition of international law. Before stating the positive case for an endogenous theory, three of these deficiencies merit discussion here.

First, the dualistic-horizontal linkage implies a traditional horizontal approach to international law in this country. On close examination, however, early United States history provides little real support for a

47. MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 1 n.2 (1988).
48. Id.
49. For discussions of the distinction between monism and dualism, see HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 553-88 (Robert W. Tucker ed., 2d ed. 1966), WERNER LEVI, CONTEMPORARY INTERNATIONAL LAW: A CONCISE INTRODUCTION 22-25 (2d ed. 1991), J.G. STARKE, AN INTRODUCTION TO INTERNATIONAL LAW 72-74 (10th ed. 1989), and Steinhardt, supra note 1, at 1127-34.
50. This theory that international law does not require a predicate legitimating municipal act is sometimes called "incorporation," particularly in England. See, e.g., Trendtex Trading Corp. v. Central Bank of Nig., 1977 Q.B. 529, 553-54 (C.A.).
tradition of either verticalism or horizontalism. On the surface, the
United States' system may suggest both a vertical theory of international
law and a monistic tradition of judicial review. For example, Article I of
the Constitution expressly authorizes Congress to "define and punish ... Offenses against the Law of Nations." It also empowers Congress to
prosecute "Piracies and Felonies committed on the high Seas," crimes
under international law. Article III gives the federal courts jurisdiction
under treaties as well as under "the Laws of the United States." Further,
the courts may hear all cases involving "Ambassadors, other Public
Ministers and Consuls; ... Cases of admiralty and maritime Jurisdiction;
... [and] Controversies ... between a State, or the Citizens thereof, and
foreign States, Citizens or Subjects." Moreover, while the term "law of
nations" was dropped from Article III, the drafters spoke repeatedly of
the law of nations as part of the legal system inherited from the English
common law. These references to the law of nations, however, can be misleading. Virtually all of these references involve horizontal conflicts over treaties,

51. See infra Part III.A.
52. U.S. Const. art. I, § 8, cl. 10.
53. Id.
55. Id.
56. An early draft of Article III, apparently written by James Wilson, would have ex-
tended federal courts' jurisdiction to cases arising under the "Law of Nations," but the phrase
was deleted without explanation. See generally Jay, supra note 7, at 830 (noting that the final
version of Article III "parceled matters dealing with the law of nations into ... separate
categories of jurisdiction"). This deletion and some Federalist writings have led some academ-
ics to conclude that the drafters intentionally placed the law of nations outside the "Laws of
the United States." Arthur M. Weisburd, The Executive Branch and International Law, 41
VAND. L. REV. 1205, 1222-23 (1988). But see Jay, supra note 7, at 831-32 (arguing that the
drafters understood the law of nations as part of the "Laws of the United States" in Article
III).
57. John Jay spoke most directly on the subject of international law: "The proposed
Constitution, therefore, has not in the least extended the obligation of treaties. They are just as
binding and just as far beyond the lawful reach of legislative acts now as they will be at any
future period, or under any form of government." The Federalist No. 64, at 394 (John Jay)
(Clinton Rossiter ed., 1961); see also The Federalist No. 3, at 43 (John Jay) (Clinton Ros-
siter ed., 1961) ("Under the national government, treaties and articles of treaties, as well as the
laws of nations, will always be expounded in one sense and executed in the same manner [in
the federal courts] ... ").
The importance of the law of nations was borne out by the enactment of the Alien Tort
Statute as part of the First Judiciary Act, giving federal courts jurisdiction over "all causes
where an alien sues for a tort only in violation of the law of nations or a treaty of the United
States." Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (codified as amended at 28 U.S.C.
§ 1350 (1988)).
58. The historical support for vertical and monistic approaches to international law can
be equally deceptive. The drafters certainly inherited the concept of the law of nations from
ambassadors, or the interests of foreign sovereigns. Likewise, piracy and other crimes committed on the high seas are governed by international law only in the sense that nations are recognized as having the right to act in international waters to protect their citizens and commerce. Maritime jurisdiction is another matter. Made part of federal jurisdiction by the Constitution, law merchant (lex mercatoria) is generally accepted as a form of private transnational law.\footnote{Lex mercatoria, it might be argued, is one limited example of verticalism amidst the otherwise horizontal, sovereign-centric emphasis of early United States law.} 59

England, but the “incorporation” of the law of nations in English law was and continues to be as much a source of debate in England as in the United States. \textit{See generally} Collier, \textit{supra} note 35, at 925. The English courts have recognized the incorporation of the law of nations into the English system. \textit{See}, e.g., Barbuit’s Case in Chancery, 25 Eng. Rep. 777, 778 n.1 (Ch. 1736) (“[T]he law of nations . . . in its fullest extent [is] part of the law of England.”). Nevertheless, many English judges have with equal firmness required international principles to be adopted by and conform to municipal decisions—a distinctly dualistic position. For example, in a decision by Lord Richard Alverstone, the well-known jurist disagreed with a colleague’s monistic statement, remarking:

\begin{quote}
[T]he expressions used by Lord Mansfield when dealing with the particular and recognised rule of international law on this subject, that the law of nations forms part of the law of England, ought not to be construed so as to include as part of the law of England opinions of text-writers upon a question as to which there is no evidence that Great Britain has ever assented, and a fortiori if they are contrary to the principles of her laws as declared by her Courts.
\end{quote}

West Rand Cent. Gold Mining Co. v. The King, [1905] 2 K.B. 391, 407-08. \textit{See also} Chung Chi Cheung v. The King, 1939 App. Cas. 160 (P.C. 1938) (appeal taken from H.K.) (Lord Atkin) (“It must be always remembered that, so far, at any rate, as the Courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our own domestic law.”). This confusion is evident in the writings of Lord Denning, who has vacillated between monistic and dualistic rulings. Compare Trendtex Trading Corp. v. Central Bank of Nig., 1977 Q.B. 529, 554 (C.A.) (endorsing “incorporation,” or monism, and applying limitations on immunity principles under international law) \textit{with} Thakrar v. Secretary of State for the Home Office, 1974 Q.B. 684, 702 (C.A.) (applying a “transformation,” or dualist, rule to deny an immigration claim based on international law).

\footnote{Koh, \textit{supra} note 1, at 2351; \textit{see also} Harold J. Berman & Colin Kaufman, \textit{The Law of International Commercial Transactions (Lex Mercatoria)}, 19 HARV. INT’L L.J. 221 (1978).} 60

In later cases, the suggested incorporation of international law often included forms other than strict public international law. In 1895, for example, the Supreme Court stated:

International law, in its widest and most comprehensive sense—including not only questions of right between nations, governed by what has been appropriately called the law of nations; but also questions arising under what is usually called private international law, or the conflict of laws, and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation—is part of our law, and must be ascertained and administered by the courts of justice, as often as such questions are presented in litigation between man and man, duly submitted to their determination.

Nevertheless, it is clear that neither the Constitution nor early cases manifest a purely horizontal or vertical system of international law. 61

Second, even assuming that the United States’ approach could be classified as horizontal or vertical, neither definition of international law actually compels the adoption of a monistic or a dualistic system. The particular definition of international law is distinct from the question of its incorporation. Horizontal theory justifies a decision to bar the application of international sources in private domestic disputes. Monism and dualism simply delineate general positions on the relative hierarchy of international versus municipal laws. In other words, the question of whether a state recognizes a horizontal or a vertical system will only affect the scope of the international law that would be applied under a monistic system or selectively applied under a dualistic system. Thus, a state could be a monistic jurisdiction and still follow a horizontal theory of international law. Such a horizontal-monistic system differs from a vertical-monistic system only in that the former produces fewer potential domestic applications, because it defines international law along a narrow band of public international disputes.

Moreover, the mere incorporation of international principles does not in itself suggest monism or exclude dualism. Dualism does not reject the application of international sources. Rather, under dualism, domestic law controls the decision as to where international law may be used within the “domestic legal hierarchy.” 62 As Professor Henkin noted, dualistic systems “dictate whether international law is subject to constitutional limitations and whether it is equal, superior, or inferior in authority to strictly domestic law when the two conflict.” 63 Thus, a dualistic system could in fact favor international sources as a matter of domestic law.

In adopting jus gentium, for example, the Romans did not automatically adopt a monistic system. Quite to the contrary, jus gentium selectively incorporated international principles compatible with municipal laws. Likewise, soon after the ratification of the Constitution, Congress enacted the Alien Tort Statute as part of the First Judiciary Act. 64 The Alien Tort Statute expressly gave federal courts concurrent jurisdiction

61. Professor Koh made this point with great force: “In short, long before the modern period, United States courts routinely applied international law in domestic cases without regard to whether the dispute concerned private or public international law or could be characterized as ‘horizontal’ or ‘vertical.’” Koh, supra note 1, at 2353.
62. Henkin, United States Sovereignty, supra note 1, at 865.
63. Id.
over "all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." Congress's decision to grant federal jurisdiction over tort actions based on international law is perfectly consistent with a dualistic system. In fact, it might be argued that such a statute would be redundant if the Constitution were based on a monistic system. It would be incorrect, therefore, to say that the United States has a monistic tradition simply because it has recognized the authority of international law in the form of treaties, or any other international source. Certainly, any such tradition cannot be traced to early English cases, which evidence similar equivocation on the status of international law in municipal courts.

Finally, and perhaps most importantly, the horizontal justification for dualism has become an anachronism in the twentieth century by virtue of the increasing judicial and academic recognition of vertical claims. In fact, many commentators now reject the very distinction between horizontalism and verticalism or public and private international law. Judge Philip Jessup used the term "transnational law" instead of "international law" precisely because the latter failed to convey the real mix of "[b]oth public and private international law . . . [with] other rules which do not wholly fit into such standard categories." The traditional linkage of horizontalism and dualism, therefore, is no longer compelling today. The United States has long recognized vertical international claims. Historically, the only question has been the relative weight to be given international sources, particularly when they conflict with municipal sources. The horizontal or sovereign-centric theories do not suggest a rationale for favoring or disfavoring these sources; they simply reaffirm a right to reject international sources altogether in private cases.

B. Dualism as an Endogenous Value: An Institutional Legitimacy Model

Although it is sometimes justified on the basis of horizontalism, dualism can no longer rest on such a narrow and controversial foundation. It would be a mistake, however, to discard dualism as an anachronism without exploring alternative justifications. While horizontal theories are fast becoming passé, dualism clearly remains a force within United States jurisprudence. This suggests that dualistic values may serve other func-

65. Id.
66. See supra note 58. For a discussion of dualism in the English courts, see Collier, supra note 35, at 925 (noting that "English Judges seem traditionally to have leaned towards the monist view").
67. PHILIP C. JESSUP, TRANSNATIONAL LAW 2 (1956).
68. See infra notes 152-159, 200-201 and accompanying text.
tions beyond their possible horizontalistic, sovereign-centric roots. This Article suggests that modern dualism is best understood as a product of endogenous, intranational values. Under this view, dualistic canons of construction reflect the internal values and institutional preferences of a representative democracy.

These canons, principally the presumption in favor of international law and the presumption against extraterritoriality, were developed to define and limit the courts' role along the borderland of municipal and international law. They represent what Professor William Eskridge has called "meta-rules"—rules of statutory construction that require especially high standards of clarity.69 Professor Eskridge offered the presumption in favor of international law as an example of a meta-rule derived from "the notion that the Court should be reluctant to interpret laws expansively when doing so would approach the constitutional periphery."70 This use of the presumption in favor of international law is based on an endogenous value of institutional legitimacy. Whether faced with a customary international principle against extraterritoriality or a formal treaty obligation, the Supreme Court has historically viewed international conflicts as falling near the "constitutional periphery" of its judicial powers.71 The Court continues to regard international law as heavily imbued with political questions and potential institutional complications.72 Under separation of powers principles,73 such decisions are considered to be outside the judiciary's legitimate institutional domain.74


70. Id. at 1020, 1027-28.

71. See, e.g., Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 431-33 (1964) (refusing to decide propriety of foreign expropriations under international law, citing potential conflict with executive branch attempts to secure compensation through negotiations with expropriating nation); Mexico v. Hoffman, 324 U.S. 30, 35-36 (1945) (holding courts may not enlarge immunities related to foreign policy beyond the limits recognized by the political branches); Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918) (holding judiciary is conclusively bound by political branches' determination of who is the de jure or de facto sovereign of a foreign territory).

72. The most recent example of this judicial deference appeared in United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992), in which the Court refused to address the propriety of state-sponsored abduction of foreign citizens, leaving this sensitive question to the executive branch. Id. at 2195-96.

73. See infra Part II.B.1.

74. See, e.g., Alvarez-Machain, 112 S. Ct. at 2195-96 (deferring to the executive branch on international law arguments regarding the propriety of obtaining personal jurisdiction over criminal defendant through state-sponsored abduction); Oetjen, 246 U.S. at 302 (reasoning that conduct of foreign relations, having been committed to political branches by the Constitution, is not subject to judicial inquiry or decision); Williams v. Suffolk Ins. Co., 38 U.S. (13 Pet.)
1) The Countermajoritarian Rationale

Although the dualistic canons clearly reflect judicial uncertainty about the constitutional periphery of international disputes, the specific cause of this uncertainty was left undefined in past cases and remains shrouded in ambiguity. The most common institutional justification for judicial restraint is the separation of powers argument that courts must defer such "political questions" to the legislative and executive branches. This justification, which we may refer to as the "countermajoritarian rationale," reflects the inherent institutional tension between the judiciary and the "political branches." In a system that emphasizes the republican ideals of deliberative process and pluralism, the courts serve an often countermajoritarian, undemocratic function. Although an independent judiciary serves to protect the country from majoritarian tyranny, federal judges exhibit all the most worrisome traits of an elitist, countermajoritarian group: they are unelected, life-tenured, highly educated, and for the most part wealthy individuals subject to removal only for serious misconduct.

The traditional response to this countermajoritarian fear is to restrict the courts' role in the legislative process by limiting judges to strict interpretative principles. This is not to say that judges do not legislate under a tripartite system. The Supreme Court has long recognized a leg-

415, 420 (1839) (holding judiciary is bound by executive branch determinations or assumptions regarding sovereignty of other nations).

75. For descriptions of the political question doctrine, see Mathews v. Diaz, 426 U.S. 67, 81 (1976) (noting political branches' flexibility in responding to foreign affairs; consequently, judicial review of these branches' decisions in area of immigration and naturalization is narrow), Baker v. Carr, 369 U.S. 186, 217 (1962) (noting that various formulations describing political questions are essentially a function of separation of powers), and Antolok v. United States, 873 F.2d 369, 379-84 (D.C. Cir. 1989) (unjoined opinion of Sentelle, J.) (describing matters relating to the diplomatic recognition of foreign sovereigns as within the exclusive domain of the political branches and thus not subject to judicial review).

76. For a now-classic explication of the countermajoritarian rationale for judicial restraint, see ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16-23 (2d ed. 1986).

77. See id. at 21.

78. Id.


islative role for courts in statutory interpretation. In the words of Justice Oliver Wendell Holmes, however, when judges legislate “[they must] do so only interstitially; they are confined from molar to molecular motions.”

Monism is in some ways the fulfillment of the worst countermajoritarian nightmare. By taking law from sources outside of the system, a judge seems to threaten the integrity of the tripartite system itself. Monism rejects the belief that legal authority in a democracy can only be derived from within the domestic democratic process. By applying international over municipal sources, judges appear to be not only acting politically and independently of the other branches, but doing so at the expense of our legal sovereignty. To make matters worse, these unelected officials are deferring to foreign sources that are themselves arguably produced by elitist, undemocratic bodies.

As is shown below, international law derives from various sources aside from the formal agreements of sovereign states. These sources can be based on something akin to international legislative history—customs or principles that are byproducts of foreign relations rather than formal sovereign voting. Monistic interpretation, therefore, may appear to embody the deadly combination of an unelected official applying undemocratic and extrinsic sources in a field (foreign relations) that is viewed as quintessentially political.

The countermajoritarian rationale favors a narrow institutional role for courts in statutory interpretation. Courts have generally confined their legislative role to the Holmesian “molar and molecular” through either textualist or intentionalist principles of interpretation. Textualism confines the court's interpretation to the actual statutory text enacted by Congress. An intentionalist interpretation is distinguished by a judicial inquiry of more liberal scope, but remains focused on the question of

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82. The very definition of monism by some scholars, treating international law as beyond even constitutional limitation, inevitably arouses countermajoritarian fears. See, e.g., Steinhardt, supra note 1, at 1106 n.7 (“In the monist paradigm, the international and municipal legal systems comprise a single universal order, with international law as the normative superior. Under a monist view, therefore, international law is not subject even to the constitutional limitations of municipal law.”).
83. See infra note 356 and accompanying text.
84. See infra notes 351-357 and accompanying text.
85. But cf. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982) (arguing that courts ought to begin a “common law” process of renovating obsolete statutes, using such techniques as updating statutes by overruling them).
86. See William N. Eskridge, Jr. & Philip P. Frickey, Statutory Interpretation as Practical Reasoning, 42 STAN. L. REV. 321, 340-41 (1990). A product of the formalist school of statutory interpretation, strict textualism has largely fallen out of contemporary use with the gen-
Congress's intent in enacting the statute.\textsuperscript{87} Regardless of its actual interpretative approach, however, a court motivated by countermajoritarian fears will favor a minimalist role in statutory interpretation, often by applying strict canons of construction.\textsuperscript{88} This minimalist approach is clearly at work in the application of the canons that govern the borderland of municipal and international law. Applications of these canons often lead to strict textualist approaches. While generally viewed as an extreme judicial philosophy in statutory cases, strict textualism retains vitality in cases along the borderland with courts that would otherwise apply intentionalist principles in statutory cases.

Although it provides a classic justification for narrow interpretative rules, the countermajoritarian rationale proves on closer examination to be a poor basis for contemporary dualistic values and canons. Various factors militate against a countermajoritarian rationale. First, the rationale has been challenged in other areas as a form of constitutional hysteria, seldom supported in practice.\textsuperscript{89} Scholars have noted, as did Professor Michael Tigar, that “if we examine the Court in the performance of the judicial review function, we see that it is no more countermajoritarian in the nature of things than the Congress and the President are majoritarian in the nature of things.”\textsuperscript{90} Admittedly, this common criticism does not fully answer the countermajoritarian argument inasmuch as (unlike federal judges) Members of Congress and the President are elected and serve at the pleasure of majorities. After all,
countermajoritarian elected officials present something of a self-correcting problem in a Madisonian democracy. The criticism nevertheless challenges the actual basis of countermajoritarian fears, given the presence of other constitutional and institutional safeguards on judicial excess, such as the appointment and impeachment provisions,91 the legislative supremacy doctrine,92 and Congress’s control of federal courts’ jurisdiction.93

Second, and on a more basic level, the countermajoritarian rationale actually amounts to little more than a tautological argument: courts are countermajoritarian because courts are not majoritarian. More specifically, the rationale does little to support dualism beyond yielding a general preference for judicial abstinence in statutory interpretation. It is not self-evident why the undemocratic character of courts should compel either the rigid dichotomy of municipal and international sources or the supremacy of municipal sources.

It is, of course, possible to recognize the countermajoritarian problem and still allow courts to interpret statutes by reference to sources extrinsic to the municipal law. Intentionalists have often analogized this interpretative role to that of an “honest agent”94 or, as Judge Richard Posner once advocated, a loyal soldier.95 Under this view, statutory provisions serve as a series of commands to courts—commands that must be carried out as precisely as possible.96 A court may find that a textual

91. See U.S. Const. art. II, § 2, cl. 2 (Appointments Clause); id. art. I, § 2, cl. 5, § 3, cl. 6-7, art. II, § 4 (impeachment provisions); see also id. art. III, § 1 (“The Judges . . . shall hold their Offices during good Behaviour . . . ”).

92. Professor Daniel Farber described the legislative supremacy doctrine as “grounded in the notion that, except when exercising the power of judicial review, courts are subordinate to legislatures.” Daniel A. Farber, Statutory Interpretation and Legislative Supremacy, 78 Geo. L.J. 281, 283 (1989).

93. U.S. Const. art. III, § 1 (“Congress may from time to time ordain and establish” lower federal courts); id. § 2, cl. 2 (“The supreme Court shall have appellate Jurisdiction . . . with such Exceptions, and under such Regulations as Congress shall make.”). For discussions of jurisdictional control as a response to countermajoritarianism, see Perry, supra note 79, at 125, and Gerald Gunther, Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate, 36 Stan. L. Rev. 895 (1984).


96. Posner explained:
reference to international values illuminates a legislative objective, thereby making the application of extrinsic sources necessary to fulfill the true majoritarian intent of Congress.

