

WHY JURISPRUDENCE DOESN'T MATTER FOR
CUSTOMARY INTERNATIONAL LAW

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INTRODUCTION

Customary international law is puzzling in a way treaties are untroubling. Treaties are contracts, and the source of the obligations they impose on states, as well their content, present no special legal problem.¹ If there is a puzzle about how treaties can bind states, it is a general puzzle about how contracts can legally bind promisors. By comparison, the status of customary international law is controversial.² Customary international law is law that “results from a general and consistent practice of states followed by them from a sense of legal obligation.”³ Because it is created by the regular practice of states, the extent of behavioral regularity required for a custom to exist is vague. Similarly, because customary international law does not have the canonical form of a treaty or statute, its content is uncertain. Even the extent to which states act merely in accordance with norms, rather than from a sense of obligation, is unknown and understudied.⁴

Customary international law has to answer a range of questions. May a state unilaterally withdraw from a treaty to which it is a party when the treaty does not otherwise provide for withdrawal?⁵ Are states obligated to not arbitrarily detain people or subject them to degrading treatment?⁶ May a successor state repudiate the odious

1. See JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 83 (2005).

2. See *id.* at 23-24.

3. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987); cf. Maurice H. Mendelson, *The Formation of Customary International Law*, 272 RECUEIL DES COURS 155, 188 (1998) (explaining that a rule of customary international law is one that emerges from, and is sustained by, constant and uniform state practice “in circumstances which give rise to a legitimate expectation of similar conduct in the future”).

4. For different assessments of the causal role of customary international law, see generally GOLDSMITH & POSNER, *supra* note 1; ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* (2008); George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 AM. J. INT’L L. 541 (2005).

5. See Nathan Feinberg, *Unilateral Withdrawal from an International Organization*, 39 BRIT. Y.B. INT’L L. 189, 216 (1963) (arguing presumption in favor of unilateral termination of treaties).

6. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (discussing arbitrary detention and degrading treatment).

debts of the preceding state?⁷ Because customary international law is created by the regular practice among states, not by the states' lawmakers,⁸ its legal validity is not self-evident. Three questions can therefore be asked in connection with its legal status: (1) What are the norms of customary international law governing the conduct of states and their citizens?; (2) Are states legally bound by customary international law?; and (3) Does customary international law apply domestically without incorporation by domestic law?

I will argue that there are other sorts of questions that do not need to be asked about customary international law—namely, jurisprudential ones. It is often thought that judicial recognition of customary international law depends on jurisprudential assumptions about the nature of law, legal norms, and legal validity.⁹ This is a mistake. The limits of judicial reliance on customary international law are constitutional or evidentiary, not jurisprudential.¹⁰ Jurisprudential views about law, which are analytic in character, have nothing to say about the questions posed above.

My argument follows in three steps. The first step is a claim about *Erie Railroad Co. v. Tompkins*.¹¹ Although *Erie* can fairly be read to require domestic authorization in order for customary international law to have domestic legal effect, the case and its reasoning do not rely on commitments to a theory of law, including legal positivism. Second, reliance on positivism has an unwelcome consequence for the binding character of customary international law. Third, conceptions of law or legal validity can ground different views about the relation between international and domestic law. Positions on the priority of customary international law are therefore determined by views about that relation, not by views on the

7. James V. Feinerman, *Odious Debt, Old and New: The Legal Intellectual History of an Idea*, LAW & CONTEMP. PROBS., Spring 2007, at 193 (questioning the existence of a norm permitting repudiation of odious debts).

8. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2).

9. See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734-36 (2004) (citing *The Paquete Habana*, 175 U.S. 677, 700 (1900)); *Igartua v. United States*, 626 F.3d 592, 602 (1st Cir. 2010); *Doe v. Saravia*, 348 F. Supp. 2d 1112, 1144 (E.D. Cal. 2004).

10. GOLDSMITH & POSNER, *supra* note 1, at 23-24 (evidentiary issues); Saikrishna Prakash, *The Constitutional Status of Customary International Law*, 30 HARV. J.L. & PUB. POL'Y 65, 66 (2006) (constitutional issues).