Finally, the countermajoritarian rationale has lost much of its appeal in the courts as judges have moved away from both textualism and narrow intentionalism in other areas. It is notable that the use of international sources has increased concurrently with a discernible trend toward contextual interpretation. While strong advocates of a “plain meaning” approach remain, judges today are more willing to consider a variety of sources, including international law, in determining the proper application of a statute. Some concerns regarding countermajoritarian decisionmaking may still arise in statutory interpretation, but courts have generally put formalistic responses to these concerns aside under the pressures of “the age of regulation.” Courts have recognized a need to update and clarify statutes in light of changed circumstances that Congress is unlikely to address.

By the command analogy I mean simply that it is helpful to think of statutes on the analogy of commands, as of military superiors to their subordinates. . . . The superior officer's command may have become garbled in transmission or may fail to correspond to conditions on the ground, yet the subordinate still must act, in a way that will best carry out the common enterprise—and this whether or not he shares the precise values of his superior.

Id. at 448.

97. See ESKRIDGE & FRICKEY, supra note 22, at 592-94 (arguing that the plain meaning rule has lost vitality); Patricia M. Wald, Some Observations on the Use of Legislative History in the 1981 Supreme Court Term, 68 IOWA L. REV. 195, 195 (1983) (observing that the plain meaning rule “has effectively been laid to rest” in the Supreme Court); Nicholas S. Zeppos, Judicial Candor and Statutory Interpretation, 78 GEO. L.J. 353, 376-78 (1989) (suggesting that courts used dynamic interpretative techniques—techniques that were not limited to text and historical context but also considered contemporary societal, political, and legal contexts—to decide cases under the McFadden Act, which regulates branching by national banks).

98. Most notable is Justice Scalia. See, e.g., INS v. Cardoza-Fonseca, 480 U.S. 421, 452 (1987) (Scalia, J., concurring in judgment) (“[I]f the language of a statute is clear, that language must be given effect . . . .”).

99. ESKRIDGE & FRICKEY, supra note 22, at 696-98 (describing the common use of various extrinsic sources in statutory interpretation); Steinhardt, supra note 1, at 1152-56 (stating that recent Supreme Court cases “suggest a broad endorsement of international principle in the interpretation of statutes”).

100. The last fifty years have witnessed an explosion of command and control regulations. Although there were once only a few statutory schemes regulating distinct subjects, there is now a stratified record of related statutes passed at different times. These statutes overlie one another, with later schemes often making preceding schemes obsolete. For a discussion of such statutory obsolescence, see ESKRIDGE & FRICKEY, supra note 22, at 844-46 (describing four ways that statutes can become obsolete). Much has been written on the problem of updating obsolete statutes. See, e.g., CALABRESI, supra note 85; RONALD DWORKIN, LAW'S EMPIRE (1986); T. Alexander Aleinikoff, Updating Statutory Interpretation, 87 Mich. L. Rev. 20 (1988); Eskridge, Dynamic Statutory Interpretation, supra note 90, at 1479.

101. See generally Aleinikoff, supra note 100 (viewing statutory interpretation as a journey
(2) The Pluralistic Rationale

This Article explores an alternative basis for dualism in modern cases. This alternative justification, which we may refer to as the “pluralistic rationale,” focuses on the importance of international sources as a new form of legislation in a Madisonian system. A dualistic perspective considers both international law and the laws of other nations to be extrinsic sources because they are created largely outside the domestic legislative process. Extrinsic legal sources are viewed as destabilizing and dangerous to a system that is principally motivated by the desire to influence legislation.102 It is faith in the legislative process that prompts dis-parate factional groups to seek compromise rather than conflict in achieving their social and economic goals.103 This faith can be severely shaken either by the existence in Congress of hidden special dealing that circumvents majoritarian pressures or by the availability of alternative avenues to Congress for attaining factional goals.104 This Article considers both of these dangers to the legislative process as they arise from the use of extrinsic sources in domestic cases.

Clearly, both the countermajoritarian and pluralistic rationales for dualism rest on institutional concerns of courts operating on the constitutional periphery. There is, however, a difference in emphasis between the two rationales. The countermajoritarian rationale rejects a judicial role in resolving questions that are political or potentially divisive. Requiring extreme judicial deference, this narrow view of institutional legitimacy produces predictable results in borderland cases that are viewed as heav-

102. An analogous distrust for extrinsic sources is most evident in “dealist” literature, which regards the legislative process as a free market that operates more efficiently as a function of internal forces than in response to tampering from without. For dealists like Judge Frank Easterbrook, who view broad intentionalist interpretation as dangerous to the process, the application of extrinsic sources would present an even greater threat. See Frank H. Easterbrook, Statutes' Domains, 50 U. Chi. L. Rev. 533 (1983) [hereinafter Easterbrook, Statutes' Domains]. These scholars are uncomfortable with the use of municipal legislative sources other than the statutory text in judicial interpretation. Past concerns over the legitimacy of such municipal sources as committee reports obviously pale in comparison to the concerns regarding the use of sources with origins completely outside the municipal system.

103. See generally Turley, Transnational Discrimination, supra note 3, at 349-54.

ily laden with political issues. A court can trigger countermajoritarian fears by simply identifying an issue of foreign relations in a case. The countermajoritarian fear is heightened further when the court views a borderland case as requiring the rejection of traditional concepts like the sovereign-centricity of international law.105 By framing the decision in this way, courts reduce cases to ultimate political questions that compel only one result under a countermajoritarian rationale: extreme judicial deference to the legislature in the form of a strict textualist approach.

The pluralistic rationale shifts the inquiry into international sources away from this outcome-determinative construct to consider their function as a new form of legislation within the tripartite system. The pluralistic rationale focuses on the dangers of including an alternative legislative form in a system that is built on the assumption that all factional groups must go through Congress to achieve their social and economic goals. This concern drives to the heart of the still-dominant legal process school of statutory interpretation. While the countermajoritarian rationale primarily aims to restrain the potential growth of judicial activism and elitism, the pluralistic rationale emphasizes judicial authority as a guarantor of democratic process. Courts perform this function through judicial review and their insistence that legislation follow the constitutionally mandated procedures of bicameralism and present-ment.106 By preventing circumvention of the checks and balances incorporated in our representative democracy,107 courts facilitate deliberative, majoritarian decisions by Congress and the executive branch. Dualistic rules ostensibly serve this proceduralistic purpose by favoring municipal sources derived from within the system.

III. Canons Along the Borderland: Dualism, Statutory Interpretation, and the Constitutional Periphery

When viewed from a pluralistic standpoint, judicial mistrust of extrinsic sources simply reflects a preference for legislative products that

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105. For an argument that social justice may require the rejection of such traditional concepts, see Purvis, supra note 38, at 93-98.
106. See, e.g., INS v. Chadha, 462 U.S. 919, 945 (1983) ("[P]olicy arguments supporting even useful 'political inventions' [specifically, the legislative veto] are subject to the demands of the Constitution which defines powers and, with respect to this subject, sets out just how those powers are to be exercised.").
107. This function of the courts is a driving force behind the legal process school. See Turley, Transnational Discrimination, supra note 3, at 349-53 (describing legal process school's public purpose approach as based on the belief that procedural safeguards in Madisonian model of representative government would check special interests and allow collective pressures to motivate the enactment of legislation).
have been "tested" by an open and deliberative process. Regardless of whether a judge follows a formalist\textsuperscript{108} or legal realist\textsuperscript{109} or legal process approach,\textsuperscript{110} international sources can only be truly legitimated, or rejected, on this legislative basis. With its economic critique, the public choice school has contributed much to the study of interest group forces in the legislative process.\textsuperscript{111} Before turning to this interest group analysis, however, it is important to consider the origins and applications of dualistic values in statutory interpretation. Remarkably little has been written on the background of and relationship between the two principal dualistic canons along the borderland of municipal and international law. It is to that question that we must now turn. Those readers less interested in the canons themselves may skip this background discussion in favor of the subsequent analysis of the changing institutional role for courts in transnational cases.\textsuperscript{112}

A. \textit{Charming Betsy} and the Presumption in Favor of International Law

Originating in the early nineteenth century, the presumption in favor of international law clearly predates the presumption against extraterritoriality. Commentators generally trace the presumption in favor of international law back to \textit{Murray v. The Schooner Charming Betsy},\textsuperscript{113} a case that reads like an Errol Flynn epic. On July 3, 1800, the United States frigate \textit{Constellation} encountered a small trading schooner, the \textit{Charming Betsy}, on the open seas.\textsuperscript{114} At the time, the United States was waging an undeclared war with France, and Congress had enacted a number of measures to restrict trade with the enemy.\textsuperscript{115} These included

\textsuperscript{108} See generally Margaret Jane Radin, \textit{Reconsidering the Rule of Law}, 69 B.U. L. Rev. 781, 792-810 (1989) (describing traditional formalism as the belief that the application of general rules can conclusively produce unique answers in particular cases).

\textsuperscript{109} See generally Joseph William Singer, \textit{Legal Realism Now}, 76 CAL. L. Rev. 465 (1988) (book review) (describing legal realism as based on pragmatism, encompassing beliefs that it is impossible to derive unique legal rules from existing precedents, that judges should make law based on contemporary understandings of social reality, and that judges should never formally or mechanically apply rules without regard for their social consequences).

\textsuperscript{110} See generally Daniel B. Rodriguez, \textit{The Substance of the New Legal Process}, 77 CAL. L. Rev. 919, 940-46 (1989) (book review) (describing traditional legal process theories as attempts to legitimate and constrain judicial decisionmaking by carefully delineating its processes and limits, and by remaining true to the public purposes of the laws).

\textsuperscript{111} See Turley, \textit{Transnational Discrimination}, supra note 3, at 349-65 (comparing the public choice and legal process schools); \textit{infra} Part IV.

\textsuperscript{112} See \textit{infra} Parts IV-V.

\textsuperscript{113} 6 U.S. (2 Cranch) 64 (1804). For a discussion of \textit{Charming Betsy}, see Steinhardt, \textit{supra} note 1, at 1135-62.

\textsuperscript{114} \textit{Charming Betsy}, 6 U.S. (2 Cranch) at 66 (district court's opinion).

the Federal Nonintercourse Acts, which prohibited all commercial transactions "between any person or persons resident within the United States or under their protection, and any person or persons resident within the territories of the French Republic, or any of the dependencies thereof." The skipper of the U.S.S. Constellation, Captain Alexander Murray, was under orders from President Adams to seize any vessel trading with the French. The President specifically referred to Danish vessels in his instructions to United States sea captains:

You are not only to do all that in you lies to prevent all intercourse, whether direct or circuitous, between the ports of the United States and those of France and her dependencies, in cases where the vessels or cargoes are apparently, as well as really American, and protected by American papers only, but you are to be vigilant that vessels or cargoes really American, but covered by Danish or other foreign papers, and bound to or from French ports, do not escape you.

The Charming Betsy was a United States trading schooner operating out of Baltimore when it first attracted Captain Murray's attention. In April 1800, after dropping off a load of flour at St. Bartholomew, the schooner sailed to St. Thomas of the Virgin Islands to be sold to Jared Shattuck, a Danish subject. The ship then sailed (under a Danish flag) for Guadaloupe, a French possession. Before landing at Guadaloupe, however, the luckless schooner was first seized by French privateers and then captured by the Constellation. Captain Murray seized the vessel under the Nonintercourse Acts, sold its cargo, and took the schooner to Philadelphia.

The seizure of the Charming Betsy and sale of its cargo prompted an almost immediate suit in Philadelphia by the Danish consul, who objected to the taking of a Danish vessel. The consul argued that the ship was not only sailing under a foreign flag, but was also owned by a Danish citizen. Although Shattuck was born in the United States, he left for St. Thomas around the time of the Constitution's ratification and therefore may never have been a United States citizen. Moreover, Shattuck lived in St. Thomas for twenty years, became a Danish burgher, and

116. Federal Nonintercourse Act, ch. 10, § 1, 2 Stat. 7, 8 (1800) (expired 1801). The Federal Nonintercourse Acts provided as punishment for their violation in part that "any ship or vessel, owned, hired, or employed wholly or in part by any person or persons resident within the United States, or any citizen or citizens thereof resident elsewhere . . . shall be wholly forfeited, and may be seized and condemned." Id. at 7-8.

117. Charming Betsy, 6 U.S. (2 Cranch) at 78 (argument of Captain Murray's counsel).

118. Id. at 78-79 (quoted by Captain Murray's counsel).

119. Id. at 115-16.

120. Id. at 116.

121. Shattuck had apparently left the United States in 1789 or 1790. Id.
swore loyalty to the King of Denmark. The Danish consul therefore denounced the application of the Nonintercourse Acts to Shattuck as a violation of international law and the sovereign authority of Denmark. The federal district and appellate courts agreed with the consul, ordering the return of the vessel and the payment of compensation. The case was then appealed to the Supreme Court.

Writing for the Court, Chief Justice John Marshall held in favor of Shattuck. Marshall viewed the issue as one of simple statutory interpretation and the violation of international principles of conduct. The seizure of the schooner, he noted, placed a United States law in potential conflict with international principles governing the protection of all foreign citizens outside United States territory. Marshall stated that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." Consequently, the Court held that "the Charming Betsy, with her cargo, being at the time of her recapture the bona fide property of a Danish burgher, is not forfeitable, in consequence of her being employed in carrying on trade and commerce with a French island."

Although Charming Betsy can be viewed narrowly as defining what constitutes "a person under the protection of the United States," the case became the bedrock for a series of later decisions involving international law and judicial construction. The progeny of Charming Betsy

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122. Id.
123. The district court awarded the vessel and full damages to Shattuck. On appeal, the court modified the order to deduct the costs incurred by Captain Murray from the sale of the cargo. Id. at 117. Both parties appealed the court of appeals' decision to the Supreme Court.
124. See id. at 118-21.
125. Id. at 120. Marshall argued that this was not a case of a citizen in a foreign country: He is not a person under the protection of the United States. The American citizen who goes into a foreign country, although he owes local and temporary allegiance to that country, is yet, if he performs no other act changing his condition, entitled to the protection of his own government; and if, without the violation of any municipal law, he should be oppressed unjustly, he would have a right to claim that protection, and the interposition of the American government in his favor would be considered a justifiable interposition.
126. Id. at 118.
127. Id. at 120-21.
128. Id. at 120.
129. The Court again endorsed the presumption in favor of international law in MacLeod v. United States:

The statute should be construed in the light of the purpose of the Government to act within the limitation of the principles of international law, the observance of which is so essential to the peace and harmony of nations, and it should not be assumed that Congress proposed to violate the obligations of this country to other
apply a strict presumption against extraterritorial applications in the face of countervailing international principles. In *Lauritzen v. Larsen*, for example, the Court held that a Danish sailor injured on a Danish ship in Cuban waters had no remedy under United States laws. The sailor had filed suit under the Jones Act, which provided relief for "any seaman who shall suffer personal injury in the course of his employment." The Court observed that "[b]y usage as old as the Nation, [United States laws] have been construed to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law." One such principle, the Court noted, is that a state should not regulate foreigners on the high seas or otherwise outside of its borders. Presented with this international principle and a "simpl[e] problem of statutory construction," the Court applied the presumption from *Charming Betsy* to narrowly construe the Jones Act.

Similarly, in *McCulloch v. Socieded Nacional de Marineros de Honduras*, the Court held that the National Labor Relations Act did not extend to the operation of ships under foreign flags. After noting the absence of a clear legislative decision on the matter, the Court found that such an application would implicate the "well-established rule of international law that the law of the flag state ordinarily governs the in-

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130. *Charming Betsy* is often cited for another, more general canon of construction: "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).


134. The Court cited an English case for this rule of "maritime jurisprudence." *Id.* at 578 (citing The Queen v. Jameson, [1896] 2 Q.B. 425, 430).

135. *Id.*

136. *Id.* at 577-78. The Court stressed the importance of respecting non-national or international maritime law of impressive maturity and universality. It has the force of law, not from extraterritorial reach of national laws, nor from abdication of its sovereign powers by any nation, but from acceptance by common consent of civilized communities of rules designed to foster amicable and workable commercial relations.


138. *Id.* at 20.
ternal affairs of a ship.” Applying the presumption, the Court held that the application of a United States labor law to a foreign-flagged vessel would “arouse[] vigorous protests from foreign governments and create[] international problems for our Government.”

More recently, in Weinberger v. Rossi, the Supreme Court applied Charming Betsy to narrowly interpret a federal statute in deference to an executive agreement between the United States and the Philippines. The executive agreement established hiring preferences for Filipino citizens at United States military bases in that country. A subsequently enacted federal statute, however, prohibited discriminatory hiring by the military, except when required by treaty. Defining executive agreements as treaty obligations, the Court relied in part on Charming Betsy to support its refusal to apply the law to the Philippines.

The common denominator of these presumption cases is the perceived violation of international principles. As demonstrated by Wein-

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139. Id. at 21.
140. Id. at 17; see id. at 21.
142. Base Labor Agreement, May 27, 1968, U.S.-Phil., 19 U.S.T. 5892, 5892-93 “The United States Armed Forces in the Philippines shall fill the needs for civilian employment by employing Filipino citizens, except when the needed skills are found . . . not to be locally available, or when otherwise necessary for reasons of security or special management needs . . . .”
144. The Supreme Court held that “some affirmative expression of congressional intent to abrogate the United States’ international obligations is required in order to construe the word ‘treaty’ . . . as meaning only Art. II treaties.” Weinberger, 456 U.S. at 32.
145. Id. The Court acknowledged the clear difference between Weinberger and Charming Betsy:

While [Charming Betsy] appl[ies] with less force to a statute which by its terms is designed to affect conditions on United States enclaves outside of the territorial limits of this country than [it does] to the construction of statutes couched in general language which are sought to be applied in an extraterritorial way, [it is] nonetheless not without force in either case.

Id.
146. See also United States v. Victoria, 876 F.2d 1009, 1010-11 (1st Cir. 1989) (discussing international protection afforded to “stateless vessels” in upholding an arrest on the high seas). The rule of Charming Betsy is now a recognized part of the United States’ law on foreign relations. See Restatement (Third) of the Foreign Relations Law of the United States § 114 (1986) (“Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.”).
berger, these principles can be derived from a variety of sources and often do not fit formal definitions of “international law.” In his article on international sources, Professor Ralph Steinhardt explored the varying definitions of “international law” under the presumption in favor of international law. He showed how courts use customary international law and treaties as virtually interchangeable foundations for the presumption. Courts often cite international custom as the basis for restricting statutory interpretations under the presumption, thereby “undermin[ing] the traditional distinction between customary and conventional law.” Drawing a distinction between international law and international comity in past international cases, Professor Steinhardt challenged the view of the presumption as simply limiting extraterritorial jurisdiction, instead treating it as “an affirmative warrant for applying more substantive international standards in the construction of domestic statutes.”

With the growing importance of both international law and international organizations, it is tempting to use Charming Betsy and its presumption in favor of international law for more substantive, nonjurisdictional purposes. This new role, however, is clearly at odds with the presumption’s original dualistic applications. Early cases applying Charming Betsy express a strong judicial aversion to international conflicts. These cases largely involved alleged violations of prescriptive jurisdiction principles—principles of customary international law. Charming Betsy, Lauritzen, and McCulloch all involved extrater-

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147. The meaning of the presumption is clearly in the eye of the beholder. An internationalist, for example, might argue that this presumption reflects the problem of exporting domestic law into a normally international realm rather than the problem of importing international law into a normally domestic realm. Dualists would clearly subscribe to the latter characterization.

148. See Steinhardt, supra note 1, at 1161.
149. Id.
150. Id. at 1144.
151. See id.
152. For a definition of prescriptive jurisdiction, see infra note 203. This includes the nationality principle, which usually refers to a state’s positive right to regulate its own citizens. See Restatement (Third) of the Foreign Relations Law of the United States § 402 (1986). The nationality principle can also stand for the inverse proposition: a state should not regulate foreign nationals beyond its borders.
153. Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804) (action by Danish ship owner against the United States for seizing vessel); see supra notes 113-127 and accompanying text.
154. Lauritzen v. Larsen, 345 U.S. 571 (1953) (action by a Danish sailor against a Danish shipping company under the Jones Act); see supra notes 131-136 and accompanying text.
155. McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963) (ac-
ritorial disputes in which at least one party was a foreign national.\textsuperscript{156} This strong judicial concern for the nationality and territoriality principles of customary international law\textsuperscript{157} can be traced to an established English canon of construction that stands for the same jurisdictional proposition as \textit{Charming Betsy}. The English canon, derived from maritime cases, states:

\begin{quote}
[If] any construction otherwise be possible, an Act will not be construed as applying to foreigners in respect to acts done by them outside the dominions of the sovereign power enacting. That is a rule based on international law by which one sovereign power is bound to respect the subjects and the rights of all other sovereign powers outside its own territory.\textsuperscript{158}
\end{quote}

Arguments favoring extraterritorial regulation of foreign nationals often prompt a quick application of \textit{Charming Betsy} by United States courts to limit an ambiguous statute to less controversial, territorial applications.\textsuperscript{159}

\textsuperscript{156} Similarly, in Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138 (1957), the Court refused to interpret the Labor Management Relations Act of 1947 so as to govern a Panamanian vessel within a United States port. After citing various cases of narrow construction, the Court emphasized:

\begin{quote}
For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain. We, therefore, conclude that any such appeal should be directed to the Congress rather than the courts.
\end{quote}

\textit{Id.} at 147. The Court expressed much the same position in MacLeod v. United States, 229 U.S. 416, 434 (1913) (involving action by British merchants against the United States), \textit{quoted supra} note 129, and The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815) (action by Buenos Aires native to recover Spanish cargo seized from British ship during War of 1812).

\textsuperscript{157} \textit{See supra} note 152.

\textsuperscript{158} The Queen v. Jameson, [1896] 2 Q.B. 425, 430. But see Mortensen v. Peters, 8 Fr. (J.) 93, 100-01 (Scot. H.C.J. 1906) (ruling that if the legislative act is clear, it must be observed even if it conflicts with international law).

\textsuperscript{159} But see Sandberg v. McDonald, 248 U.S. 185, 195 (1918) (applying \textit{American Banana}'s presumption against extraterritoriality in an action by foreign seamen against a foreign vessel under the Seamen's Act). This strong trend against extraterritorial jurisdiction may also reflect the traditional view that the nationality principle is a poor basis for jurisdiction when the wrongdoer (or defendant) is a foreign national. \textit{See generally} \textsc{Restatement (Third) of the Foreign Relations Law of the United States} § 115 cmt. b (1986) (even though Congress or the Constitution may supersede international law's force as domestic law, the United States remains bound internationally).
B. *American Banana* and the Presumption Against Extraterritoriality

The Supreme Court’s aversion to international conflict is equally evident in a second, related canon of construction that developed after *Charming Betsy*: the presumption against extraterritoriality. Cases applying the presumption in favor of international law generally involve regulation of foreign-flagged vessels,\(^\text{160}\) treaty violations,\(^\text{161}\) or actions against foreign citizens.\(^\text{162}\) Running throughout these cases is a strong judicial concern with institutional legitimacy in the area of international relations—a concern that is also evident in cases applying the presumption against extraterritoriality. A brief review of the presumption against extraterritoriality reveals a legal and historical development similar to that of its common-law predecessor.

In *American Banana Co. v. United Fruit Co.*, an American banana exporter operating in Panama sued another exporter for alleged violations of the Sherman Antitrust Act.\(^\text{163}\) Among other things, the American Banana Company (ABC) charged the United Fruit Company (UFC)\(^\text{164}\) with hiring a local army that invaded and physically confiscated the ABC plantation.\(^\text{165}\) Writing for the Court, Justice Oliver Wen-

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\(^{164}\) The United Fruit Company has the dubious distinction of inspiring the term “banana republics” to refer to Latin American countries that operated at the behest (if not the beck and call) of U.S. business concerns. The company was founded in Costa Rica by an American entrepreneur named Minor Keith in the 1870s. Susanna McBee, *In Central America: Why Distrust of U.S. Runs Deep*, U.S. NEWS & WORLD REP., Oct. 17, 1983, at 36. Keith merged his company with the Boston Fruit Company to create the United Fruit Company. Banana multinationals like UFC and its rival, Standard Fruit, dominated whole countries to protect the considerable land holdings they developed in the late 1800s. During the period of the *American Banana* decision, the U.S. military repeatedly intervened in Honduras, Panama, Nicaragua, and Guatemala to protect the interests of UFC and other multinational corporations. See id.; see also infra notes 333-341 and accompanying text.

\(^{165}\) *American Banana*, 213 U.S. at 354-55. The history of UFC is a remarkable collection of corporate interventions in the affairs of states. See infra note 340. Although UFC is now part of the United Brands Corporation, accusations of transnational corporate meddling and intrigue have continued to contemporary times. In one particularly well-known event, a coup ousted Honduran General Oswaldo Lopez Arellano in 1975 following revelations that his government was taking bribes from UFC. McBee, supra note 164, at 38.
dell Holmes ruled that the dispute raised issues that the Court did not have the power to resolve. Given the absence of a statutory provision authorizing extraterritorial application, Holmes held that the Sherman Act applied only within the territorial borders of the United States. To hold otherwise, Holmes concluded, would be to violate Panama’s sovereign rights. Thus, while recognizing that Congress could order it to violate international law, the Court refused to do so without an express congressional mandate.

Holmes outlined a rough presumption for extraterritorial cases based on his understanding of international comity and the principles of prescriptive jurisdiction. He noted that “the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.” This recognized principle of sovereign prerogative, Holmes concluded, “would lead in case of doubt to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power.”

Courts often defend the presumption against extraterritoriality on the grounds that extraterritorial regulation is an area laden with political controversy and difficult policy questions. Courts view the legislative branch as the proper forum for the resolution of such issues. This deference to Congress is particularly evident in the Court’s opinion in Foley Bros. v. Filardo. In that 1949 case, the Court was asked to apply the Eight Hour Law to the employment of an American cook working for an American company in Iran and Iraq. The Eight Hour Law

166. American Banana, 213 U.S. at 357.
167. Id. at 358. When the dispute began, Panama was still part of Columbia. Id. at 354.
168. See id. at 357.
169. Id. at 356.
170. Id. at 357.
171. In an earlier article, this author considered the presumption against extraterritoriality in American Banana from a public choice perspective, and proposed eliminating the presumption as a way of facilitating Madisonian ideals by liberally interpreting statutes to fulfill their stated “public-regarding” purposes. In doing so, courts would force “hidden deals” to the surface and compel legislators to balance the public costs against the private benefits of their decisions. Turley, Transnational Discrimination, supra note 3, at 349-58, 387-92.
172. While the presumption against extraterritoriality defers to the legislative branch, other rules defer to the executive branch in international cases. Perhaps the best example is the political question doctrine. See infra notes 248-257 and accompanying text.
174. Id. at 282-83. The Eight Hour Law provided that no employee “shall be required or permitted to work more than eight hours in any one calendar day upon such work” except when paid for work “in excess of eight hours per day at not less than one and one-half times the basic rate of pay.” 40 U.S.C. §§ 324-325a (1940), repealed by Work Hours Act of 1962, Pub. L. No. 87-581, § 203, 76 Stat. 357, 360.
required "time and a half" overtime compensation for American workers, but the American company insisted that such labor laws applied only within the United States. The Court agreed with the company, remarking that areas such as extraterritorial labor regulation are "the primary concern of a foreign country." In reaching its decision, the Court ruled that ambiguous statutes should be presumed strictly territorial in application absent a "clearly expressed" congressional intention to the contrary. The Court noted that Congress did not normally engage in extraterritorial regulation and would not have done so without making its intentions clearly manifest in the statute. Thus, in interpreting ambiguous laws, the Court advocated the "assumption that Congress is primarily concerned with domestic conditions."

After Foley Bros., courts repeatedly applied the presumption in the interpretation of statutes that were silent or ambiguous on extraterritorial jurisdiction. Most recently, in EEOC v. Arabian American Oil Co., the Supreme Court applied the presumption to restrict Title VII of the Civil Rights Act of 1964 to territorial applications. Rejecting

175. Foley Bros., 336 U.S. at 283. See generally Turley, When in Rome, supra note 9, at 617-18 (describing the application of Foley Bros. to extraterritorial labor disputes).
176. Id. at 285.
177. Id.
178. Id.
179. Id.

In theory, the presumption serves as a clear judicial statement to Congress as to the degree of clarity required for a law to have extraterritorial application. In practice, however, the cases are far less uniform and predictable. In a previous work, this author explored similar extraterritorial cases in four different regulatory areas and showed how courts have reached radically divergent results under extraterritorial review. See Turley, When in Rome, supra note 9, at 598. On close examination, the outcome of extraterritorial review appears more a function of the statute's subject matter than of its degree of linguistic clarity. Market statutes (for example, antitrust and securities) are often applied extraterritorially while nonmarket statutes (for example, environmental protection and employment discrimination) are usually denied such application. See infra notes 189-195 and accompanying text. This interpretative difference under the presumption cannot be explained by either the statutes themselves or various jurisdictional concepts. In fact, the different treatment given equally ambiguous statutes appears to be guided more by judicial sentiments than by any jurisdictional principle. Turley, When in Rome, supra note 9, at 638-54.

183. ARAMCO, 111 S. Ct. at 1229. The holding of ARAMCO was overridden within the
an agency's interpretation of the statute, Chief Justice Rehnquist explained:

[The presumption against extraterritoriality] serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.

In applying this rule of construction, we look to see whether "language in the [relevant act] gives any indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control." We assume that Congress legislates against the backdrop of the presumption against extraterritoriality. Therefore, unless there is "the affirmative intention of the Congress clearly expressed," we must presume it "is primarily concerned with domestic conditions."\(^1\)

In the \textit{ARAMCO} opinion, the presumption appears robust and virtually irrebuttable absent an express statement of congressional intent. The opinion's language bears out the Court's clear concern for institutional legitimacy and proceduralistic values. By deferring to Congress, the Court upheld a "clear statement" rule that maximizes the role of the legislative process in resolving controversial matters. The Court seems to require a much higher standard of proof to rebut the presumption than is normally associated with a presumption or canon of construction.\(^2\) As for Title VII, there was ample legislative\(^3\) and implied textual evidence\(^4\) of congressional extraterritorial intent. Chief Justice Rehnquist


\(^4\) \textit{See} Turley, \textit{When in Rome}, supra note 9, at 619.

\(^5\) \textit{See} Turley, \textit{When in Rome}, supra note 9, at 619.

\(^6\) For a discussion of the legislative and textual support for extraterritoriality under Title VII, see id. at 619-24.

\(^7\) Title VII itself lacked an express, positive mandate, but the statute included language firmly implying an extraterritorial intent. The most significant provision was that which excepted certain aliens from the statute's protections: "[Title VII] shall not apply to an employer with respect to the employment of aliens outside any State . . . ." 42 U.S.C. § 2000e-1 (1988), \textit{amended by} Civil Rights Act of 1991, Pub. L. No. 102-166, § 109(b)(1), 105 Stat. 1071, 1077. This provision's negative implication suggested that the law applied abroad; it would not have been necessary to include a provision that expressly excluded aliens from the Act's coverage if the Act automatically excluded extraterritorial employers. \textit{Turley, When in Rome, supra} note 9, at 620-22; \textit{accord} Bryant v. International Sch. Servs., 502 F. Supp. 472, 482 (D.N.J. 1980), \textit{rev'd on other grounds}, 675 F.2d 562 (3d Cir. 1982).
nevertheless read the presumption as requiring more than inferential or implied support for extraterritorial jurisdiction.\textsuperscript{188}

What is peculiar about the \textit{ARAMCO} decision is that the supposed uniformity and potency of the presumption is evident only in the opinion itself and not from a review of modern extraterritoriality cases. Such a review reveals that courts vary widely in their treatment of equally ambiguous statutes.\textsuperscript{189} In four areas—antitrust, securities, employment, and environmental law—courts apply the presumption in a disturbingly selective manner. In antitrust and securities cases, courts have traditionally allowed liberal extraterritorial application even though the statutes are silent on the subject of extraterritoriality.\textsuperscript{190} The courts often justify this interpretation based on the inherent transnational character of modern markets. As Judge Malcolm Wilkey argued in his opinion in \textit{Laker Airways v. Sabena, Belgian World Airlines},

\begin{quote}
[c]ertainly . . . territorial sovereignty is not such an artificial limit on . . . legitimate sovereign interests that the injured state confronts the wrong side of a one-way glass, powerless to counteract harmful effects originating outside its boundaries which easily pierce its "sovereign" walls, while its own regulatory efforts are reflected back in its face.\textsuperscript{191}
\end{quote}

In employment and environmental cases, however, Judge Wilkey’s fears are easily realized: courts routinely reject all extraterritorial applications of statutes that carry clear transnational implications.\textsuperscript{192} Even

\begin{flushright}
\textsuperscript{188} \textit{ARAMCO}, 111 S. Ct. at 1230.
\textsuperscript{189} See Turley, \textit{When in Rome}, supra note 9, at 603-34 (discussing cases).
\textsuperscript{190} See id. at 608-17. Although the Court first articulated the presumption in \textit{American Banana}, an antitrust case, see supra text accompanying notes 163-170, courts dropped the presumption from later cases in favor of more liberal interpretations of the antitrust laws. See, e.g., United States v. Aluminum Co. of Am., 148 F.2d 416, 443-44 (2d Cir. 1945). Courts also tend to read penal statutes more liberally, giving them extraterritorial application without clear expressions of congressional intent on the subject. The Supreme Court adopted an approach similar to that of the antitrust and securities cases when it stated in \textit{United States v. Bowman} that for many criminal statutes, “strictly territorial jurisdiction would . . . greatly . . . curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home.” 260 U.S. 94, 98 (1922); see also United States v. Larsen, 952 F.2d 1099, 1100 (9th Cir. 1991) (inferring congressional intent for extraterritoriality from the nature of the offenses); United States v. Thomas, 893 F.2d 1066, 1068 (9th Cir.) (same), \textit{cert. denied}, 111 S. Ct. 80 (1990); United States v. Wright-Barker, 784 F.2d 161, 167 (3d Cir. 1986) (same); United States v. Orozco-Prada, 732 F.2d 1076, 1087-88 (2d Cir.) (same), \textit{cert. denied}, 469 U.S. 845 (1984); United States v. Baker, 609 F.2d 134, 136-37 (5th Cir. 1980) (same). These cases primarily dealt with drug laws; courts have applied the strict presumption in other criminal areas. See, e.g., United States v. Javino, 960 F.2d 1137, 1142-43 (2d Cir.) (holding federal firearms statute to be territorial in scope), \textit{cert. denied}, 113 S. Ct. 477 (1992).
\textsuperscript{191} 731 F.2d 909, 923 (D.C. Cir. 1984).
\textsuperscript{192} See Turley, \textit{When in Rome}, supra note 9, at 617-34.
\end{flushright}
statutes like the National Environmental Policy Act (NEPA), which was designed to protect the “global commons,” have been confined to territorial applications. In these areas, courts apply a strong presumption, expressly deferring to Congress’s decisions on the inherently political questions of extraterritoriality. In a recent employment case, for example, the Second Circuit recognized the changes in world markets, but still ruled against extraterritorial application of collective bargaining laws:

In the present “global economy” ever-expanding trade makes it increasingly possible that foreign industry might affect commerce “between a foreign country and any State.” But to construe [the statute] as governing collective bargaining agreements in such an industry “would inevitably lead to embarrassment in foreign affairs and be entirely infeasible in actual practice.”

If Congress wants federal courts to enforce collective bargaining agreements between foreign workers and foreign corporations doing work in foreign countries according to the body of labor law developed [under this law], such legislative purpose must be made unmistakingly clear.

The Supreme Court in ARAMCO failed to address why market violations “easily pierce . . . ‘sovereign’ walls” but environmental and employment violations do not. For Chief Justice Rehnquist, the question is not one of balancing alternative interpretations, but one of satisfying an intentionally high standard under the presumption. Reasoning that Congress would not lightly create international conflicts and that a court should never presume such an intent, the Court in this sense applied the presumption as a “clear statement” rule—requiring an “‘affirmative intention of the Congress clearly expressed.’”

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196. Laker Airways, 731 F.2d at 923.
197. See ARAMCO, 111 S. Ct. at 1231 (“We need not choose between these competing interpretations as we would be required to do in the absence of the presumption against extraterritorial application . . . .”).
198. In line with its “assum[ption] that Congress legislates against the backdrop of the presumption against extraterritoriality,” id. at 1230, the Court reasoned that “had Congress intended Title VII to apply overseas, it would have addressed the subject of conflicts with foreign laws and procedures,” id. at 1234.
199. Id. at 1230 (quoting Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957)).
Putting aside the uneven treatment accorded past market statutes, the Supreme Court's use of a stringent clear statement rule is consistent with the origins of both common-law presumptions. The majority in *ARAMCO* actually relied on a number of cases that dealt with the older presumption in favor of international law.\(^{200}\) These cases require a higher standard of clarity in the interpretation of statutes that would "implicat[e] sensitive issues of the authority of the Executive over relations with foreign nations."\(^{201}\) As in the cases following *Charming Betsy*, the Court left the perceived complexity of international conflict to Congress and the President. The following discussion shows that the Court's institutional legitimacy concerns—as well as its support for the continued use of the presumptions—are largely misplaced.

C. The Last-in-Time Doctrine and the Dualistic Applications of the Borderland Canons

Both *Charming Betsy* and *American Banana* reaffirmed the dualist principles of their days. Both presumptions manifest a strong deference to the legislative and executive branches in judicial decisions on the use and importance of international sources. This dualist tradition jealously guards the supremacy of municipal law, even in possible contravention of treaty obligations.\(^{202}\) Although the extreme dualism of the nineteenth century is now a legal relic, courts continue to structure their statutory interpretations along municipal lines, with a heavy aversion to international entanglements or conflicts.

Both *American Banana* and *Charming Betsy* present courts with traditional canons of construction that turn on Congress's original in-

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202. Under the original English doctrine, "municipal law" was read quite narrowly. In England, the creation of treaty obligations that conflict with municipal law poses special difficulties for dualistic judges:

[If the international legal obligation is contained in a treaty, then, because a treaty is concluded by the Crown in the exercise of the prerogative and because the Crown cannot by the prerogative alter the law of the land, the obligation does not form part of the law of English and may not be enforced by the courts unless it has been incorporated into English law by means of legislation.]

*Collier, supra* note 35, at 925 (citing *The Parlement Belge*, 4 P.D. 129 (P. 1879) (Sir Robert Phillimore)).
Although their emphasis is highly static and intentionalist, it would be a mistake to view the two canons as simply originialistic expressions of statutory interpretation: if this were the case, courts would not require a special rule for disputes with extraterritorial or international dimensions. A strict textualist or contractarian approach would suffice if courts merely feared countermajoritarian judicial activism. Yet, in both cases, the Court exceeded conventional interpretative standards to require especially clear evidence of congressional intent.

203. At its most basic level, an extraterritorial dispute raises two distinct questions for a court: First, the court must determine whether Congress gave it authority to adjudicate the dispute. This question of "subject-matter" jurisdiction is generally resolved by the statutory text, but when extraterritorial cases arise, Congress has commonly failed to mention extraterritorial jurisdiction. Second, the court must determine whether Congress has authority to regulate the particular extraterritorial behavior. This question is one of "prescriptive jurisdiction." See FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300, 1315 (D.C. Cir. 1980) (defining prescriptive jurisdiction as a state's authority to regulate "the conduct, relations, status or interests of persons or things, whether by legislation, executive act or order, or administrative rule or regulation" (citing RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 6 cmt. a (1965))). In essence, there are three types of jurisdiction:

(a) jurisdiction to prescribe, i.e., the authority of a state to make its law applicable to persons or activities; (b) jurisdiction to adjudicate, i.e., the authority of a state to subject particular persons or things to its judicial process; and (c) jurisdiction to enforce, i.e., the authority of a state to use the resources of government to induce or compel compliance with its law.

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. 4, introductory note (1986); see also id. § 401.

Although these jurisdictional concepts often merge in contemporary cases, the central question of extraterritorial review is one of subject-matter jurisdiction—whether Congress wanted to extend the courts' jurisdiction under a statute to extraterritorial disputes. See, e.g., United States v. Sisal Sales Corp., 274 U.S. 268, 275-76 (1927) (antitrust statute); Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 608 (9th Cir. 1976) (same); Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1333-34 (2d Cir. 1972) (securities statute); Schoenhaum v. Firstbrook, 405 F.2d 200, 206 (same), rev'd on other grounds en banc, 405 F.2d 215 (2d Cir. 1968), cert. denied, 395 U.S. 906 (1969); United States v. Aluminum Co. of Am., 148 F.2d 416, 443-44 (2d Cir. 1945) (antitrust statute). Thus, in Charming Betsy the Court reasoned that Congress would not idly violate international principles without making its intent clear in the text of a statute. See 6 U.S. (2 Cranch) at 118. Likewise, the American Banana Court reasoned that Congress does not normally concern itself with extraterritorial matters. See 213 U.S. at 357.

204. See supra notes 85-88 and accompanying text and infra Part III.D.

205. Judge King mistakenly argued in Boureslan v. ARAMCO that the presumption against extraterritoriality requires a less stringent showing of legislative intent than does the presumption in favor of international law. See 857 F.2d 1014, 1023 (5th Cir. 1988) (King, J., dissenting) ("A separate, more stringent standard is properly reserved for cases in which the exercise of jurisdiction, extraterritorial or otherwise, would violate international law."). aff'd on rehearing en banc, 892 F.2d 1271 (5th Cir. 1990), aff'd sub nom. EEOC v. Arabian Am. Oil Co., 111 S. Ct. 1227 (1991). The case law suggests otherwise. See generally Turley, When in Rome, supra note 9, at 623-24 & n.175 (discussing Judge King's interpretation). From the outset,
The strong dualistic tradition underlying these two presumptions meshed easily with the laissez-faire policies of the early twentieth century. This was a time of tremendous economic growth and foreign commerce for United States business. Congress and the executive branch fostered this entrepreneurship through a variety of legislative and diplomatic measures. Not surprisingly, there is a strong similarity between these presumptions and a third canon that developed around the time of the American Banana decision. Under the “last-in-time doctrine,” the Supreme Court mandated that conflicts between statutes and treaties be resolved in favor of the later enacted measure. In the Head Money Cases, the Court stressed that treaty violations are matters for governments to address either through state-to-state negotiation or ultimately by war. The Court concluded that “so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification, or repeal.” Although this principle of legislative supremacy over treaty obligations has always attracted criticism, the Supreme Court has consistently de-

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American Banana was primarily a statement of judicial resistance to extraterritorial regulation and imposed a very high standard of proof.