11. 304 U.S. 64 (1938).

source of its authority. Taken together, these considerations suggest that jurisprudence is not needed to answer the questions courts and other legal authorities ask about customary international law's content, the legal obligations it creates, and its domestic legal effect.

This Article is divided into four parts. Part I argues that legal positivism is irrelevant to *Erie's* holding that federal jurisdiction does not give federal courts general law-making power. Positivism is neither sufficient nor necessary for *Erie's* result and rationale. Instead, the holding rests on one or more uncertain constitutional bases. Part II describes a dilemma for those relying on legal positivism as a basis for *Erie's* result: dualists about international law must either conclude that customary international law does not bind governments or select a conception of positivism that preserves customary international law but is ad hoc. The domestic effect of customary international law concerns the relative priorities a legal system places on domestic and international law. Part III argues that the same conception of law can ground different views about that priority. It concludes that positions on customary international law are determined by substantive legal views about the proper relation between international and domestic law, not by the source of authority of customary international law. Part IV briefly argues, based on the conclusions in Parts I-III, that legal arguments about customary international law are unaffected by conceptual questions about the nature of law, legal authority, or the identity of a legal system.

I. POSITIVISM AS DICTA

The requirement that customary international law must have domestic authorization to have domestic legal effect derives from *Erie*. According to *Erie*, federal courts have no power to make common law “[e]xcept in matters governed by the Federal Constitution or by the Acts of Congress.”¹² Absent constitutional or congressional authorization to make law, a federal court must apply state law as decided by the state's highest court.¹³ *Erie's* requirement of federal or state authorization is frequently thought to depend on legal

12. *Id.* at 78.

13. *Id.*

positivism.¹⁴ As a result, the domestic status of customary international law is also thought to rely on the same view about the nature of law. Customary international law is a regularity in behavior among states acting from a “sense of legal obligation.”¹⁵ Because *Erie* requires a legal rule to have an authoritative federal or state source, customary international law has no domestic application unless it is authorized by federal or state law.

Legal positivism is a view about the nature of law.¹⁶ It is a claim about what makes a norm a legal norm and makes it part of a legal system.¹⁷ In its most general form, positivism holds that law consists of social facts of a particular sort.¹⁸ Versions of positivism differ according to the social facts on which law depends, as well as how these facts explain law.¹⁹ The classic form of the theory is that a state’s law consists only of what its legal officials declare as binding.²⁰ In John Austin’s version of legal positivism, law consists of the coercive orders of the sovereign and its agents.²¹ This is the version that Holmes asserted in his dissent in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.* and that Brandeis approvingly recited in *Erie*.²² Positivism, if independent of *Erie*’s holding, is superfluous to *Erie* and therefore also

14. See, e.g., William R. Casto, *The Erie Doctrine and the Structure of Constitutional Revolutions*, 62 TUL. L. REV. 907, 907-08 (1988); Lawrence Lessig, *Erie-Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785, 1789-95 (1997); Louise Weinberg, *A General Theory of Governance: Due Process and Lawmaking Power*, 54 WM. & MARY L. REV. 1057, 1060-61 (2013); cf. TONY FREYER, HARMONY & DISSONANCE: THE SWIFT AND *ERIE* CASES IN AMERICAN FEDERALISM 101 (1981) (noting that “*Erie* reflected jurisprudential assumptions” of the period). For an example of judicial support for the claimed reliance, see *Guaranty Trust Co. v. York*, 326 U.S. 99, 101 (1945) (“[*Erie*] overruled a particular way of looking at law.”).

15. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

16. Jack Goldsmith & Steven Walt, *Erie and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673, 677 (1998).

17. *Id.*

18. See *id.* at 679; see also JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY 120 (2001); Jules L. Coleman, *Negative and Positive Positivism*, 11 J. LEGAL STUD. 139, 139 (1982).

19. Goldsmith & Walt, *supra* note 16, at 678.

20. See *id.* at 679.

21. See JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 18-19 (Wilfrid E. Rumble ed., 1995).

22. See *infra* text accompanying notes 23-27.

to the domestic status of customary international law. It is independent of the holding if positivism is neither sufficient nor necessary for the holding.

It is understandable that *Erie* might be thought to rely on legal positivism. The opinion itself almost says as much. After basing the limitation on a federal court's power to make general common law on statutory construction and policy, Justice Brandeis came to the constitutional objection to the power.²³ The "fallacy" underlying the view that federal courts have general common law-making power, he said, is the assumption of a wrong theory of law.²⁴ Quoting approvingly Justice Holmes's dissent in *Black & White Taxicab*, Brandeis identified the assumption as the belief that there is "a transcendental body of law outside any particular State but obligatory within it unless and until changed by statute."²⁵ The correct theory of law instead is one which holds that "law in the sense in which courts speak of it today does not exist without some definite authority behind it."²⁶ This is Holmes's then-unexceptional version of legal positivism. The closeness in proximity in the opinion between this observation and the constitutional objection makes it appear that the objection has a partly jurisprudential basis. In fact, it does not. Positivism is a superfluous premise in *Erie*'s rationale and its constitutional holding.²⁷

Positivism is insufficient for *Erie*'s holding. Assume that positivism is true. It follows that all legally valid norms must have a federal or state source of authority. *Erie*'s holding limiting federal judicial law-making power could still be wrong because legal positivism's truth is consistent with a variety of different constitutional roles for federal courts. Article III's grant of diversity jurisdiction might authorize federal courts to make independent judgments about state law. Admiralty jurisdiction is understood to give law-

23. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("And no clause in the Constitution purports to confer such a power upon the federal courts.").

24. *Id.* at 79.

25. *Id.* at 64 (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

26. *Black & White Taxicab*, 276 U.S. at 533 (Holmes, J., dissenting).

27. For a slightly different version of the relationship between *Erie* and positivism, see Goldsmith & Walt, *supra* note 16; Steven Walt, *Before the Jurisprudential Turn: Corbin and the Mid-Century Opposition to Erie*, 2 WASH. U. JURISPRUDENCE REV. 75 (2010).

making authority,²⁸ and diversity jurisdiction might do the same. Alternatively, Article III might give federal courts authority to create general federal common law: a national common law based on the same sources of law as state common law but that is neither state law nor federal law for Article VI's purposes. Different courts understood *Swift v. Tyson's* recognition of the judicial power to make general federal law in a diversity case in different ways.²⁹ If they were wrong, their error was in the interpretation of Article III, not because their interpretation was inconsistent with legal positivism. As far as positivism goes, Article III could authorize a general federal law-making power. Thus, positivism by itself does not assign any particular law-making role to federal courts. It is implausible to think otherwise, and those who think that *Erie* and positivism are connected in some way do not likely believe that positivism is sufficient for *Erie's* holding.

More likely, positivism in combination with constitutional limitations restricts a federal court's law-making authority. Although positivism by itself is insufficient for *Erie's* holding, positivism together with these limitations might be regarded as sufficient. After all, Justice Brandeis's opinion invokes both positivism and constitutional considerations.³⁰ However, the trouble with this view is that positivism figures as a superfluous premise in the reasoning supporting *Erie's* conclusion. Although the constitutional basis of the opinion is opaque, Justice Brandeis likely relied on the Tenth Amendment to find constitutional limitations on the federal government's powers. Because the Tenth Amendment, according to the opinion, limits Congress's power to declare substantive rules of common law,³¹ it also limits the power of federal courts to do the same.³² As a result, federal courts lack the power to make general

28. Ernest A. Young, *It's Just Water: Toward the Normalization of Admiralty*, 35 J. MAR. L. & COM. 469, 469 (2004).

29. 41 U.S. (16 Pet.) 1 (1842).

30. *Erie*, 304 U.S. at 78-79.