206. See infra notes 332-342 and accompanying text.
207. See, e.g., infra notes 332-342 and accompanying text.
208. See, e.g., The Chinese Exclusion Case, 130 U.S. 581, 600 (1889); The Head Money Cases, 112 U.S. 580, 599 (1884); see also The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815) (holding that international law governs “[t]ill such an act [of Congress] be passed”).
209. Head Money Cases, 112 U.S. at 598.
210. Id. at 599.
211. Some of the first critics of such a rule were John Jay and Alexander Hamilton, both of whom viewed treaties as outside the proper legislative authority of Congress to alter or negate by later legislative acts. John Jay brought this point home most forcefully:

This idea [that treaties are subject to later legislative reversal] seems to be new and peculiar to this country, but new errors, as well as new truths, often appear. These gentlemen would do well to reflect that a treaty is only another name for a bargain, and that it would be impossible to find a nation who would make any bargain with us, which should be binding on them absolutely, but on us only so long and so far as we may think proper to be bound by it. They who make laws may, without doubt, amend or repeal them; and it will not be disputed that they who make treaties may alter or cancel them; but still let us not forget that treaties are made, not by only one of the contracting parties, but by both, and consequently, that as the consent of both was essential to their formation at first, so must it ever afterwards be to alter or cancel them. . . . [Treaties] are just as binding and just as far beyond the lawful reach of legislative acts now as they will be at any future period, or under any form of government.

The Federalist No. 64, at 394 (John Jay) (Clinton Rossiter ed., 1961); see also Ruth Wedgwood, The Revolutionary Martyrdom of Jonathan Robbins, 100 Yale L.J. 229, 365 (1990) (noting Hamilton's position, in agreement with Jay, that “treaties were sacrosanct and not subject to legislative supersession” (citing Alexander Hamilton, The Defence No. 38
ferred to clear congressional decisions on the continued validity of international agreements.\textsuperscript{212}

The original last-in-time doctrine is the virtual embodiment of the endogenous values underlying dualism: it requires that courts give way to a domestic legislative decision to violate a standing treaty or customary international law.\textsuperscript{213} Over the years, however, courts have gradually qualified this doctrine. In \textit{Cook v. United States}, the Supreme Court held that "[a] treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed."\textsuperscript{214} While the Court has held that the need for a clear expression is not a per se rule,\textsuperscript{215} courts in modern cases have routinely denied attempts to supersede treaty obligations, honoring the last-in-time doctrine more in the breach.\textsuperscript{216} For example, in \textit{Spiess v. C. Itoh & Co.}

(1795), reprinted in 20 \textsc{The Papers of Alexander Hamilton} 22, 24, 25 n.* (Harold C. Syrett ed., 1974)).

\textsuperscript{212} For a recent application of this rule, see United States v. Dion, 476 U.S. 734, 745 (1986) (holding treaty with Indian tribe to be abrogated by Eagle Protection Act).

\textsuperscript{213} \textit{See}, e.g., \textit{The Cherokee Tobacco}, 78 U.S. (11 Wall.) 616, 621 (1871) ("A treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty."); \textit{The Nereide}, 13 U.S. (9 Cranch) 388, 423 (1815) (The "law of nations" may be superseded by an Act of Congress).

\textsuperscript{214} 288 U.S. 102, 120 (1933). \textit{Cook} presented a novel variation of the last-in-time problem because it involved the reenactment of an antecedent statute that ostensibly became the subsequent authority to the treaty. In that case, the 1924 Treaty between the United States and Great Britain, a self-executing treaty that governed smuggling of intoxicating liquors and searches of British vessels, conflicted with a provision of the Tariff Act of 1922, which allowed for wider searches and was reenacted in 1930. The Court held that "[t]he Treaty was not abrogated by re-enacting... the Tariff Act of 1930 in the identical terms of the Act of 1922," because Congress had not "clearly expressed" such an intent. \textit{Id.} at 119-20; see also United States v. Lee Yen Tai, 185 U.S. 213, 221 (1902) ("[T]he purpose by statute to abrogate... a treaty, or the purpose by treaty to supersede... an act of Congress, must not be lightly assumed, but must appear clearly and distinctly from the words used in the statute or in the treaty."); Whitney v. Robertson, 124 U.S. 190, 194-95 (1888) (holding that later enactments trumped a prior treaty); Spiess v. C. Itoh & Co. (Am.), 643 F.2d 353, 356 (5th Cir. Unit A Apr. 1981) ("Only when Congress clearly intends to depart from the obligations of a treaty will inconsistent federal legislation govern."); cert. dismissed, 454 U.S. 1130, and vacated on other grounds mem., 457 U.S. 1128 (1982), appeal dismissed, 725 F.2d 970 (5th Cir.), cert. denied, 469 U.S. 829 (1984); Diggs v. Shultz, 470 F.2d 461, 466 (D.C. Cir. 1972) (finding clear congressional intent to abrogate treaty through a later enactment), cert. denied, 411 U.S. 931 (1973).

\textsuperscript{215} \textit{See} \textit{Dion}, 476 U.S. at 739 (explaining that although explicit statement of congressional intent to abrogate treaty is preferable, such an intent can also be found from clear, compelling, and reliable evidence in legislative history).

(America), the Fifth Circuit acknowledged a conflict between the Friendship, Commerce and Navigation (FCN) Treaty with Japan and the later enacted Civil Rights Act of 1964.\textsuperscript{217} Under the FCN Treaty, Japanese companies were ostensibly given the authority to hire only Japanese executives and managers,\textsuperscript{218} in direct conflict with Title VII of the Civil Rights Act, which prohibited discrimination in employment on the basis of national origin.\textsuperscript{219} Although it recognized that Title VII, by operation of the last-in-time doctrine, “might be thought to nullify inconsistent principles of domestic law created as a by-product of the Treaty,” the court refused to hold the subsequent legislation controlling without a clearly expressed congressional intent to that effect.\textsuperscript{220} Without such clear “congressional guidance,” the court stated, it would be inappropriate “to abrogate the American government’s solemn undertaking with respect to a foreign nation.”\textsuperscript{221}

While courts struggle to protect antecedent treaty obligations through the clear expression rule, they may be less protective of antecedent statutory authority threatened by a last-in-time treaty.\textsuperscript{222} Last-in-

\textsuperscript{217} See 643 F.2d at 355. In Spiess, American employees of a wholly owned Japanese subsidiary alleged that the company restricted managerial promotions and benefits to Japanese citizens, in violation of Title VII of the Civil Rights Act of 1964. \textit{Id.}

\textsuperscript{218} The FCN Treaty with Japan provided: “Companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice.” Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, U.S.-Japan, art. 8, 4 U.S.T. 2063, 2070.

\textsuperscript{219} Title VII provided:

\begin{quote}
It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
\end{quote}


\textsuperscript{220} \textit{Spiess}, 643 F.2d at 362 (citing \textit{McCulloch v. Sociedad Nacional de Marineros de Honduras}, 372 U.S. 10, 21 (1963)). The \textit{Spiess} court actually applied both the last-in-time doctrine and the presumption in favor of international principles. The court noted that it must, whenever possible, construe Title VII to be consistent with the FCN treaty, and it also acknowledged its obligation to follow a last-in-time statute that clearly superseded such treaty provisions. \textit{See id.} at 356, 362.

\textsuperscript{221} \textit{Id.} at 362.

\textsuperscript{222} \textit{See}, e.g., \textit{Factor v. Laubenheimer}, 290 U.S. 276, 293 (1933) (holding that validity of extradition treaty did not depend on whether offense was a crime under local law).
time treaty cases often come to a court with attendant political questions that are viewed as better left to the "political branches." The result can be a heavy presumption in favor of treaty sources over statutory sources. For example, the court in Antolok v. United States considered tort claims stemming from nuclear testing conducted by the United States in the Marshall Islands after World War II. Residents of the Marshall Islands filed suit against the United States under the authority of the Federal Tort Claims Act (FTCA), which waived sovereign immunity. The United States, however, argued that the FTCA, passed in 1946, was superseded by the Compact of Free Association between the United States, Micronesia, Palau, and the Marshall Islands, which provided a full settlement of all nuclear testing claims—including any then pending or later filed in United States courts. The court held that the Compact divested United States courts of jurisdiction over the plaintiffs' FTCA claims for nuclear testing damages. While the majority based its decision on its interpretation of the Compact, Judge David Sentelle expressed a strong view that "this is one of those areas of foreign relations textually committed to the political branches to the exclusion of the judiciary." Concurring in the judgment, Chief Judge Patricia Wald criticized the majority's use of questionable legislative authority to support its reading of the Compact—authority that, she argued, was at best ambiguous, and at worst supportive of the residents' claims.

Conversely, the recent district court opinion in United States v. Georgescu, a case involving a later enacted statute, illustrates the original dualistic values underlying the last-in-time doctrine. There the court considered the prosecution of a foreign national for child molestation

223. For a discussion of the political question doctrine, see infra notes 248-257 and accompanying text.
224. 873 F.2d 369 (D.C. Cir. 1989). Although Antolok involved a last-in-time treaty, one of the three judges deciding the case heavily relied on the political question doctrine. See id. at 379-84 (unjoined opinion of Sentelle, J.). As noted elsewhere in this Article, both doctrines (and the two presumptions) can have relevance in cases in which international and municipal sources conflict. See infra notes 371, 380 and accompanying text.
227. Antolok, 873 F.2d at 373-74.
228. Id. at 381 (unjoined opinion of Sentelle, J.).
229. Id. at 387-90 (Wald, C.J., concurring in judgment). Chief Judge Wald also suggested that the Compact, under the majority's interpretation, might amount to an unconstitutional deprivation of access to the courts, but declined to address that question "absent clear evidence that Congress did in fact intend to effect an unconditional withdrawal of jurisdiction." Id. at 395 (Wald, C.J., concurring in judgment).
that occurred during an international flight aboard a foreign aircraft.\textsuperscript{231} The case involved a conflict between the Tokyo Convention,\textsuperscript{232} signed and ratified by the United States in 1966, and a 1987 statute governing sexual abuse crimes committed on aircraft.\textsuperscript{233} The Convention expressly allowed criminal jurisdiction over crimes committed during international flights, even aboard aircraft of foreign registry. The defendant, however, stressed a provision that limited attempts by states to "interfere[] with an aircraft in flight," generally defined as forcing an aircraft to land or unduly delaying its flight. Arguing that the United States interfered with the flight in violation of the international agreement, the defendant challenged the jurisdiction for his arrest and prosecution.\textsuperscript{234} In rejecting the defendant's interpretation of the Convention, the court referred directly to the last-in-time doctrine. Even if the prosecution violated international law, the court noted, "this fact does not lessen the validity of the statutes as superseding domestic legislation."\textsuperscript{235} Citing Charming Betsy, the court went on to distinguish the realms of international and municipal law:

> While the courts must make a fair effort to interpret domestic law in a way consistent with international obligations, in the event of irreconcilable conflict, the courts are bound to apply domestic law if it was passed more recently. The statutory provisions under which defendant is being prosecuted were passed subsequent to the development of the traditional notions of international law jurisdiction to which defendant argues this court is confined. They were also passed subsequent to the Tokyo Convention. The domestic statutes are controlling.\textsuperscript{236}

This language, with its sharp distinction between the two systems, is highly indicative of dualistic decisionmaking. In stressing the proceduralistic importance of superseding congressional action, the court protected the Madisonian values of deliberative process and legislative supremacy. Moreover, the court treated the conflict as one between a municipal source and an international source legitimated by the municipal system. Its focus was on the procedural over the normative; on the municipal legitimation rather than the international principle.

The last-in-time doctrine and the presumption in favor of international law may appear synonymous in some cases. Chief Justice Marshall actually seemed to lay the groundwork for both doctrines in

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\textsuperscript{231} Id. at 913.
\textsuperscript{234} See Georgescu, 723 F. Supp. at 920.
\textsuperscript{235} Id. at 921.
\textsuperscript{236} Id. (citations omitted).
Charming Betsy. After declaring the presumption in favor of international law, Marshall noted that a "plainly expressed" congressional statement to the contrary must nevertheless always control in cases of conflict. Marshall's limiting language reaffirmed legislative supremacy through the clear meaning of a statute under review or, by implication, later legislative acts.

While the last-in-time doctrine is expressly dualistic in its deference to Congress, Charming Betsy shows the presumption in favor of international law to be equally dualistic in application. Chief Justice Marshall honored international law primarily in its avoidance—not in its application. Although the Court recognized that international principles protected the luckless Mr. Shattuck, it did not apply those principles as controlling precedent or rules. Charming Betsy represents the very essence of dualistic values: the decision whether to incorporate or to exclude international principles rests with the municipal governmental structure. If Charming Betsy were truly monistic, on the other hand, the presumption would be a simple rule mandating the application of international principles.

As with the presumption in favor of international law, the language of the presumption against extraterritoriality can deceive. At first glance, the presumption appears to advance a monistic model by respecting international principles of prescriptive jurisdiction. After all, the presumption was created by the direct application of an international source in the form of the customary international law on prescriptive jurisdiction. In reality, however, the original presumption was more isolationist than internationalist. At the time of its inception, most forms of extraterritorial jurisdiction were viewed as per se violations of international law. In a dualistic system, international discord is a matter for Congress and the executive branch to resolve through a deliberative legislative process. The Supreme Court has used the canon essentially to avoid international law and international complications by leaving such matters to Con-

237. See Charming Betsy, 6 U.S. (2 Cranch) at 119. The interplay of the two doctrines is particularly interesting in Spiess v. C. Itoh & Co. (America), in which the court juggled the two presumptions with evident difficulty. See supra note 220 and accompanying text.

238. The recent Georgescu case demonstrates how the last-in-time doctrine might trump an international source. See supra text accompanying notes 230-236.

239. Like the Charming Betsy Court, later courts used the presumption primarily to deny jurisdiction in order to avoid some perceived conflict with another nation. See, e.g., Commodity Futures Trading Comm'n v. Nahas, 738 F.2d 487, 493-95 (D.C. Cir. 1984) (applying Charming Betsy to deny jurisdiction in a case that pitted the Commodity Exchange Act against international principles of sovereignty, and construing the Act to make sure its application would not violate international law).
The Court appears more concerned with avoiding "international discord" than it is with fostering "international law." 241

D. The Political Question Doctrine and the Evolution of Institutional Legitimacy

In all three of these doctrines, the dualistic function of the rules was based entirely or in part on a separation of powers rationale. The application or rejection of international sources in domestic cases was viewed as a usurpation of the constitutional authority of either the Congress or the President and thus an illegitimate exercise of judicial powers. 242 This would explain, in Professor Eskridge's terminology, the use of meta-rules at the inception of these doctrines to avoid the constitutional periphery of foreign relations and international conflicts. 243 It does not, however, explain the contemporary use of such rules. 244 In numerous cases, courts have shown a growing willingness to resolve disputes in what was once the constitutional borderland. 245 International sources are increasingly part of the domestic legal system, through treaties, executive agreements, or extraterritorial statutes. 246 Thus, courts are now more accustomed to applying international sources as municipal law or, in some cases, directly as international law. 247

The past institutional legitimacy arguments for these doctrines will continue to lose potency as courts adopt a more expansive institutional perspective. These arguments are based on rigid institutional notions and countermajoritarian fears, and are simply less compelling for courts

240. See Turley, When in Rome, supra note 9, at 603-34; supra Part III.B.
241. See Turley, When in Rome, supra note 9, at 634.
242. See supra notes 171-172, 200-201, 213-236 and accompanying text.
244. See supra notes 146-150 and accompanying text.
today. An example of this evolution appears from modern applications of the political question doctrine.\textsuperscript{248} Since \textit{Marbury v. Madison},\textsuperscript{249} the Supreme Court has gradually limited the political question doctrine's use as a bar to judicial consideration of international cases.\textsuperscript{250} Although the doctrine was once a stiff barrier to courts in the foreign relations area,\textsuperscript{251} the Supreme Court has noted that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."\textsuperscript{252} Thus, while the doctrine continues to be


\textsuperscript{249} 5 U.S. (1 Cranch) 137 (1803). In \textit{Marbury}, Chief Justice Marshall foreshadowed the doctrine when he asserted in dicta that "[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." \textit{Id.} at 170.

\textsuperscript{250} See Steinhardt, supra note 1, at 1187-89; Tigar, supra note 90, at 1167-68.

\textsuperscript{251} See, e.g., Regan v. Wald, 468 U.S. 222, 242-43 (1984) (declining to find a due process violation of the right to travel to Cuba, because of deference to political branches in matters of foreign policy); Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) (holding Court had no power to review Civil Aeronautics Board's order granting or denying authority to engage in overseas transport); United States v. Pink, 315 U.S. 203, 230 (1942) (refusing challenge to the United States' recognition of the Soviet Union in the Litvinov Assignments); Guaranty Trust Co. v. United States, 304 U.S. 126 (1938) (same); Oetjen v. Central Leather Co., 246 U.S. 297, 302-03 (1918) (rejecting jurisdiction in a suit for recovery of chattel seized by a faction in the Mexican Revolution, because the United States had officially recognized that faction as the legitimate government of Mexico); United States v. Palmer, 16 U.S. (3 Wheat.) 610, 634 (1818) (rejecting jurisdiction to decide a piracy case, turning on the United States' official recognition of a foreign state involved in a civil war).

\textsuperscript{252} Baker v. Carr, 369 U.S. 186, 211 (1962). Under \textit{Baker}, a court will defer under the political question doctrine only in cases that "[i] turn on standards that defy judicial application, or [ii] involve the exercise of a discretion demonstrably committed to the executive or legislature[,] . . . or [iii] uniquely demand single-voiced statement of the Government's views." \textit{Id.}; see also Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221, 229-30 (1986) (rejecting political question argument against review of Secretary of Commerce's decision to refuse to certify to the President that Japan's violation of whale-harvesting restrictions diminished the effectiveness of an international fishery conservation program, which certification would have permitted discretionary sanctions by the President); Antolok v. United States, 873 F.2d 369, 390-92 (D.C. Cir. 1989) (Wald, C.J., concurring in judgment) (arguing against use of the political question doctrine to bar review, on the basis of an international agreement, of a claim by alleged victims of U.S. nuclear testing). This deference to the executive is often justified by reference to the need for the nation to speak in one voice. See, e.g., United States v. Belmont, 301 U.S. 324, 330 (1937) ("In respect of what was done here, the Executive had authority to speak as the sole organ of [the] government."); see also Ralph G. Steinhardt, \textit{Human Rights Litigation and the "One-Voice" Orthodoxy in Foreign Affairs}, in \textit{World Justice? U.S. Courts and International Human Rights} 23 (Mark Gibney ed., 1991) (criticizing view that the United States must "speak with one voice" as a failed principle that should be replaced in the context of human rights litigation). This rationale also forms part of \textit{Baker}'s definition of nonjusticiable political questions, 369 U.S. at 211, as quoted above.
applied, there is a developing trend in favor of judicial scrutiny in an area once thought to be beyond the domain of the judicial branch. The United States Court of Appeals for the District of Columbia Circuit, for example, reversed a district court’s dismissal on political question grounds of claims stemming from the United States’ seizure of property to train “contra” guerilla fighters in Honduras. Like many others, the court expressed grave doubts about the usefulness and legitimacy of this doctrine in contemporary cases:

The political question doctrine is a tempting refuge from the adjudication of difficult constitutional claims. Its shifting contours and uncertain underpinnings make it susceptible to indiscriminate and overbroad application to claims properly before the federal courts. . . . Despite confusion over whether a retreat to the political question doctrine is proper in particular cases, it is clear that the doctrine is, at best, a narrow one.

This trend has been encouraged by a number of academics who reject the doctrine’s underlying countermajoritarian fears and narrow view of judi-

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253. One such application occurred in Antolok v. United States, 873 F.2d 369 (D.C. Cir. 1989), discussed supra notes 224-229 and accompanying text. After holding that an international agreement superseded the plaintiffs’ right to sue under the FTCA for injuries resulting from nuclear tests, one judge went on to note in dicta that he found jurisdiction equally objectionable on the basis of the political question doctrine, which “protects the political realm from judicial invasion.” Id. at 383 (unjoined opinion of Sentelle, J.); see also Finzer v. Barry, 798 F.2d 1450, 1458 (D.C. Cir. 1986) (“Defining and enforcing the United States' obligations under international law require the making of extremely sensitive policy decisions, decisions which will inevitably color our relationships with other nations.”), aff'd in part and rev'd in part sub nom. Boos v. Barry, 485 U.S. 312 (1988).

254. In Goldwater v. Carter, 444 U.S. 996 (1979), Justice Powell formulated a test for the presence of political questions that strongly emphasizes the institutional legitimacy concerns behind the doctrine. Under the Powell test, a court should ask: “(i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of Government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention?” Id. at 998 (Powell, J., concurring in judgment); see Antolok, 873 F.2d at 381 (unjoined opinion of Sentelle, J.) (following Powell’s test). But cf. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 803 n.8 (D.C. Cir. 1984) (Bork, J., concurring) (“That the contours of the doctrine are murky and unsettled is shown by the lack of consensus about its meaning among the members of the Supreme Court and among scholars.” (citations omitted)), cert. denied, 470 U.S. 1003 (1985). The political question doctrine has not barred review of the most controversial political issues of this century, including the invalidation of President Truman’s seizure of steel mills during the Korean War, see Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 589 (1952), and the review of the highly charged claims agreement with Iran, see Dames & Moore v. Regan, 453 U.S. 654, 686 (1981).


256. Id. at 1514 (footnote omitted).
cial competence. These academics offer an alternative institutional view of the judiciary as an active player in the political process.

Past institutional legitimacy arguments afford an especially problematic basis for the presumption against extraterritoriality. Under the auspices of institutional legitimacy, courts refuse to resolve questions that the legislative or executive branches are better suited to consider, given their technical or diplomatic elements. Questions with international dimensions have always been viewed as highly complex and poorly suited for judicial determination. Laden with complex diplomatic and economic concerns, international questions are viewed as best left to the offices of the President and Congress rather than individual judges and their law clerks. This practical deference to the executive or legislative branch reflects a common “institutional competence” concern of the courts. Courts may also refuse to consider issues that they view as constitutionally better suited for one of the other branches. Although they might have the practical ability to resolve the question, the courts are sometimes concerned about the content of the question itself. The political question doctrine is an excellent example of this latter rationale. When presented with a question that is highly policy-laden, a court will

257. Professor Martin Redish has strongly criticized the doctrine as based on four essentially flawed presuppositions: Some questions are too complex for judicial resolution; courts lack institutional capacity to review decisions of the political branches; courts must refrain from such reviews due to their undemocratic nature; and courts will undermine their authority by creating confrontations with the political branches, which may simply choose to ignore decisions by the judicial branch. Redish, supra note 248, at 1043-44. Professor Redish concluded: “Once we make the initial assumption that judicial review plays a legitimate role in a constitutional democracy, we must abandon the political question doctrine, in all of its manifestations.” Id. at 1059-60; see also Henkin, Political Question, supra note 248, at 600 (arguing that there is no legitimate basis for finding political questions nonjusticiable, and no legal doctrine requiring judges to abstain from reviewing such matters). For an equally able defense of the doctrine, see Mulhern, supra note 248, at 175-76.

258. See, e.g., Sanchez-Espinoza v. Reagan, 770 F.2d 202, 208 (D.C. Cir. 1985) (finding that to grant relief against executive officials for supporting forces attempting to overthrow a foreign government would be an abuse of discretion because the matter involved diplomatic relations with at least four states and was therefore better suited to the political branches); International Ass’n of Machinists v. OPEC, 649 F.2d 1354, 1358 (9th Cir. 1981) (holding act of state doctrine barred exercise of federal jurisdiction over action to enjoin OPEC’s price-fixing activities), cert. denied, 454 U.S. 1163 (1982); Friedar v. Government of Isr., 614 F. Supp. 395, 399-400 (S.D.N.Y. 1985) (holding act of state doctrine, rooted in concerns about “the politically sensitive nature of judging the validity of acts by a foreign state and the relative institutional competence of the judiciary to make such a determination,” barred action for veteran’s benefits allegedly promised by a foreign government); DeRoburt v. Gannett Co., 548 F. Supp. 1370, 1376 (D. Haw. 1982) (holding act of state doctrine barred foreign citizen’s claim against a U.S. newspaper for alleged libel in stories about loans made by a foreign government’s development corporation to alleged “separatist” interests in another foreign state), rev’d on other grounds, 733 F.2d 701 (9th Cir. 1984), cert. denied, 469 U.S. 1159 (1985).
defer on the basis of separation of powers to either of the "political branches." 259

The constitutional periphery has moved considerably since American Banana. Although it was once extraordinary to regulate activities abroad, Congress's regulatory concerns are no longer clearly territorial or domestic. As the uniqueness of extraterritorial regulation diminishes, so too does the institutional dilemma for courts. It is now common for courts to resolve conflicts with foreign jurisdictions. In addition to the growing number of expressly extraterritorial statutes, 260 many statutes raise transnational issues and have possible extraterritorial applications. 261 In an earlier article, this author argued that the presumption against extraterritoriality was fast becoming a legal relic with little or no contemporary justification. 262 Addressing the main premise of Foley

259. See, e.g., Oetjen v. Central Leather Co., 246 U.S. 297, 302 ("The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—"the political"—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.").

The Supreme Court's decision in United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992), presents an interesting example of this type of deference to the executive branch. While not directly invoking the political question doctrine, the majority relied heavily on the doctrine's underlying separation of power rationales. Alvarez-Machain involved the abduction of a Mexican citizen, Dr. Humberto Alvarez-Machain, by the United States Drug Enforcement Agency (DEA). The DEA arranged the kidnapping of Alvarez-Machain from Guadalajara, Mexico in order to charge him with an assortment of crimes stemming from the torture and murder of a DEA agent. Alvarez-Machain challenged the arrest on the basis of the 1978 Extradition Treaty between Mexico and the United States. That Treaty, he argued, denied jurisdiction to the United States' courts in the absence of a formal extradition by the Mexican government. See id. at 2190. Although the lower courts had agreed with this reading of the Treaty, the Court reversed in an opinion by Chief Justice Rehnquist, holding that the text of the Treaty did not expressly forbid abduction. Id. at 2190-91, 2197. Notably, the Court allowed the extraterritorial application of United States penal laws with little discussion of the presumption or the rationales found in nonmarket extraterritorial cases.

In rejecting the defendant's argument, the Court adopted a narrow interpretation of the treaty language and specifically deferred the question of transnational abduction's propriety to the executive branch. See id. at 2195-96. The Chief Justice further suggested that the proper forum for this question was the diplomatic corps, not the federal courts. This "diplomatic approach," he argued, had worked in earlier cases in which the Court had refused to resolve international conflicts. Id. at 2196-97 n.16. Ironically, the Court supported its decision not to involve itself in diplomatic concerns by citing an example in which an earlier extraterritorial decision by the Court had improved the United States' position in ongoing diplomatic negotiations. See infra note 272.

260. These statutes now include Title VII, which Congress amended in 1991 to override the Supreme Court's limitation of the Act to territorial applications in EEOC v. Arabian American Oil Co. See supra notes 181-184 and accompanying text.


262. Turley, When in Rome, supra note 9, at 601.
Bros. v. Filardo, the author suggested that the Court's assumption that Congress's normal concerns are domestic is no longer valid in the age of transnational markets and regulation. In EEOC v. Arabian American Oil Co., however, the Court clearly reaffirmed the presumption as a useful "backdrop" for congressional action. The Court viewed the presumption as a way for the judiciary to avoid creating international conflicts and discord. Notably, while ARAMCO cuts back on a trend in the lower courts to dilute the clarity requirement under the presumption, the decision was not premised on the political question doctrine or the countermajoritarian difficulty. Rather, the Court justified its decision by reference to a traditional interpretative basis for clear-meaning canons: ensuring statutory predictability in a sensitive policy area.

Institutional legitimacy concerns stem from the perceived practical or constitutional limitations of a court, but neither basis is particularly useful in supporting the presumption against extraterritoriality. Courts are clearly capable of resolving extraterritorial questions. There is nothing mysterious or especially complex about extraterritorial disputes: courts often deal with jurisdictional conflicts in both domestic cases and cases involving expressly extraterritorial statutes. Since these disputes affect private parties, the central issues are primarily legal and not technical or political. There is, therefore, little basis for an institutional competence rationale for the presumption. Nor is there a true separation of powers basis for the presumption. Various courts have suggested that the presumption against extraterritoriality is needed to allow the properly authorized branches, rather than the judiciary, to resolve highly political questions that are heavily steeped in foreign relations. This sentiment was strongly expressed in the recent ARAMCO decision. This argument, however, is superficial. In ARAMCO and other extraterritorial cases, the conflict was not between the United States and a foreign country, but between the United States and a United States citizen. Extraterritorial decisions do not instruct another country in what laws are appropriate; they define the prescribed behavior of United States citizens doing business abroad. Although the Supreme Court created the

263. See id. at 639-55; supra text accompanying notes 173-179 (discussion of Foley Bros.).
265. See id. at 1235-36.
266. See Turley, When in Rome, supra note 9, at 603-34 (discussing cases).
268. See 111 S. Ct. at 1234.
269. There is an analogy here to the academic critique of the political question doctrine,
presumption out of an institutional concern with avoiding international conflict, transnational litigation is now a common feature of court dockets. In this new context, institutional legitimacy should, if anything, compel courts to play a more efficient regulatory role by adjusting legislative schemes to new global circumstances.\textsuperscript{270}

From the outset, the institutional legitimacy concerns underlying \textit{Charming Betsy}'s presumption in favor of international law differed from the concerns underlying the presumption against extraterritoriality. The latter canon was designed to lessen tension between the judicial and legislative branches. The presumption in favor of international law, in contrast, addresses conflicts between the judicial and both the legislative and executive branches. Under the separation of powers rationale, courts are loath to usurp the executive branch's unique voice in foreign affairs. Similarly, courts wish to avoid making controversial decisions that should be left to the deliberative processes of Congress. Thus, courts have applied the presumption in favor of international law largely to avoid jurisdiction or, more recently, to avoid an international conflict by following the least controversial course available under international law.\textsuperscript{271}

The presumption in favor of international law is difficult to defend on the grounds established by past cases. The heightened separation of powers concerns with international sources are not lessened by the use of this canon. A court does not remove itself from decisionmaking in the area of foreign relations by adopting the presumption in favor of international law. On the contrary, by interpreting international sources and defining "conflicts" between municipal and international laws, the court is actively engaged in a transnational dispute regardless of its ultimate decision under the canon. The very selection of relevant and conflicting international sources represents a significant judicial role in transnational conflicts. Some role in these cases is unavoidable for United States courts in the future.\textsuperscript{272} As with extraterritorial cases, these cases are no longer

\textsuperscript{270} Particularly to Professor Redish's challenge to the "judicial humility" that marks the cases. \textit{See} Redish, \textit{supra} note 248, at 1046-52 (arguing that political question doctrine should have no relevance to exercise of judicial review).

\textsuperscript{271} \textit{Cf.} Julius Cohen, \textit{Judicial "Legisputation" and the Dimensions of Legislative Meaning}, 36 Ind. L.J. 414, 420 (1961) ("[Textualism and judicial deference create] an inordinate amount of delay in correcting what might not have actually been intended—granted the present complicated machinery of the legislative process.").

\textsuperscript{272} The Supreme Court recently supplied a highly ironic example of the limitations of this neutrality argument, although not in a \textit{Charming Betsy} case. In \textit{United States v. Alvarez-Machain}, the Court ruled that an extradition treaty with Mexico did not bar the abduction from Mexico of a Mexican citizen by the DEA for trial in the United States. 112 S. Ct. 2188,
rare events along the constitutional periphery; instead, they represent increasingly common source conflicts. The increasing frequency and magnitude of these conflicts place corresponding pressures on courts to update or gap-fill ambiguous statutes in transnational cases.

Moreover, even if a real separation of powers problem existed, both the last-in-time doctrine and the political question doctrine offer direct limitations on judicial action. The use of conflicts principles that can weed out "unreasonable" attempts at extraterritorial regulation might also partially ease judicial aversion to international conflict and dispute.\(^2\)

When viewed on their own terms, both presumptions appear to be canons in search of a meaning. The traditional bases for a meta-rule are simply absent in contemporary cases under either canon of construction. The question remains, however, whether either canon retains any viability as a matter of dualistic principle. The following discussion considers the two canons from the alternative pluralistic perspective suggested in Part II.

IV. Proceduralism and International Rent-Seeking in a Representative Democracy

The two principal canons along the borderland are products of early nineteenth and twentieth century cases that favored conservative judicial roles in those areas better suited to the political branches. Dualism em-

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2197 (1992); see supra note 259. Writing for the Court, Chief Justice Rehnquist specifically deferred this complex diplomatic question to the executive branch. Alvarez-Machain, 112 S. Ct. at 2195-96. Yet, in support of the decision to defer this question, the Chief Justice further suggested that deferral might prompt diplomatic action. The Chief Justice specifically referred to the Court's 1923 ruling in Cunard Steamship Co. v. Mellon, in which the Court allowed the U.S. government to search foreign vessels within the territorial waters of the United States. 262 U.S. 100, 122-23, 127-29 (1923); see Alvarez-Machain, 112 S. Ct. at 2196-97 n.16. While England and the United States were "at loggerheads" over the issue and unable to agree on a treaty before the case, the decision forced a diplomatic confrontation and ultimately a new treaty. See id. Cunard is an excellent example of how courts influence legislative and diplomatic decisionmaking. Regardless of whether the Court had allowed or barred the searches, its decision in Cunard would have had an impact on the treaty negotiations between the United States and England.

273. See Turley, When in Rome, supra note 9, at 659-61 (describing the "effects" and "conduct" tests of prescriptive jurisdiction as placing a maximum limit on the extent of extraterritorial legislation permissible under international law).

Moreover, for a conservative intentionalist, the presumption in favor of international law will produce rather than avoid interbranch conflicts if it develops in a monistic way. The use of the presumption to incorporate extrinsic sources into statutory schemes raises the type of intentionalist concerns that the original dualistic rule was meant to avoid. Clearly, judges who fear usurping the constitutional powers of other branches in foreign affairs cases would gravitate toward a narrow interpretation of the statute at hand rather than rely on extrinsic sources.
bodies a faith in proceduralism as a necessary facet of a pluralistic democracy. One central proceduralistic norm within dualism is a judicial respect for deliberative dialogue within and between the representative branches. Debate and negotiation that allow for consensus and majoritarian decisionmaking are key to achieving harmony in a Madisonian system. Dualistic decisions can advance these goals by forcing controversial issues of international conflict to come before Congress and the executive branch, where such a process can forge a pluralistic compromise.

Dualism also reflects a strong legal process fear of circumventing the legislative process and its barriers to special interest measures. Even as the tripartite system encourages compromise, it also inhibits favoritism and factional advantage. By exposing legislation to both houses of Congress, the drafters hoped to guard against abuses by special interests and to check the potential excesses of the executive branch. Part of the legal process tradition has been a belief that pluralism is a value sustained principally through deliberative process. By subordinating international law to domestic law, courts guarantee that domestic deliberation remains the key to achieving legislative "goods." By refusing to act in matters of international conflict, therefore, a court does much more than simply protect its own institutional legitimacy; it defends pluralism itself, in the form of representative voting and open debate. International law runs against the Madisonian grain when used as an equal or controlling source in domestic disputes. While decisions based on international law might be subject to congressional reversal, the use of a legal source that develops outside the tripartite system is highly problematic for a Madisonian democracy as it was first conceived. Remarkably, the gradual incorporation of international sources is often discussed with little attention to its potential impact on this carefully balanced Madisonian system. This is particularly troublesome when courts use international sources to augment or rebut conventional legislation. "International legislation" in the form of treaties, executive agreements, and customary law can enter the domestic system untouched by proceduralistic protections against special interest dealing and political excess.274 The contemporary challenge to dualism presents a unique opportunity to examine the continued relevance of these values.

274. As discussed below, treaties are not wholly outside this system, given the ratification requirement. Likewise, executive agreements are often the result of informal consultation between the executive and legislative branches. Thus, for both treaties and executive agreements, some proceduralistic pressures do apply. See infra notes 346-349 and accompanying text.
In a representative democracy, legislation is a vehicle for majoritarian compromise and deliberation.\footnote{275} The Federalists believed that institutional divisions and procedures would protect the country from the ravages of the factional and countermajoritarian forces that had plagued earlier governmental systems.\footnote{276} While the Federalists clearly viewed factions as inevitable forces in any democracy, they believed that a system that contained checks and balances would allow collective purposes to prevail against excess by any particular group or branch.\footnote{277} The separation of powers between the executive, legislative, and judicial branches served as the system's central protection against factionalism.\footnote{278} These branches were meant to live in uneasy cohabitation, each jealous of its own authority and suspicious of possible transgressions by the other branches.\footnote{279}

In economic terms, the problem of "factions" described by Madison and Hamilton is a problem of rent-seeking—"the attempt to obtain economic rents (i.e., rates of return on the use of an economic asset in excess of the market rate) through governmental intervention in the market."\footnote{280} Whether the rent is measured in dairy subsidies or pollution dollars, rent-seeking is the mainstay of the modern special interest group. The Federalists expected rent-seeking to occur primarily in the legislative branch. Accordingly, the drafters divided legislative authority between two houses with different constituencies, interests, and powers.\footnote{281} The bicameral system raises the costs of legislation in general. While this

\footnote{275. See The Federalist No. 27 (Alexander Hamilton), No. 63 (James Madison). For an excellent discussion of both federalist and antifederalist principles, see Cass R. Sunstein, Interest Groups in American Public Law, 38 Stan. L. Rev. 29, 35-45 (1985) [hereinafter Sunstein, Interest Groups].}

\footnote{276. Madison defined a "faction" as "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." The Federalist No. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961).}

\footnote{277. See The Federalist No. 51, at 321-22 (James Madison) (Clinton Rossiter ed., 1961) ("[The tripartite system gives each branch] the necessary constitutional means and personal motives to resist encroachments of the others.").}

\footnote{278. Hamilton was most eloquent in his concern that antifactional measures prevail in the new system of government "[w]hen occasions present themselves in which the interests of the people are at variance with their inclinations." The Federalist No. 71, at 432 (Alexander Hamilton) (Clinton Rossiter ed., 1961).}

\footnote{279. See The Federalist No. 10 (James Madison); Bickel, supra note 76, at 16-23.}


\footnote{281. See The Federalist No. 62, at 378-79 (James Madison) (Clinton Rossiter ed., 1961).}
may inhibit some public interest legislation as well as rent-seeking, the bicameral system decreases the efficacy of most hidden deals by forcing them into the open through either the intervention of other representatives or the actions of adversarial groups. Ideally, most narrow legislative deals become prohibitively expensive when forced into the open, unless the wealth-maximizing faction can ally its interests with a secondary, majoritarian purpose. This is why hidden deals are the greatest danger to the Madisonian system. Special interest groups often cloak rent-seeking in the guise of “public-regarding legislation.”

The separation of powers doctrine offers barriers to rent-seeking beyond those intrinsic to the legislative branch. On the executive side, the President is entitled to veto any legislation that does not benefit the national constituency. While a faction might easily capture a Member of the House and possibly a Senator, the drafters thought it less likely that a narrow interest could control a President, who is accountable to the widest constituency. On the judicial side, the courts have the power to review legislation for unconstitutional excess. The Federalists were quite clear on the necessary judicial role vis-à-vis rent-seeking. Hamilton stated that “where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former.” Judicial review was the final structural barrier to rent-seeking, after which the political system was expected to work for collectively beneficial changes in regulations.

As noted earlier, the two borderland canons address different institutional tensions. The presumption against extraterritoriality was a

283. As used here, the term “public-regarding” is taken from Professor Jonathan Macey’s work on interest group theory and legislation. See id. at 228. “Legislation may be said to be public-regarding if it serves some purpose other than obtaining for particular legislators the pecuniary advantage of the political support of some narrow interest group, even if this purpose is the transfer of wealth from one group to another.” Id. at 228-29 n.29. The original roots of the term lie in the work of Professor Jerry Mashaw. See Jerry L. Mashaw, Constitutional Deregulation: Notes Toward a Public, Public Law, 54 Tul. L. Rev. 849, 868 (1980).
285. Professor Cass Sunstein has argued that a court must actively resist rent-seeking measures. See Sunstein, Naked Preferences, supra note 6, at 1691. Professor Sunstein linked this judicial interventionary role with the overall antifactional scheme of the Constitution: “The notion that government actions must be responsive to something other than private pressure is associated with the idea that politics is ‘not the reconciling but the transcending of the different interests of the society in the search for the single common good.’” Id. (quoting Gordon S. Wood, The Creation of the American Republic, 1776-1787, at 58 (1972)); see also Sunstein, Interest Groups, supra note 275, at 49-55.
286. See supra text accompanying notes 258-273.
response to tension produced primarily between the judicial and legislative branches when courts extended legislation abroad. The presumption in favor of international law was a response to tension produced primarily between the judicial and executive branches when courts resolved international conflicts. This institutional difference is reflected in the differing potential problems of rent-seeking under the two canons.