31. *Cf. id.* at 78 ("Congress has no power to declare substantive rules of common law applicable in a State."). The text identifies federalism as a possible constitutional limitation on federal judicial law making. *See id.* There are other well-known possible constitutional bases, including separation of powers or other structural limitations. The basis identified in the text serves only to illustrate the role of constitutional limitations in *Erie's* result. For this purpose, any possible constitutional limitation on federal judicial law making suffices.

32. *See id.* at 80 ("We merely declare that in applying the doctrine [of *Swift*] this Court

federal common law. Here, the Tenth Amendment and an inferred limitation on federal courts restrict the federal judicial authority. They alone justify *Erie's* holding. Positivism, even if true, plays no role in limiting the judicial power to make general common law. As a theory of law, positivism asserts a necessary truth about law. If true, it holds for all logically, or sociologically, possible legal systems. However, the constitutional limitation on federal judicial law making does not rely on positivism's necessary truth any more than it relies on any other necessary truth, such as "2 + 2 = 4" or "bachelors are unmarried males." If the justification for *Erie's* result included the statement "2 + 2 = 4," the statement would easily be understood as irrelevant to the justification. In exactly the same way, positivism is irrelevant to the justification for the limitation on the authority of federal courts to make common law. It might be true, but its truth has nothing to do with *Erie's* justification.

Positivism is also unnecessary to *Erie's* result. To see this, notice again that positivism is a theory of law: a view about the conditions that norms must satisfy in order to be legal norms.³³ Positivism maintains that social facts necessarily determine the legal status of norms.³⁴ Suppose, however, moral facts, not social facts, necessarily determine their legal status. In this case, positivism is false. For instance, a natural law theory might require norms to be consistent with natural law, morality, or reason to be law.³⁵ Although such a

and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States.").

33. See *supra* text accompanying notes 16-18.

34. Formulations of positivism distinguish exclusive positivism from inclusive positivism. Exclusive positivism maintains that the existence and content of legal rules are determined solely ("exclusively") by social facts such as relevant social practices. See SCOTT J. SHAPIRO, LEGALITY 274-76 (2011); see also JOSEPH RAZ, THE AUTHORITY OF LAW 47-48 (2d ed. 2009). Inclusive positivism holds that the social facts that determine law can include the acceptance of moral criteria. See, e.g., COLEMAN, *supra* note 18, at 107-09; W.J. WALUCHOW, INCLUSIVE LEGAL POSITIVISM 81-82 (1994). When morality is accepted as a criterion of legality, the existence and content of legal rules are determined by morality. COLEMAN, *supra* note 18, at 110-11. In this case law is not determined solely by social facts. The statement in the text describes both exclusive and inclusive positivism. Nothing in the arguments below concerning positivism turns on favoring one version of positivism over the other.

35. See DERYCK BEYLEVELD & ROGER BROWNSWORD, LAW AS A MORAL JUDGMENT 11-18 (1986). For natural law theories that do not make morality a condition of legality, see JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 25-29 (2d ed. 2011); MARK C. MURPHY, NATURAL LAW IN JURISPRUDENCE AND POLITICS 8-20 (2006).

view is a storybook version of such theories, it is a coherent view. Nonetheless, *Erie's* limitation on federal judicial law making could still apply in a legal system whose norms have the required moral content. In this system, a federal court would need authority to create norms, even when they are consistent with morality. Thus, even if positivism is false, *Erie's* limitation on judicial law making could still apply. Positivism therefore is not necessary for *Erie's* result because *Erie's* holding is narrow. It is limited to the constraints that the U.S. Constitution imposes on the power of federal courts.³⁶ Because these constraints are constitutional and peculiar to a particular legal system, they do not apply to other legal systems in which the same constitutional constraints do not operate. *Erie's* requirement that law have an authoritative source in federal or state law is a requirement in a particular legal system with particular constitutional constraints. Thus, *Erie's* holding depends only on constitutional allocations of law-making authority in this legal system. By contrast, legal positivism is a theory of law: a view about the conditions that hold for legal norms in all logically or perhaps socially possible legal systems. Because constitutional provisions can vary across legal systems, positivism might be false although *Erie's* holding remains correct.