A. Rent-Seeking in the Legislative Branch

The presumption against extraterritoriality was originally advanced as a clear meaning rule designed to reduce tension between the judicial and legislative branches. This classic rationale was most recently put forward by the Supreme Court in its *ARAMCO* decision. The presumption's value as a clear meaning rule may substantially offset its cost as a vehicle for rent-seeking. Under the public choice model, legislative rent-seeking describes conduct aimed at acquiring affirmative gifts through legislation of some good at a rate that a party could not have obtained in the market. Rent-seekers, however, can often achieve their designs through more surreptitious means, such as by securing the omission of critical legislative elements to negate a statutory objective. Such an opportunity arises in extraterritorial cases, in which a multinational interest can acquire a rent simply by forcing ambiguity in an otherwise transnational statute. Courts then become the unwitting instrument of rent-seeking when they exempt the multinational concern from regulation.

For a representative democracy, multinational interests in many ways embody the worst of Madisonian fears. The multinational acts as a special interest group that seeks legislative rents obtainable as easily through legislative inaction as through legislative action. For example, multinationals can avoid having to comply with environmental statutes by encouraging lawmakers to leave extraterritorial application of the acts ambiguous. The presumption against extraterritoriality will suffice to deliver on the hidden legislative deal. Public choice scholars have criticized the traditional legal process theory of legislation precisely because they do not share the latter's faith in the system's ability to resist special interest legislation. Specifically, modern political conditions challenge

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288. Macey, *Transaction Costs*, supra note 280, at 472 n.4 (describing rent-seeking as the attempt to achieve economic rates of return (i.e., rents) from the use of an economic asset in excess of the market rate through governmental intervention in the marketplace).
290. Turley, *When in Rome*, supra note 9, at 627-34.
291. See, e.g., Easterbrook, *Statutes' Domains*, supra note 102 (arguing that trading of votes in Congress to pass measures benefiting special interests makes legislative intent difficult
the system's ability to winnow out the self-serving measures of special interest groups and to further public-regarding measures in their place.

Multinationals as special interest groups have other, equally troubling characteristics. Professor Mancur Olson showed that in comparison to larger groups, such small interest groups tend to be very successful in furthering their interests. Multinationals comprise a relatively small group of companies with homogeneous, defined, and concentrated interests. Multinational players have a large stake in securing legislative rents through limitations on employment, environmental, and other remedial statutes. They can easily coordinate their lobbying efforts and, due to their size and small numbers, the incidence of free riders among them is low.

Multinationals also have an advantage over many domestic groups in that United States citizens generally lack even the most fundamental information about transnational regulation. Public choice scholars have criticized the traditional school's failure to consider the informational barriers that serve to hide legislative deals from most voters. This information deficiency protects hidden deals by special interest groups. If the informational and transactional costs are high in the domestic political realm, they are considerably higher when transnational interests are involved. Since most transnational regulatory decisions have very diffuse impacts on the population, there is generally no counteractive faction in Congress to oppose such interests beyond the occasional effort by organized labor or environmentalists. More importantly, the failure to regulate transnationally does not offer the same organizational potential for opposing groups as would an overt congressional decision to allow extra-
territorial discrimination or pollution. The informational and transac-
tional barriers severely frustrate attempts by citizens to sift through
legislation to discover such hidden deals. Because of these costs, it is
entirely possible for legislators to enact transnational special interest leg-
islation without incurring any political backlash.

Eliminating the presumption against extraterritoriality would close
this avenue for rent-seeking. Courts would then perform their traditional
role in statutory interpretation. It might be argued that eliminating the
presumption would simply create an incentive for the affected groups to
seek rents in the courts, but it has never been shown that such rent-
seeking is likely or even possible on a significant scale.296 Federal judges
do not receive direct compensation from the parties to disputes, and life
tenure reduces the value of such indirect benefits as campaign contribu-
tions or political action committee (PAC) support. While multinational
interests would clearly spend money to secure a “judicial rent,” such ac-
tivity would meet with counseled opposition. Any legislation presents
the opportunity for some party to gain an advantage outside of either the
market or a voluntary exchange. Although judicial rent-seeking is
clearly more likely to occur today in the “age of regulation” than in years
past, the institutional dangers of such activity pale in comparison to
those presented by traditional legislative rent-seeking, given the character
of the adversarial process.

B. Rent-Seeking in the Executive Branch

While public choice scholarship has focused almost exclusively on
rent-seeking in the legislative arena, it is clear that rent-seeking occurs in
the executive branch as well. Since most international legislation begins
with the executive branch, initial rent-seeking will occur outside the bi-
cameral system, which has the greatest procedural barriers to faction and
special interest deals. Although the Supreme Court has never addressed
rent-seeking per se, it has shown some preference for bicameral legisla-
tive products over primarily executive products such as treaties. This
preference was evident in the Head Money Cases.297 In rejecting an argu-
ment that treaties should be considered superior to statutes, the Court
noted:

296. For discussions of the relationship between the judiciary and special interest groups,
see Graham K. Wilson, Interest Groups 62-64 (1990), and William N. Landes & Richard A. Posner,
The Independent Judiciary in an Interest-Group Perspective, 18 J.L. & Econ. 875 (1975).
297. The Head Money Cases, 112 U.S. 580 (1884).
A treaty is made by the President and the Senate. Statutes are made by the President, the Senate and the House of Representatives. The addition of the latter body to the other two in making a law certainly does not render it less entitled to respect in the matter of its repeal or modification than a treaty made by the other two. If there be any difference in this regard, it would seem to be in favor of an act in which all three of the bodies participate.298

As noted above, the drafters appeared less concerned with rent-seeking in the executive branch and erected fewer internal structural impediments to such activity.299 They viewed the President as the virtual personification of national interests, and saw the executive branch as a check in itself on rent-seeking—its majoritarian vigilance to be expressed through the executive veto. There is no indication that the drafters expected the President to be generally susceptible to factional forces, in contrast to their expectations with respect to legislators. Their greatest concern regarding the President's power was that it might promote not factional favoritism but despotic insensitivity to local concerns.300

The executive branch, however, has evolved considerably since Washington's pintsize cabinet.301 From Teapot Dome to the savings and loan crisis, the executive branch has repeatedly been accused of serving narrow special interests.302 Presidents like Grant and Reagan were criticized during their tenures as instruments of special interests.303 The rise of rent-seeking in the executive branch began after the Civil War, when the President's power was radically inflated to include sweeping regulatory control.304 Before the war, the executive branch was small.305 In 1789, there were only three departments in the cabinet (Department of War, Department of State, and Department of the Treasury), compared

298. Id. at 582.
299. See supra text preceding note 281.
300. See, e.g., The Federalist No. 69 (Alexander Hamilton) (comparing President with English monarch).
301. The first Congress established three executive departments: Foreign Affairs, War, and Treasury. 5 Dictionary of American History 162 (James Truslow Adams ed., 1940). The Department of State (as it was soon renamed) had a staff of six, including Thomas Jefferson. Id. In sharp contrast, there were 25,699 employees at State by September 1991. Reversing the Reagan Staffing Trend, Gov't Executive, Feb. 1992, at 6.
305. 5 Dictionary of American History, supra note 301, at 162.
with fourteen today.\textsuperscript{306} By 1816, the executive branch had grown exponentially to encompass 1138 civilian personnel.\textsuperscript{307} The President exerted control through political influence and his appointment and veto powers. Federal agencies expanded in number and size along with this power. The executive branch increasingly took responsibility for the various public goods valued by special interest groups, particularly during the administration of Franklin Roosevelt before World War II.\textsuperscript{308} At last count, the executive branch contained 14 cabinet-level departments, 12 offices in the Executive Office of the President, 61 “independent establishments and government corporations,” and employed 3,067,167 persons.\textsuperscript{309} Modern Presidents delegate most actual regulatory decisions, beyond the overall policy objectives, to agencies. As President Carter discovered, it is actually viewed as a sign of weakness for the President to attempt to “micro-manage” the executive branch.\textsuperscript{310}

The size and complexity of the modern executive branch lends itself to rent-seeking behavior. The classic form of rent-seeking in the executive branch is “agency capture,” in which special interest groups gradually co-opt their regulators.\textsuperscript{311} Most agencies rely heavily on industry information and cooperation.\textsuperscript{312} This relationship between the regulator

\footnotesize{306. This of course does not count the Environmental Protection Agency (EPA), which will likely be elevated to the status of a cabinet department in 1993.}

\footnotesize{307. U.S. Bureau of the Census, Historical Statistics of the United States: Colonial Times to 1970, pt. 2, at 1103 (1975). This figure and those that follow exclude postal employees. See id. The executive branch continued to grow in spurts until 1981, when the number of civilian employees fell slightly. The pace of growth is impressive: 1821 (1760 employees); 1841 (3260 employees); 1861 (5837 employees); 1871 (13,459 employees); 1891 (55,395 employees); 1911 (176,127 employees); 1921 (298,720 employees); 1941 (1,081,436 employees); 1961 (1,824,578 employees); 1981 (2,143,025 employees); 1991 (2,250,281 employees). Id. at 1102-03; U.S. Bureau of the Census, Statistical Abstract of the United States 1982-1983, at 266-67 (1982); U.S. Bureau of the Census, Statistical Abstract of the United States 1992, at 330 (1992) [hereinafter Statistical Abstract 1992].}

\footnotesize{308. See Farina, supra note 304, at 465 & n.57.}


\footnotesize{310. See Dily M. Hill, Domestic Policy, in The Carter Years: The President and Policy Making 13, 26-29 (M. Glenn Abernathy et al. eds., 1984).}


\footnotesize{312. For a case study of the interplay between industry groups and government agencies contributing to the Montreal Protocol, an international agreement aimed at phasing out pro-}
and the regulated industry can become dangerously close, with industry assuming a prominent role in regulatory changes. Agency capture is possible because of the high informational and transactional costs involved in doing business with, or watching over, regulatory agencies. Citizens' groups often face prohibitive costs in attempting to monitor the development of several hundred thousand regulatory decisions and interpretations each year. Monitoring is especially difficult when a special interest group seeks agency inaction, or the failure to regulate. Even the Office of Management and Budget can do little to truly monitor federal agencies beyond establishing broad budgetary guidelines. Unfortunately, most agency deals do not appear in a budgetary form. Through information control and regulatory proposals, special interest groups can silently achieve their narrow objectives without exposing their interests to open public scrutiny in the conventional legislative process.

Some rent-seeking, however, occurs entirely at the White House. There is perhaps no better example of successful rent-seeking in the executive branch than appears from the recent decisions of the Council on Competitiveness. Created in 1989 by President Bush and chaired by Vice President Quayle, the Council was formed specifically to listen and respond to industry's concerns with over-regulation. After Congress passed stiff new amendments to the Clean Air Act in 1990, for example, industry groups sought assistance from the White House, which used the Council to make over 100 requested changes in the law at the rule-making stage. Many of these changes ran counter to the legislative decisions reflected in the Act and reinstated defeated industry

13. All agencies are required to submit major rule-making decisions to the Office of Management and Budget (OMB) for review. Under Executive Order No. 12,291, 46 Fed. Reg. 13,193 (1981), the OMB must scrutinize agency decisions to ensure that they are efficient and maximize the net benefits to society.


15. Michael Duffy, Need Friends in High Places? For Industries Trying to Skirt the Law, Dan Quayle's Council on Competitiveness Is a Good Place to Start, TIME, Nov. 4, 1991, at 25; see also D.C. Bar Panel Debates Legitimacy of Quayle Council Regulatory Reviews, [Jan.-June] Daily Rep. for Executives (BNA) No. 37, at A20 (Feb. 25, 1992) (quoting congressional sources as saying that "the council gutted EPA's recycling rule . . . overturned EPA's decision to ban burning of lead acid batteries, severely weakened the agency's ground water regulations, undercut EPA's requirement for liners in municipal landfills, and rewrote the wetlands manual to eliminate half of the protected acreage").
For example, while considering the 1990 legislation, Congress hotly debated the new emission limitations for industrial plants. Industry wanted to relax restrictions in the permitting process to allow for increased emissions without new permits after giving proper notice. Congress defeated the suggested amendments in a highly publicized move to force compliance among state implementation plans. After the Act's passage, however, industry groups used the Council to suggest to the EPA the identical change, which was later published in the Federal Register.

In another case, the Administration pushed Congress to relax new emissions abatement control technology requirements for electric utility plants. The House and Senate defeated the Administration's proposal three times but, using the Council as a conduit, the industry succeeded in getting the same changes incorporated through the rule-making process. The Council has achieved similar rollbacks in other regulations, as in its recent decision to narrow a key definition in wetlands legislation to allow development or other private use of thirty million acres of wetlands that both Congress and, apparently, the EPA thought were protected. Many congressional leaders criticized the Administration for intentionally waiting until after the public debate and voting in Congress to silently achieve industry goals outside the open, deliberative legislative process. Some critics specifically objected to the Council's refusal to make its meetings and deliberations public.

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316. Michael Weisskopf, Rule-Making Process Could Soften Clean Air Act, WASH. POST, Sept. 21, 1991, at A1, A10; see also Michael Ross, Quayle Accused of Trying to Weaken Clean Air Act, L.A. TIMES, Mar. 23, 1991, at A1 ("[i]ndustry now seems to have found a new front in their fight to undermine the new clean air law." (quoting Rep. Waxman)). One of the drafters of the new amendments was quoted as saying: "The problem isn't just that [the new rule-making proposals are] inconsistent with the law. The whole process is outrageous and fraudulently illegal to allow polluters, which opposed the law, to go through the back door and have the law rewritten to favor their point of view." Weisskopf, supra at A10.


318. Id. ("[I]n one of the most hotly argued provisions . . . [I]ndustry repeatedly, and unsuccessfully, petitioned for 'flexibility' in the limits, and the ability to exceed them without going through the costly and time-consuming process of obtaining new permits.").

319. Id. at A1 ("Administration efforts for the provision were rebuffed three times—including on the Senate floor and during the House-Senate conference.").

320. Id.

321. Id. at A10.

322. Id. at A1.

323. Duffy, supra note 315, at 25.

324. See, e.g., Philip J. Hilts, At Heart of Debate on Quayle Council: Who Controls Federal Regulations?, N.Y. TIMES, Dec. 16, 1991, at B11 ("[T]he council has acted behind closed doors, without disclosing who was seeking the changes or any other facts of its deliberations. When several Congressional committees sought recently to obtain documents that would shed
There are, of course, various potential rent-seekers in the executive branch. Foreign interests, for example, often must look to the executive branch as an alternative to Congress for rent-seeking. In Congress, foreign interests are barred from contributing to political campaigns and thus stand in a weaker market position in relation to domestic groups. Moreover, foreign interests must be particularly wary of triggering protectionist reactions in Congress. The executive branch, on the other hand, is the most insulated from local pressures. It commonly uses trade and regulatory benefits as a tool of foreign policy. While the President cannot receive direct contributions from foreign interests, the recent Iran-Contra and BCCI scandals show how a President can use foreign banks and nations to further political agendas. Moreover, foreign

light on these matters, the council refused, claiming that as an executive-branch agency, it was not required to divulge such information."


326. See 2 U.S.C. § 441e (1988). There is, of course, the possibility of post-service rewards—a subject of much concern during and after the Reagan Administration. See infra note 331 and accompanying text. The BCCI scandal also shows the pervasive practice of high office bribery in other countries. See, e.g., Steve Lohr, B.C.C.I. Official Says Link to U.S. Bank Was Obvious, N.Y. TIMES, Oct. 23, 1991, at D1 (describing bribes to senior officials of developing nations in the form of direct payments, hiring of relatives, payments of medical bills, and even prostitutes).

327. See, e.g., Robert L. Jackson, McFarlane: Reagan Asked for Secrecy, L.A. TIMES, Mar. 12, 1989, at A1 (discussing the use of various countries, and even national charities, to indirectly finance the contras); James O'Shea & Michael Tackett, Congress Gets Contra Probe, CHI. TRIB., May 3, 1987, at C1 (giving chronological account of the efforts to indirectly fund the contras); Jeffrey Schmalz, Bank Is Charged by U.S. With Money-Laundering, N.Y. TIMES, Oct. 12, 1988, at A1 (discussing the use of BCCI in 1986 to transfer funds in the Iran-Contra affair). The example of the contra scandal is particularly telling. In the early 1980s, the Reagan Administration was intent on funding the contra forces in Nicaragua as a front line against communism in Latin America. This effort was stymied by the "Boland Amendment," which barred the U.S. government from funding the "overthrow" of the Sandinista government. Unable to use direct funding, therefore, the Reagan Administration used various friendly nations and banks to divert funds to the contras. This dealing often appeared to be "tit for tat," with the Administration assisting in arms agreements and sales. In one case, President Reagan used his emergency powers to grant a request for missiles by Saudi Arabia; one month later, Saudi Arabia began funding the contras. This funding later doubled after the President announced an agreement to sell a $250 million weapon system to the Saudis. O'Shea & Tackett, supra at C1; Bob Woodward, Contra War Secretly Run by Three NSC Officials, WASH. POST, Feb. 27, 1987, at A1.

interests have proved highly successful at acquiring the assistance of past and present administrative figures like Clark Clifford, Richard Allen, and even the occasional former President.

Of the various players in the regulatory market, multinational firms clearly are one of the most likely to rent-seek and lobby the executive branch. Multinational interests have traditionally enjoyed a close working relationship with the executive branch, often operating as a virtual extension of the government. Past Presidents have defined foreign policy in terms of multinationals' interests and have even engaged in combat over the property claims of multinationals based in the United States. Military forces were repeatedly sent to


333. Multinationals have always had a symbiotic relationship with their native country. The United States is, of course, not unique in its close identification with business interests. During the period of so-called U.S. "gunboat diplomacy," a number of other countries were also supporting their multinationals with military force. For example, in 1902 German ships bombarded Puerto Cabello, Venezuela as punishment for that nation's late payment of a debt. See SAMUEL FLAFF BEMIS, A DIPLOMATIC HISTORY OF THE UNITED STATES 522-23 (5th ed. 1965). The United States, which would actually occupy the Dominican Republic to force a debt payment two years later, protested the German intervention. See id. at 523-26.

334. In the 1800s and 1900s, United States multinationals enjoyed tremendous govern-
mental support—particularly of the military and diplomatic varieties. See Rostow & Ball, supra note 333, at 8-10.

335. Large numbers of U.S. troops first landed in Cuba during the Spanish-American War in 1898. The troops remained for four years to direct and, at times, control the transition from colony to nation. In 1906, the United States intervened in a Cuban civil war, installed a friendly government, and occupied the country for three years. In 1917, U.S. troops again intervened to prevent a revolt and to protect U.S. interests. Thomas E. Skidmore & Peter H. Smith, Modern Latin America 257-58 (1984). The most famous intervention, however, was the Bay of Pigs invasion in 1961. This latter invasion, of course, had strong geopolitical underpinnings, as did the 1962 air and naval quarantine of the island. See id. at 275-76. The nonmilitary U.S. interests in Cuba were primarily sugar mills and plantations and, later, resort holdings. See id. at 258-63, 272.

336. The United States first sent troops to the Dominican Republic in 1902 to protect U.S. business interests and to force the country to make good on a debt owed U.S. banks. A year later, the United States intervened again to support U.S. businesses, which had complained of harassment by the government. By that time, the United States had taken over the collection of Dominican customs duties to service the country's debts to U.S. creditors, an arrangement that continued until 1911. Jan Knippers Black, The Dominican Republic: Politics and Development in an Unsovereign State 21 (1986); Julius William Pratt, A History of United States Foreign Policy 220-21 (3d ed. 1972); see also Bruce Palmer, Jr., Intervention in the Caribbean: The Dominican Crisis of 1965, at 12 (1989). In 1916, U.S. Marines landed and established martial law, in part to protect U.S. financial interests. During the eight years of occupation that followed, the United States instituted a number of “reforms” to benefit U.S. business interests. See Black, supra at 21-25. The most spectacular intervention occurred in 1965, when President Johnson sent in 22,000 troops to crush an insurrection that the United States considered communistic and threatening to U.S. interests. See Palmer, supra; McBee, supra note 164, at 36.

337. The United States has invaded Honduras and Nicaragua on thirteen separate occasions. Colman McCarthy, 'National Security,' Mother of Intervention, WASH. POST, Mar. 27, 1988, at F6. In 1903, President Roosevelt sent in troops four times to protect U.S. interests. In 1907, U.S. troops again entered six Honduran cities to protect the large U.S. banana and banking interests there. Id.