An example illustrates this possibility. Suppose the conflict-of-law rules applied by a federal court sitting in diversity select the law of a jurisdiction that makes natural law or reason controlling. Suppose, too, that, as a matter of the jurisdiction's constitution, interpretation by the jurisdiction's highest court is not declarative of the norm's content. Courts in the selected jurisdiction themselves are not bound by a superior court's interpretation of the controlling norm.³⁷ According to *Erie*, the same holds for the federal court.³⁸ The

36. See *Erie*, 304 U.S. at 78-79.

37. The case of Louisiana makes for an interesting study. Its courts are bound by the decisions of higher courts, at least in the sense that their decisions are appealable to superior courts. See Michael Steven Green, *Erie's Suppressed Premise*, 95 MINN. L. REV. 1111, 1147 n.155 (2011). However, the decisions of higher courts may or may not be binding authority for them. *Id.* The reversibility of a lower court decision does not by itself show that state law considers the reversing court's interpretation of law authoritative. For a different observation that convergence among different jurisdictions, although not authoritative, can be evidence of what domestic law requires, see Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129 (2005). Convergence also can sometimes be bad evidence.

38. See *Erie*, 304 U.S. at 78-79.

court is not bound by the pronouncements of lawmakers in the selected jurisdiction as to the controlling norm's construction. It need not defer to the jurisdiction's highest court's view of what natural law or reason requires. For federal constitutional reasons, the federal court has no authority to make law on a basis other than natural law or reason.

Holmes would agree. In his dissent in *Black & White Taxicab*, which Brandeis relied on in *Erie*, Holmes stated:

If a state constitution should declare that on all matters of general law the decisions of the highest Court should establish the law until modified by statute or by a later decision of the same Court, I do not perceive how it would be possible for a Court of the United States to refuse to follow what the State Court decided in that domain.³⁹

Holmes made it clear that the basis of federal court deference to state courts is state constitutional law: state constitutional provisions deem state supreme court decisions declarative of state law. The implication of Holmes's statement is the converse proposition in that if a state's constitution, expressly or by implication,⁴⁰ does not consider decisions by the state supreme court declarative of state law, a federal court is not bound by the declarations of that court as to state law. The jurisdiction's law in the example above does not contain a constitutional provision of the sort required to bind federal courts. Thus, the interpretation of the norm of natural reason by that jurisdiction's highest court is not authoritative of what natural law requires.

It might be objected that the example does not embarrass positivism because the possibility assumes that there is a judicial practice among courts in the reference jurisdiction: the practice of

39. 276 U.S. 518, 534 (1928); see Letter from Oliver Wendell Holmes to Sir Frederick Pollock (Feb. 17, 1928), in 2 HOLMES-POLLOCK LETTERS 214, 215 (Mark DeWolfe Howe ed., 1941) ("The question of what is the law of Massachusetts or of Louisiana is a matter that Mass. or La. has a right to determine for itself, and that being so, the voice of the state should be obeyed as well when it speaks through its Supreme Court as it would be if it spoke through its Legislature.").

40. See *infra* text accompanying note 44. For discussion of the constitutional basis of Holmes's views about the distribution of law making between federal and state courts, see Walt, *supra* note 27, at 80-88.

making independent judgments about what natural law or reason requires. However, the objection fails. If a judicial practice is enough to authorize law making, *Swift* would be consistent with positivism, a theory that Brandeis rejected. The Supreme Court in *Swift*, and lower courts before *Swift*, recognized the authority of federal courts to make general federal common law.⁴¹ Rather, constitutional limits based on the Tenth Amendment or structural constraints of federalism limited this authority.⁴² For the same reason, constitutional considerations require the federal court to apply the norm of natural law or reason. Positivism's truth has nothing to do with this requirement. Put another way, if law must have an authoritative source, it is because constitutional considerations require it, not the other way around.