Panama,339 and other countries340 to protect and advance United States business interests.341 Although it is less likely to prompt direct interven-


One of the more interesting interventions was led by William Walker, a Tennessean, who in 1855 successfully overthrew the Nicaraguan government with the help of 58 Americans. Walker, who had earlier tried to overthrow the Mexican government, was funded and supported by Cornelius Vanderbilt, who owned large railroad interests in that country. Vanderbilt was unhappy with the restrictions placed on his enterprises by the Nicaraguan government. In 1857, U.S. troops captured Walker and removed him from his self-proclaimed dictatorship. It is interesting to note that a year before the U.S. intervention, Walker had turned on Vanderbilt and attempted to regulate U.S. corporate interests. See JOHN A. BOOTH, THE END AND THE BEGINNING: THE NICARAGUAN REVOLUTION 18-20 (1982).


340. The United States has used troops on sixty separate occasions in Central America and the Caribbean. McBee, supra note 164, at 36. Mexico has been repeatedly invaded by large and small U.S. forces. United States troops first occupied part of Mexico in 1846, which led to the Mexican-American War. See MICHAEL C. MEYER & WILLIAM L. SHERMAN, THE COURSE OF MEXICAN HISTORY 342-46 (2d ed. 1983); SKIDMORE & SMITH, supra note 335, at 228-29; RICHARD N. CURRENT ET AL., AMERICAN HISTORY: A SURVEY 380-84 (6th ed. 1983). In Guatemala, the United States has intervened repeatedly since 1920. In 1953, Guatemalan President Jacobo Arbenz Guzmán expropriated large landholdings of the United Fruit Company in a moderate agrarian reform. A dispute arose over the amount of compensation owed UFC, and UFC lobbyists and their allies in the Eisenhower Administration branded Arbenz a "stooge" for communists and a threat to U.S. security. On the orders of President Eisenhower in 1954, the CIA organized and funded an exile group that overthrew Arbenz within the year. The new government quickly returned UFC's land. SKIDMORE & SMITH, supra note 335, at 316-19.

341. The direct military support of U.S. business interests was so close that one of the senior military officers of this period, Marine Major General Smedley Butler, later described himself as "a high-class muscle man for Big Business, for Wall Street and for the bankers." Butler, who later became an ardent isolationist, also described himself as a "racketeer for capitalism." Jonathan Peterson, Economics and the Route to War, L.A. TIMES, Sept. 9, 1990, at D1.

By contemporary standards, this governmental involvement often reached incredible levels. In one noteworthy case, General Butler, then commanding a contingent of U.S. Marines at Bluefields, Nicaragua, told the Nicaraguan army that the Nicaraguan government could not attack a town containing a rebel force because U.S. property might be damaged. General Butler insisted that the government could only attack the rebels if it did so without weapons. The government withdrew. See IVAN MUSICANT, THE BANANA WARS: A HISTORY OF UNITED STATES MILITARY INTERVENTION IN LATIN AMERICA FROM THE SPANISH-AMERICAN WAR TO THE INVASION OF PANAMA 141 (1990). In another case, in Greytown, Nicaragua, the Navy sloop-of-war Cyane was sent to protect a U.S. company, the Bluefields Steamship Company, that was involved in a local dispute. WILKINS, supra note 332, at 25. The captain of a company steamboat had shot and killed a native boatman after their ships collided. The captain was arrested, and a U.S. diplomat was slightly injured by debris thrown during the resulting melee. The Cyane demanded an apology and damages for the
tion today, this symbiotic relationship is still present in the executive branch.342

The efficiency of small interest groups and the insularity of the executive branch combine to make rent-seeking a great danger in the executive branch.343 Multinationals can sometimes achieve by executive agreement what they could not hope to achieve through congressional legislation. A small industry may be unable to secure an exception to an environmental law with extraterritorial application. If its proposal is unpopular, the industry may come up against well-organized environmental groups that would oppose any express exception to the legislation. That industry, however, might be able to secure the same rent through a superseding executive agreement or treaty. By waiving jurisdiction over certain areas, the President can substantially assist certain multinational interests. Likewise, although a firm may be unable to secure a direct bailout, as Lockheed did in the 1970s,344 it might be able to secure guaranteed sales for products and spare parts under a defense agreement or international loan guarantee.345

company. On July 13, 1853, after the local authorities failed to issue an apology, the Cyane bombarded and destroyed the entire town. Id.; see also Perrin v. United States, 4 Ct. Cl. 543 (1868) (involving suit for damages stemming from Cyane bombardment), aff'd, 79 U.S. 315 (1871); Wiggins v. United States, 3 Ct. Cl. 412 (1867) (same).

342. WILSON, supra note 296, at 61-62 (discussing interest group access to the White House); see also Robert L. Pacholski, Note, The FCC and Reciprocity: An Examination of the "Public Interest" Standard, 62 TEX. L. REV. 319, 321 (1983) (describing the FCC's efforts to reduce market barriers overseas for U.S. telecommunications firms); cf. Seymour J. Rubin, Multinational Enterprise and National Sovereignty: A Skeptic's Analysis, 3 LAW & POL'Y INT'L BUS. 1, 6 (1971) (arguing that "expansion of international investment . . . could not move forward without at least tacit governmental concurrence, if not active support").

343. Obviously, the presence of rivalling political parties serves as a check on agency capture and executive abuses. Such was the case with the partisan criticism of a little-known program called "Trade, Not Aid," run by the United States Agency for International Development (AID). See Michael deCourcy Hinds, Workers Say U.S. Program Took Their Jobs, N.Y. TIMES, Oct. 19, 1992, at A8. Through this program, the AID subsidized the transfer of factories from the United States to Central America as a way of stabilizing Central American governments. Id. It is unlikely that such a program would have received much public support during a recession, as evidenced by the outcry following media reports. The insularity of the executive branch and the complexity of the budget process, however, allowed the program to remain largely unknown for twelve years.


345. See generally JANE H. BAYES, IDEOLOGIES AND INTEREST-GROUP POLITICS: THE UNITED STATES AS A SPECIAL-INTEREST STATE IN THE GLOBAL ECONOMY 31 (1982) (describing interconnections between global and domestic political affairs that characterize modern political life and interest groups).
Nevertheless, the strong potential for rent-seeking in the executive branch clearly does not mean that all international sources are products of rent-seeking or even that rent-seeking is more common in the executive branch than in Congress. Most cases along the borderland involve one of three types of international sources: treaties, executive agreements, and customary international law. A public choice critique of these principal sources fails to offer a decisive argument for either a dualistic or a monistic interpretation of Charming Betsy or the other international canons. Nevertheless, some proceduralistic arguments might be raised in favor of a dualistic rule. The high transactional and informational costs of dealing with the executive branch may make it easier to secure rents through treaties and executive agreements. Moreover, the lack of strong congressional interest in treaties or international agreements makes special deals less susceptible to the test of deliberative process that underlies the legal process model of Professors Hart and Sacks.

From a proceduralistic perspective, however, the dualistic argument against the use of international law in the municipal system is undermined by the fact of congressional involvement in the making of both treaties and executive agreements. Today formal obligations under treaties and conventions are considered fully enforceable under United States law, absent a later revocation or modification by Congress. While bicameralism is missing in the treaty-making process, the supermajority requirement for senatorial approval can function as a barrier to executive excess and special dealing. In executive agreements, informal arrangements also enhance participation and agreement between the executive

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347. See U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . ."). Courts interpreting treaties face difficult questions of how to determine legislative intent, and must resolve the same competing textualist and contextualist arguments that underlie the interpretation of conventional legislation. See supra notes 85-88, 97-101 and accompanying text. This debate is probably most evident when treaties are ambiguous as to their application. Treaties are usually characterized as either self-executing or non-self-executing. Non-self-executing treaties are agreements that contain obligations but no express provisions for remedies or adjudication of claims. See, e.g., Spiess v. C. Itoh & Co. (Am.), 643 F.2d 353, 356 (5th Cir. Unit A Apr. 1981) (defining self-executing treaties as "binding domestic law of their own accord, without the need for implementing legislation"), cert. dismissed, 454 U.S. 1130, and vacated on other grounds mem., 457 U.S. 1128 (1982), appeal dismissed, 725 F.2d 970 (5th Cir.), cert. denied, 469 U.S. 829 (1984); Smith v. Canadian Pac. Airways, 452 F.2d
and legislative branches. After an increase in the use of executive agreements became controversial, Congress and the President reached a compromise in a process called "Circular 175." Executive agreements are now limited to areas not covered by treaties. Thus, the President cannot undermine an earlier bargain with Congress by using executive agreements to achieve what Congress denied in negotiation. Moreover, an executive agreement will normally be executed only if (1) it is made in accordance with an existing treaty or statute, (2) it is subject to a congressional vote, or (3) it is made in accordance with the President's constitutional power.

Some treaties expressly state an intention to be non-self-executing, but most do not. While some courts and commentators have argued that all treaties are self-executing, the Court has recognized the distinction since 1887, repeatedly holding that non-self-executing treaties deserve less weight than federal statutes under the Supremacy Clause of the Constitution. See U.S. Const. art. VI, cl. 2 ("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 . . . ."); Cook v. United States, 288 U.S. 102, 118-19 (1933); Whitney v. Robertson, 124 U.S. 190, 194-95 (1887); Bartram v. Robertson, 122 U.S. 116, 120 (1887); see also Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829) (Marshall, C.J.) ("[A treaty is] to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract . . . the legislature must execute the contract before it can become a rule for the Court."). There is, of course, ongoing debate over whether a given treaty should be presumed self-enforcing. Many courts continue to presume that a treaty does not confer domestic rights of action without express language to that effect. See, e.g., United States v. Bent-Santana, 774 F.2d 1545, 1550 (11th Cir. 1985); Iran v. Boeing Co., 771 F.2d 1279, 1283-84 (9th Cir. 1985), cert. dismissed, 479 U.S. 957 (1986).


349. See id. at 93. Circular 175 guarantees "that the making of treaties and other international agreements for the United States is carried out within constitutional and other appropriate limits." Id. at 91. Executive agreements are similarly broken down in the Restatement (Third) of the Foreign Relations Law of the United States § 303 (1986):

Subject to § 302(2),

(1) the President, with the advice and consent of the Senate may make any international agreement of the United States in the form of a treaty;

(2) the President, with the authorization or approval of Congress, may make an international agreement dealing with any matter that falls within the powers of Congress and of the President under the Constitution;

(3) the President may make an international agreement as authorized by treaty of the United States;

(4) the President, on his own authority, may make an international agreement dealing with any matter that falls within his independent powers under the Constitution.
process, working agreements like Circular 175 enhance the claim of executive agreements as authoritative sources by deflecting criticism that these agreements circumvent the treaty clause or represent the sole decision of the executive branch.

Moreover, while the executive branch’s insularity increases the potential for rent-seeking, the actual level of rent-seeking in the drafting of treaties and executive agreements is difficult to gauge. If the drafters of the Constitution were correct, the executive branch may present less of a rent-seeking potential because of the President’s national constituency and the “dilemma of the ungrateful electorate.”

There is little question that the executive branch often does work for the “national constituency.” A treaty or executive agreement may actually introduce a collectively beneficial change in a regulation or negate a hidden legislative deal. The Office of Management and Budget, in particular, was created to weed out special dealing and agency excesses. Through executive orders and agreements, the President may act to protect national over special interests.

Perhaps the most interesting extrinsic source along the borderland is customary international law. The precedential authority of customary international law in this country is usually traced to the case of The Paquete Habana. In that case, the Court recognized the authority of customary international law, but defined it as a lesser legal source in comparison to constitutional, statutory, or treaty obligations. The applicability of customary international law under Charming Betsy remains

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350. William N. Eskridge, Jr., Interpreting Legislative Inaction, 87 Mich. L. Rev. 67, 105 (1988) (describing “an axiom of human nature under which voters and interest groups will remember the things the legislator did to hurt them more strongly than they will remember the things done for their benefit”).

351. 175 U.S. 677 (1900). In that 1898 case, the United States Navy seized two Spanish vessels operating out of Havana, Cuba. Congress had declared war on Spain and had ordered the seizure of all hostile vessels. Id. at 712-13. The Supreme Court considered the seizure and sale of the vessels under customary international law and held it an established rule of international law that “coast fishing vessels . . . are exempt by the general consent of civilized nations from capture” as prizes of war. Id. at 711. Even more significant, however, was the Court’s express application of a “law” that was neither enacted by Congress nor agreed to by the President:

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 . . . .

Id. at 700.

352. Id. at 708, 710-11. The Paquete Habana followed another case, United States v. Smith, 18 U.S. (5 Wheat.) 153 (1820), which is also considered an endorsement of the use of customary international law in United States courts. See also Steven M. Schneebaum, The
a matter of some dispute, even after *The Paquete Habana*. The *Charming Betsy* Court clearly envisioned conflicts with formal international sources or jurisdictional principles when it established the presumption in favor of international law, but it has been suggested that the decision should extend more broadly to customary international law as well. The implications of a statute being limited by customary international law, however, are a dualist's nightmare. As shown below, this interpretation goes well beyond the general understanding of *The Paquete Habana* to suggest that customary international law could control in some cases of domestic statutory interpretation.

Even though customary international law does not possess the procedural foundation of treaties or executive agreements, the danger of rent-seeking is probably the lowest in this area because most rent-seekers have little ability to influence the creation of customary law. The potential for rent-seeking in some forms of customary international law, however, cannot be discounted altogether. International organizations with increasing regulatory powers present a new avenue for rent-seeking. Customary international law is created in part by the decisions and practices of such bodies. Unlike conventional representative legislatures, these bodies are generally elitist and nonparticipatory in character. Various public interest groups have challenged new international organizations like the General Agreement on Tariffs and Trade (GATT) as inimical to both national sovereignty and nonbusiness interests. It is not clear how these new international regulatory bodies will evolve with

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353. Professor Henkin has argued persuasively that *The Paquete Habana* did not establish the legitimacy of customary international law in any domestic case. Henkin, *United States Sovereignty*, supra note 1, at 874 n.92. He noted that *The Paquete Habana* was an admiralty case that arose under a statute that compelled reference to the international law governing maritime prizes. *Id.*

354. *See supra* text accompanying notes 148-150.

355. *See infra* notes 393-401 and accompanying text. Moreover, this argument sharply contrasts with such Supreme Court decisions as United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992). Writing for the Court in that case, Chief Justice Rehnquist dismissed the argument that an abducted Mexican doctor should be released from federal custody and returned to Mexico solely under the authority of customary international law. While acknowledging that the abduction might have violated customary international law, the Chief Justice stated in dicta that “as a matter outside of the Treaty, [any violation of customary international law] is a matter for the Executive Branch.” *Id.* at 2196.

356. One such group is Public Citizen, a well-known consumer advocacy organization run by Ralph Nader, which criticized GATT as a group of “unelected, unknown bureaucrats [who are] heavily lobbied by big business.” Nancy Dunne, *Environmental Rules Set Stage for GATT Conflicts*, *Fin. Times*, Dec. 5, 1991, § 1, at 6. Public Citizen challenged the right of such a group to “establish world health, safety and environmental policy” and warned that “[a] na-
the unification of various markets. The proliferation of international bodies and regulations, however, raises new questions regarding the definition and authority of customary international law. While it is clear that any dualistic argument against customary international law finds little support in a rent-seeking rationale, the full incorporation of customary international law would certainly arouse other dualistic concerns. As shown below, strong arguments based on pluralism can be raised against any presumption in favor of customary international law.\textsuperscript{357}

C. Summary

The preceding discussion explored alternative bases for dualistic values—bases other than the classic institutional legitimacy arguments of past cases. Although courts once avoided international law and conflicts as part of the "constitutional periphery," the rise in international sources and extraterritorial jurisdiction has made common what was once foreign for United States courts. Courts now accept a legitimate institutional role of interpreting treaties and statutes in light of international conflicts, obligations, and norms.\textsuperscript{358} This shift in judicial attitudes is apparent in the narrowing of the political question doctrine as a bar to judicial review,\textsuperscript{359} the recognition of extraterritorial regulation in areas like antitrust and securities laws,\textsuperscript{360} and the preference given international sources under the last-in-time doctrine.\textsuperscript{361} Moreover, courts treat many of these "international sources" no differently than municipal sources for the purposes of judicial review. Thus, a treaty should not put a court on the "constitutional periphery" any more than a statute would

\textsuperscript{357} See infra notes 393-401 and accompanying text.

\textsuperscript{358} With the rise of the European Community, European courts are confronting a major shift in relevant sources of law from municipal to international bodies. One recent example of the difficult political questions that may result appears in a decision by the High Court of Ireland to enjoin a 14-year-old rape victim from seeking an abortion in England. Glenn Frankel, \textit{Irish Supreme Court Allows Teenager to Seek Abortion}, \textit{WASH. POST}, Feb. 27, 1992, at A27. Abortion is illegal in Ireland, but allowed in England. The High Court rejected a claim that the Irish government could not bar travel under European Community law. William E. Schmidt, \textit{Girl, 14, Raped and Pregnant, Is Caught in Web of Irish Law}, \textit{N.Y. TIMES}, Feb. 18, 1992, at Al. The Irish Supreme Court overturned the High Court's ruling without an opinion. Frankel, supra at A27. This tension between Irish and EC law represents a continuation of earlier cases. See, e.g., Society for the Protection of Unborn Children (Ir.), Ltd. v. Grogan, 1989 I.R. 760 (Ir. S.C); Society for the Protection of Unborn Children (Ir.), Ltd. v. Grogan, [1991] 3 C.M.L.R. 849 (E.C.J.).

\textsuperscript{359} See supra notes 248-257 and accompanying text.

\textsuperscript{360} See supra notes 189-195 and accompanying text.

\textsuperscript{361} See supra notes 208-236 and accompanying text.
in the typical case of interpretation. Nevertheless, like the proceduralistic rationale, the separation of powers rationale for dualism continues to have some motivating power for courts deciding international cases.

This Article suggests that dualism is best understood as advancing the pluralistic values of Madisonian democracy. Viewed from this perspective, the two principal canons of construction have little contemporary value as mechanisms for advancing the deliberative and dialogic goals. Strong pluralistic arguments support the elimination of the presumption against extraterritoriality. Ironically, the loss of this canon may result in increased attention to international principles in domestic cases. This possible application of international principles, however, would not pose the problems associated with monistic systems. The presumption is primarily jurisdictional and thus the incorporation of customary international law would be limited to this threshold question. Moreover, courts already discuss such principles in the context of prescriptive jurisdiction or conflicts review in cases with expressly extraterritorial statutes. Eliminating the presumption would simply require courts to deal directly with the international dimensions of statutory interpretation. Under conflicts principles, a court must consider prescriptive questions even after it asserts extraterritorial jurisdiction under a statute. Finally, courts would analyze prescriptive jurisdiction on a statute-by-statute basis. Thus, the courts would be working within a set statutory context or regulatory scheme defined by Congress.

While eliminating the presumption against extraterritoriality would not produce monistic difficulties for a Madisonian system, it would close an avenue for rent-seeking and increase the pressure for open debate on extraterritorial questions. Absent the presumption, a court would be free to interpret any given statute in the fashion most faithful to its "public-regarding purpose." If a statute misleads the court by its sweeping language, Congress could then reverse the court’s decision in an open legislative process. This would serve to force hidden deals to the surface and buttress the deliberative norms of a Madisonian democracy. From this perspective, the Supreme Court’s recent ARAMCO decision cannot be justified under either an institutional legitimacy or a public choice rationale.

362. See, e.g., Lauritzen v. Larsen, 345 U.S. 571, 577-78, 592-93 (1953); Laker Airways v. Sabena, Belgian World Airlines, 731 F.2d 909, 921-26 (D.C. Cir. 1984); see also The Antelope, 23 U.S. (10 Wheat.) 66, 122 (1825); Turley, When in Rome, supra note 9, at 604-08.

363. See supra note 203.

364. See supra notes 181-188, 264-270 and accompanying text.
Examining the presumption in favor of international law also reveals little pluralistic basis for preserving the canon as a dualistic principle. In most cases of conflict, a court must decide not between international and municipal sources, but between two municipal sources in the form of treaties (or occasionally executive agreements) and statutes. Pluralistic forces have already come to bear in varying degrees on the creation of treaties and executive agreements, and any conflict can be handled under traditional interpretative approaches. The most worrisome case involves the application of customary international law under the canon. While such an application would not necessarily raise rent-seeking problems, it would depart from the canon's function as a dualistic principle.

The presumption in favor of international law has far greater monistic potential than either the presumption against extraterritoriality or the last-in-time doctrine. While courts have modified the last-in-time doctrine to give some preference to treaties, the presumption in favor of international law is not clearly limited to treaties or executive agreements and does not depend on a temporal justification to overcome a statute. Thus, a statute might control under the last-in-time doctrine but fail under the presumption in favor of international law. Likewise, the presumption against extraterritoriality is a narrow rule relating to only one international principle: prescriptive jurisdiction. Thus, a statute could conceivably satisfy the presumption against extraterritoriality as transnational in application but fail under the presumption in favor of international law as violative of a treaty or some other international obligation.