It follows, then, that the demand that federal courts respect state law is a federal constitutional constraint. Federal common law-making power is therefore limited by the authority states give to their courts to determine state law. State constitutions, in turn, determine whether state judicial decisions make state law.⁴³ It is hard to know whether states' constitutions give their courts law-making authority rather than just the power to decide cases according to state law. State constitutions do not expressly deal with the matter, and the drafters of state constitutions probably did not think that courts make law. Thus, the law-making authority of state courts must be determined by a default rule of interpretation. Holmes offered one such rule in his dissent in *Black & White Taxicab*. By creating a state supreme court, the state constitution implicitly authorizes the court to make decisions declarative of state law: "[W]hen the constitution of a State establishes a Supreme Court it by implication does make that declaration [that is, that the decisions of the Court establish state law] as clearly as if it had said it in express words."⁴⁴

41. See William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1521-27 (1984).

42. See U.S. CONST. amend. X.

43. Compare ALA. CONST. art. III, § 43 (prohibiting courts from encroaching on legislative power), with MONT. CONST. art. III, § 1 (allowing the judicial branch to sometimes serve a legislative function).

44. *Black & White Taxicab*, 276 U.S. at 534 (Holmes, J., dissenting).

This possibility presents a poor default rule of interpretation for inferring state judicial law-making authority. For one thing, it is probably historically inaccurate. A few states originally had more than one highest court.⁴⁵ The drafters of state constitutions at the time were familiar with a range of state judicial systems that included both hierarchical and nonhierarchical structures.⁴⁶ They would not likely have risked having several highest courts create inconsistent state law.⁴⁷ In addition, the drafters of state constitutions probably thought that state legislatures made law; courts only discerned the rules of decision needed to decide cases. They likely did not believe that courts create rules of decision to promote social policy or other ends they favor. After all, the drafters were not early working legal realists. For both reasons, the creation of a single “supreme” court in a state does not signal an intent to delegate the authority to create state law to the court. Finally, even if a state constitution gives the supreme court law-making power by implication, that authority is created by a state constitutional provision, not by a theory of law.

Erie’s logic does not require a commitment to positivism. Whether positivism somehow predisposed or otherwise influenced the acceptance of *Erie’s* holding is a different question—a historical question about the causal influence of subscribing to a particular conception of law. Causation is supported by instances in which, other things being equal, nonpositivists dispute *Erie’s* holding. Ideally, an experiment could be designed to settle the question.⁴⁸ In the experiment,

45. For example, North Carolina’s Constitution of 1776 created three tribunals with no hierarchy among them: the Supreme Court of Law, the Supreme Court of Equity, and the Judges of Admiralty. See N.C. CONST. of 1776, §§ XIII, XXI, XXIX. New York’s Constitution of 1777 created a “supreme” court but gave it no appellate jurisdiction over the chancellor, probate courts, or admiralty. N.Y. CONST. of 1777, arts. III, XXIV, XXV, XXVII. Texas has two highest courts: the Supreme Court and the Court of Criminal Appeals. TEX. CONST. art. V, §§ II, III, V. For other states with more than one high court, see David E. Engdahl, *What’s in a Name? The Constitutionality of Multiple “Supreme” Courts*, 66 IND. L.J. 457, 470-71 (1991).

46. See Engdahl, *supra* note 45, at 473.

47. See *id.*

48. Experimental evidence also would be helpful in deciding whether there is, as sometimes claimed, a causal connection between a conception of law and adjudication. For opposing views on the causal impact of conceptions of law on adjudication, compare H.L.A. HART, *THE CONCEPT OF LAW* 210-12 (2d ed. 1994), and Liam Murphy, *The Political Question of the Concept of Law*, in HART’S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO *THE CONCEPT OF LAW* 371, 395 & n.91 (Jules Coleman ed., 2001), with DAVID DYZENHAUS, *HARD CASES IN WICKED LEGAL SYSTEMS* 32-33 (2d ed. 2010), Robert Alexy, *A Defense of Radbruch’s Formula*,

legal observers could be randomly assigned to treatment and control groups. Those in the treatment groups could be divided into two subgroups: a group instructed in nonpositivist theories of law and a group instructed in positivism. The average frequency with which members of each group come to accept *Erie*'s holding would measure the causal impact of jurisprudential theories on belief in the holding. Obviously, this randomized experiment is infeasible, and the causal inference it supports is unavailable. The evidence supporting a causal inference instead must be determined through indirect and historical means.