Some international scholars clearly approve of a greater monistic perspective for United States courts, arguing that Charming Betsy should be viewed not as simply a jurisdictional restraint but rather as a positive endorsement of the use of international principles in domestic decisions. While it seems doubtful that Charming Betsy will ever evolve into a purely monistic rule, courts and commentators evidently view the incorporation of international law as increasingly important in the developing transnational system.

The possible monistic use of the presumption in favor of international law, however, shifts its emphasis from protecting institutional legitimacy to a more aspirational function. To put it another way, the dualistic use of the presumption focuses on proceduralistic concerns with avoiding the constitutional periphery represented by foreign relations and international conflict. The monistic use of the presumption focuses

365. See, e.g., Steinhardt, supra note 1, at 1161-62.
on normative concerns regarding the content of the decision. The next Part looks at the possible role for this canon absent a dualistic rationale.

V. The Decanonization of Charming Betsy

The presumption in favor of international law is one of the last great American canons. Although once standard fare for all law students, canons of construction have been on the decline since the legal realist movement of the 1940s. Professor Karl Llewellyn hastened the demise of canons by showing how judges could use alternative canons to reach diametrically opposed results in any given case. The facial neutrality of canons sheltered judicial bias from criticism. Most canons thus fell out of favor in the 1950s and 1960s. The presumptions from both Charming Betsy and American Banana, however, survived.

The presumption in favor of international law fulfills many of the stereotypes of Llewellyn's classic canon: it is highly susceptible to the type of selective applications that Llewellyn criticized. Most cases that involve international sources apply only one of the canons discussed in this Article. In still other cases, the courts ignore the canons entirely and apply conventional interpretative devices. This is surprising since most cases that involve source conflicts raise questions under all of the previously discussed interpretative principles—the presumption in favor of international law, the presumption against extraterritoriality, the last-in-time doctrine, and the political question doctrine.

366. Interestingly, in both canons, the transnationalization of markets and economies may ultimately shift the institutional legitimacy argument in favor of judicial rather than legislative or presidential resolution. As shown below, the judicial role in the new transnational regulatory era will necessarily be more comprehensive than thought at the turn of the century.

367. See generally Turley, Transnational Discrimination, supra note 3, at 392 (explaining that "[t]he ascendency of canons [of construction] ... was cut short by the legal realists, who showed how canons often hide the political or class bias of courts").


369. See id.

370. Turley, When in Rome, supra note 9, at 603-17.

371. One recent case shows how both presumptions can apply to a given dispute. In United States v. Javino, 960 F.2d 1137 (2d Cir.), cert. denied, 113 S. Ct. 477 (1992), the court considered a person's conviction for possession of a bomb in violation of a federal statute that regulated the licensing and taxing of such devices. The government argued that this law would apply extraterritorially, if the bomb was manufactured in another country. The court first ruled that the law was not sufficiently clear to overcome the presumption against extraterritoriality, id. at 1142, and then suggested that, even if the law was extraterritorial, international principles of jurisdiction would still limit its application, id. at 1142-43. Although the court did not cite Charming Betsy, its jurisdictional argument closely resembles those of some of the original cases under the presumption in favor of international law. See also United States v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991) (applying both presumptions in holding that "the
Consider an environmental statute that is presumptively extraterritorial but, when applied in a particular case, might violate a treaty or an international principle. In *Defenders of the Wildlife v. Hodel*, a district court considered the extraterritoriality of the Endangered Species Act. Environmentalists had sued the Secretary of the Interior for issuing a regulation that limited a critical provision of the Endangered Species Act to territorial application. Previously, the Secretary had allowed extraterritorial application, even though the statute itself was ambiguous on the question. The district court found that the statute contained language of sufficient clarity to rebut the presumption against extraterritoriality, basing its conclusion equally on the language of the statute and the clear transnational objectives of the Act.

While holding that the Act applied extraterritorially, the court in *Defenders of the Wildlife* cautioned that it “expressed no view as to the 'best' or most diplomatic way of dealing with the preservation of endangered species in other countries, or how international relations regarding

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374. The critical portion of the Act, the “consultation provision,” provided in part: “Each federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species . . . .” 16 U.S.C. § 1536(a)(2) (1988).

375. *Defenders of the Wildlife*, 707 F. Supp. at 1082. Under the agency’s interpretation, the consultation provision only applied “to those actions occurring within the United States or on the high seas.” *Id.*

376. *Id.* at 1084.

377. *Id.* at 1085. The court reasoned:

In addition to this “general” international concerns [sic] of the statute . . . , [the statute] requires the Secretary to list all species that are determined to be endangered or threatened. That section clearly states that the actions of foreign nations are to be considered in determining which species to list, and many species not native to or present in the United States appear on the list.

*Id.*

378. *Id.* (“Congress’ concern with the international aspects of the endangered species problem is unmistakable and appears repeatedly throughout the statute.”). The court also noted the plaintiff’s statement that “493 of the 883 species listed as endangered in 1986 had their primary range outside the United States.” *Id.* at 1084 n.6.
this issue should be structured." In so stating, the court avoided applying the presumption in favor of international law. Yet, both presumptions might easily apply in a specific regulatory action under the Act. For example, suppose that the case involved the specific application of the Act to the killing of an endangered migratory bird in Canada. The United States and Canada have a treaty governing the protection of birds, a treaty that gives each country sole authority over the regulation of its own territory. Essentially, while establishing certain levels of protection to be recognized by the parties, the treaty mandates the strict territorial application of each party's protective laws. The district court's decision in *Defenders of the Wildlife* would allow the Endangered Species Act to apply to Canada under the presumption against extraterritoriality. Violation of the treaty between Canada and the United States, however, would trigger a secondary analysis under the presumption in favor of international law. Applying the rule from *Charming Betsy*, the district court might rule that the Act was intended to apply extraterritorially, but that Congress did not intend for such application to occur in contravention of the United States' obligations under treaties with other nations. At the very least, the district court might argue that a court should not assume such an extraordinary intent without more express statements from Congress to that effect. In this example, the selection of the relevant canon determined the outcome of the case. A similarly outcome-determinative analysis would have resulted from applying either the last-in-time or political question doctrines. Applied in isolation, any one of these canons would produce either the denial or extension of transnational environmental protection.

Courts have traditionally used *Charming Betsy* to interpret a statute in conformity with international agreements that existed before the time of the statutory enactment. Since treaties are equal to statutes as legal obligations under the Constitution, courts tried to read statutes in con-

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379. *Id.* at 1085 n.7.

380. It is not uncommon for courts to refer implicitly or explicitly to the presumptions against extraterritoriality and in favor of international law in the same case. For example, in FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300 (D.C. Cir. 1980), the District of Columbia Circuit, after considering "established and fundamental principles of international law," ruled that the FTC could not use registered mail to serve its investigatory subpoenas on a French company in France. *Id.* at 1304. The court held that it was restricted under both canons in reaching its conclusion. *Id.* at 1322-23; *see also supra* note 371.


formity, when possible, with existing international obligations.\textsuperscript{383} Charming Betsy, however, can also be used in the inverse case: to read a statute in conformity with a later international agreement. This application can serve a monistic function by shifting the emphasis away from determining congressional intent toward upholding international principles and obligations whenever possible.\textsuperscript{384} While such an interpretation might be explained in Calabresian terms as fulfilling Congress's likely intent by updating a statute,\textsuperscript{385} the use of postlegislative agreements is clearly antagonistic to the traditional intentionalistic and proceduralistic purposes of the presumption in favor of international law.\textsuperscript{386}

While the courts have generally not applied the presumption in favor of international law in a monistic fashion, the presumption presents the greatest potential for outcome selection and judicial bias. Since "international law" can be interpreted variously to include treaties, agreements, and customary law, a court can use this presumption in virtually any case with international dimensions. A liberal interpretation might include the customary international rule against extraterritorial jurisdiction and other customary principles that run contrary to the regulatory interests of the United States. The fact that the canon is neither strictly jurisdictional (like the presumption against extraterritoriality) nor temporal-dependent (like the last-in-time doctrine) further strengthens the monistic potential of the presumption in favor of international law. Thus, a court may use the presumption in virtually any case to trump rival interpretations, or even rival canons.

As noted earlier, there is a strong institutional legitimacy argument for eliminating the presumption in favor of international law. Although the maintenance of courts' institutional legitimacy once supported the use of this meta-rule to avoid the constitutional periphery, newly transnationalized markets and economies may now compel greater judicial in-

\textsuperscript{383} See, e.g., Cook v. United States, 288 U.S. 102, 118-19 (1933) (holding that treaty would not be abrogated or modified by a later statute unless Congress clearly expressed such a purpose); Spiess v. C. Itoh & Co. (Am.), 643 F.2d 353, 356 (5th Cir. Unit A Apr. 1981) (same), cert. dismissed, 454 U.S. 1130, and vacated on other grounds mem., 457 U.S. 1128 (1982), appeal dismissed, 725 F.2d 970 (5th Cir.), cert. denied, 469 U.S. 829 (1984).

\textsuperscript{384} This differs from the last-in-time doctrine in that the court is not determining which source controls but presuming conformity between the two sources.

\textsuperscript{385} See generally CALABRESI, supra note 85.

\textsuperscript{386} Interpreting legislative intent by reference to postenactment authority can also be analogized to Professor Eskridge's dynamic statutory interpretative approach. See, e.g., Eskridge, Dynamic Statutory Interpretation, supra note 90, at 1484 (describing evolutionary perspective of dynamic statutory interpretation, which accounts for subsequent changes in society and law); Eskridge, Politics Without Romance, supra note 311, at 308 (discussing public choice implications for dynamic approach to statutory interpretation).
volvement in transnational regulation. It is simply unlikely that Congress will correct conflicts or ambiguities in most statutory schemes until the flaws become so severe that action is politically feasible. A court is in a unique position to gap-fill and even update statutory schemes to conform with contemporary realities and norms. Rather than rely on canons that assume unlikely political responses from Congress, courts can perform a needed institutional role in interpreting statutes to best advance their stated "public-regarding purposes." Congress can then directly reverse unacceptable judicial measures with new enactments, subject to the pluralistic pressures of the legislative process.

It is difficult to find a contemporary role for the presumption beyond purely monistic applications. As for cases of direct conflict between statutes and treaties, it is well established that treaties are equal to statutes under the Constitution. Executive agreements have also received broad judicial support as authoritative sources. These are municipal sources with international dimensions—not strictly international law. There is no need for a presumption covering treaties or executive agreements unless the purpose of the rule is to treat such sources as superior to conventional municipal sources.

Assuming that treaties and some executive agreements are not treated as inferior to other municipal sources, the contemporary role of the presumption in favor of international law is reduced to one of two possible applications: a presumption that all international sources (including treaties, agreements, and customary law) are superior to municipal sources, or a general presumption in favor of customary international law.

An obvious institutional problem arises when the presumption is read to require deference to international over municipal sources. The courts have indeed become increasingly active in international conflicts, but to prefer international sources over municipal sources is to reject not only the dualistic model but also the concept of legislative supremacy. There is no difference in a tripartite system between a court creating a new regulation or statutory provision and a court recognizing international law as a superior and authoritative source. The Supreme Court expressed an analogous position in the Head Money Cases when it re-

387. See supra note 283.
388. See supra notes 346-347 and accompanying text.
389. See, e.g., Weinberger v. Rossi, 456 U.S. 25, 32-33 (1982); supra notes 141-145 and accompanying text (discussion of Weinberger); see also supra notes 348-349 and accompanying text.
jected the argument that treaties should not be subject to later legislative changes. While the previous discussion did not support a purely dualistic approach based on separation of powers or proceduralistic rationales, there also is no support for treating the executive or judicial branches as better avenues to legislation. A presumption in favor of international over municipal sources would suggest such a conclusion by creating a supremacy rule for international legislation created by the courts and the President.

A presumption in favor of customary international law is equally troubling. As shown above, the danger of international sources is not that they are the products of rent-seeking. A special interest group is not likely to succeed in influencing the creation of customary international law. The danger, rather, lies in the judicial power to apply international sources selectively under the presumption, a power that will serve to undermine the deliberative process. The danger to the separation of powers from a monistic presumption is evident from the varying definitions of what constitutes “international law.” Courts could conceivably apply any source suggesting a general practice, from United Nations resolutions to diplomatic or legal texts to boilerplate treaty provisions.

A presumption in favor of customary international law would present obvious difficulties for dualistic courts. The place of customary international law in the domestic legal hierarchy is a matter of long dispute. The debate primarily concerns the relative authority of customary international law and statutory law. There is little argument that a court cannot apply customary international law that conflicts with the Constitution, but Professor Henkin has argued with considerable force that customary international law cannot be easily dismissed as a “subconstitutional” source inferior to domestic legislation. “Indeed,” Professor Henkin noted, “there are plausible arguments that the Framers accepted customary law as binding on the United States, including Congress, and that it was intended to be of higher status than the laws of Congress in the domestic legal hierarchy.”

He acknowledged, however, that the incorporation of customary international law as part of the “interna-

390. See The Head Money Cases, 112 U.S. 580, 599 (1884) (suggesting that treaties between the United States and other nations are “subject to such acts as Congress may pass for their enforcement, modification, or repeal”).
391. See supra Part IV.
392. See supra notes 351-357 and accompanying text.
393. See Reid v. Covert, 354 U.S. 1, 15-17 (1957).
395. Id. at 933.
tional law” described in The Paquete Habana does not resolve its authority vis-à-vis other sources like statutes.396

While Professor Henkin’s work is compelling in a number of respects, his suggestion that customary international law is equal (let alone superior) to statutes remains controversial in the United States legal academy. Clearly, a court adopting a dualistic approach based on Madisonian values would have particular difficulty accepting customary international law as equal to a statute. Given the earlier discussion, it is not necessary to revisit here the value of legislative process in the ranking of legal sources in a representative democracy. Ironically, if courts were to accept customary international law as superior to statutory law under the Constitution, there would be no need for any presumption in favor of international law since the Constitution would resolve any conflicts. Likewise, if customary international law were viewed as equal to statutes, any presumption would be contradictory to the established hierarchy of sources.

Assuming that the supremacy of statutory authority is recognized, a presumption in favor of customary international law could be defended by analogy to the treatment of domestic common law in cases of ambiguous statutory authority. Courts sometimes interpret statutes in accordance with common law under the theory that state and federal legislators act in the shadow (and presumed awareness) of the common law. Such an argument might be made with respect to customary international law. Like customary international law, common law often develops from private transactions and undemocratic processes.397 Despite the common law’s undemocratic sources, courts still refer to common-law principles in statutory interpretation and, explicitly or implicitly, attempt to conform their decisions to those principles.398

396. Id. at 931-33; see supra notes 351-355 and accompanying text (discussion of The Paquete Habana).

397. Tort law is rife with examples of doctrine changing along with the patterns of private transactions and expectations. The definition of an abnormally dangerous or ultrahazardous activity is such an example. In determining whether an activity fits into this strict liability category, courts often consider the evolving utility, familiarity, and appropriateness of the activity to a given community. See Restatement (Second) of Torts § 520 cmts. f, i-k (1977). Similarly, the definition of a defective product provided by the Restatement (Second) of Torts can change dramatically according to either evolving consumer expectations in the market or the fluctuating relationship of a product’s risk to its utility. See Restatement (Second) of Torts § 402A cmt. i (1977).

The comparison of customary international law to municipal common law is telling. Professor Henkin's position would accord international custom greater weight than common law. In contrast to the suggested equality between customary international law and statutory authority, municipal common law is viewed as inferior to statutory law. Moreover, this enforced hierarchy is unmodified by any last-in-time principle, making common law lesser in authority to any statutory law regardless of when the statute was enacted. While the analogy with common law does suggest a role for customary international law, it does not offer a strong foundation for a presumption in its favor. After all, common law is a domestic product, albeit a nonlegislative product. Although the common law may be more a product of market forces than of political judgment, it is a reflection of decisionmaking and values intrinsic to the municipal system. Moreover, courts cannot safely assume that Congress legislates with such an understanding of customary international law as it does regarding common law. Few legislators (or their constituents) have knowledge of or experience with customary international law to the same extent as they do with common-law principles of property or torts.

This is not to say that customary international law cannot be used in statutory interpretation. Rather, as with common law, courts must consider the types of customary international law and their relation to statutes on a case-by-case basis. In cases in which a statute is clear, a court must reject conflicting customary arguments. When a statute is ambiguous, the court must evaluate the source of the relevant customary international law, as it would with a common-law rule. Among other considerations, the court should look at the likely intent of Congress to override or disregard the principle. There are a variety of possible sources of customary international law, each with varying degrees of relevance to a particular statute or, more generally, to the United States. A court is in a unique position to judge the relative significance of these sources. By incorporating some customary sources, courts perform a traditional gap-filling function in the interpretation of ambiguous statutes. In many ways, this traditional gap-filling function enhances the open and deliberative process valued so highly in a Madisonian democracy. Courts may force open and deliberative debate on significant issues.

400. Id. at 373 (“[I]n a democratic society that has placed rule-making power in the hands of elected representatives, the principle [that common law yields to statutory law] is the same whether the enacted law is earlier or later in time than the nonconstitutional common law rule.”).
that Congress might otherwise wish to ignore in its legislation. Congress, of course, can override any incorporation of customary international law through later legislation. The result is the selective incorporation of international norms within the legislative process, which ultimately controls their continued use.

The monistic use of the presumption in favor of international law compels the courts to consider fundamental questions regarding the limits of judicial interpretation within a representative democracy. Specifically, monism reflects a normative ideal that emphasizes the role of government as a facilitator of moral and civic virtue. Dualism is based more on a pluralistic view of government as facilitating conflict and compromise between factions to reach a majoritarian decision. "Under the pluralist view," as Professor Sunstein put it, "politics mediates the struggle among self-interested groups for scarce social resources." Any international principle or source is likely to benefit some group interest, even though that group may have only narrow domestic political support. A group so advantaged by a favorable international principle is less likely to compromise within the deliberative process. Viewed from this perspective, dualism reflects only a preference for the deliberative process and not necessarily a rejection of international law.

Eliminating the presumption, therefore, would not mean the rejection of international law's relevancy in domestic disputes. Instead, it would leave courts to their conventional interpretative function, using statutory text, legislative history, and other sources, possibly including international law, in a hierarchy of relevant sources. Dualistic values simply require courts to treat municipal laws as controlling in direct conflicts between international and municipal sources. In the context of statutory construction, courts can, and should, consider international standards in determining Congress's likely intent. The difference from a purely monistic system is that Congress still structures any judicial interpretation and retains the ultimate authority to reverse the outcome of that interpretative process. Under any definition of legislative supremacy, it is impossible within a Madisonian democracy for a court to ignore the primacy of collective legislative decisions.

VI. Conclusion

Dualistic values run deep within United States jurisprudence, shaping our view of both the political system and the world around us. This Article has attempted to provide a missing historical and conceptual con-

text for dualistic values and canons. Understanding the possible bases for dualism is essential if the courts are to resolve the increasing tension along the borderland between municipal and international sources. In the past, dualistic values became reified expressions of national sovereignty and self-determination. When viewed in narrow sovereign-centric terms, however, dualistic values may appear to be a form of legal isolationism that treats international sources as an inherently hostile influence on the domestic system. Conversely, monism often strikes jurists as “one-worldism,” at best a rejection of legislative supremacy and at worst a form of judicial elitism. These concerns are rooted in a strong institutional legitimacy tradition and embody a more general preference for the legislative process. International legal sources often come from bodies wholly outside the municipal system, bodies that typically have little representative character. Application of these international sources by life-tenured judges easily fulfills the Madisonian nightmare of elitist countermajoritarianism.

This Article suggests that dualism is best understood as a reaction to a new form of legislation in a Madisonian democracy. International legisprudence presents challenges and opportunities for a system built on concepts of pluralism and deliberative process. Yet, by moving beyond the traditional rationales of institutional legitimacy, courts can serve a central political function in the developing transnational arena. Although institutional legitimacy was once a barrier to the consideration of extraterritorial and transnational cases, courts are now the best—and perhaps only—institution for reconciling conflicts between municipal and international values.

The role of modern courts along the borderland must, however, be tempered by central Madisonian democratic values. To put it succinctly, in a Madisonian democracy all sources are not created equal. While the institutional legitimacy concerns raised in the past were largely overstated, courts must recognize some proceduralistic differences between sources. This Article suggests that, in direct conflicts with municipal sources, international sources should be distinguished along a comparison with conventional legislation. Regardless of the basis for this differentiation, however, it is clear that there is a natural limit in the degree to which the legal institutions of a Madisonian system can become monistic. The linkage drawn here between dualism and the Madisonian democracy will clearly be controversial in some quarters. Many will view this statement as a betrayal of normative values in favor of proceduralistic safeguards. This may be true. The strength of the Madisonian democracy, however, has always been its ability to adjust to changing circumstances.
and forge majoritarian compromise among once-disparate factional groups. This quality would seem no more relevant than in the rapidly changing world around us.