Although the causal impact of beliefs about positivism is an empirical matter, the evidence available does not suggest a causal connection. Brandeis's opinion reflects his view that positivism limits the authority of federal courts to create federal law,⁴⁹ and Holmes's dissent in *Black & White Taxicab* suggests that he would have agreed.⁵⁰ Brandeis's and Holmes's endorsements of positivism likely were not idiosyncratic; legal academics and the influential treatises of the period expressed the same view.⁵¹ But a believer in a nonpositivist theory of law could subscribe to the result in *Erie* too. He might be convinced by the constitutional limits on the law-making authority of federal courts in diversity cases. Or he might prefer more progressive state common law and believe that state court judges are more likely than federal judges to produce progressive state common law.⁵² Or the nonpositivist might believe that the risk of local prejudice no longer justifies independent federal rules of decision.⁵³ For this reason, whatever influence positivism has on

in RECRAFTING THE RULE OF LAW 15, 30-32 (David Dyzenhaus ed., 1999), and Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 648-61 (1958).

49. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938).

50. *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting).

51. See A.V. DICEY, *A DIGEST OF THE LAWS OF ENGLAND WITH REFERENCE TO THE CONFLICT OF LAWS* 13-14 (1896); NEIL DUXBURY, *FREDERICK POLLOCK AND THE ENGLISH JURISTIC TRADITION* 101 (2004); THOMAS ERSKINE HOLLAND, *ELEMENTS OF JURISPRUDENCE* 43-54 (13th ed. 1924); W.L. MORISON, *JOHN AUSTIN* 160-70 (1982).

52. Cf. EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH CENTURY AMERICA* 134-35 (2000) (discussing Brandeis's belief in the integrity of local law).

53. Cf. FREYER, *supra* note 14, at 146 (noting a perceived reduction in local uncertainty and prejudice).

the belief in *Erie*'s result can come from factors unrelated to views about the nature of law.⁵⁴

II. SHIFTING THE SOURCE OF AUTHORITY

Committing *Erie* to positivism not only misunderstands the case's holding and rationale; it also has an unwelcome consequence for customary international law: either customary international law is not binding on governments, or the conception of positivism that makes it binding on them is arbitrarily selected. *Erie*'s commitment to positivism means that federal and state law must be the result of what law-making officials declare to be the law.⁵⁵ According to the classical version of positivism, law consists of the coercive orders issued by a sovereign.⁵⁶ If customary international law requires the same authority, it is not binding on governments and therefore is not law.⁵⁷ Alternatively, if customary international law binds them, a different notion of legal authority and law must apply to obligate governments than those that apply at the domestic level. In this case, the notions of authority and law appear ad hoc, selected to preserve the obligatory nature of customary international law. Prevalent international state practices either do not bind states or

54. Judge John Parker's position came close to this possibility. Parker viewed *Erie* as relying on the wrong conception of law. See John J. Parker, *Erie v. Tompkins in Retrospect: An Analysis of Its Proper Area and Limits*, A.B.A. J., Jan. 1949, at 19, 21-22, 83. He was a nonpositivist who conceived of the common law as consisting of custom and practice, not judicial decisions. See *id.* at 20. Judicial decisions, he thought, were evidence of the applicable rule of decision, but they do not constitute the rule. See *id.* at 19 (noting that the "change effected [by *Erie*] has been neither very great nor very important"). At the same time, Parker eventually came to the conclusion that *Erie* did no harm. In his view, the United States had fairly uniform common law in the period between *Swift* and *Erie*; state and federal courts applied similarly uniform rules. *Id.* *Erie* did not materially reinforce diversity in state law, according to Parker, by preventing federal courts from applying a rule of decision that predominated among the states. See *id.* at 21-22, 83. As a result, Parker's initial policy grounds for opposing *Erie* eventually disappeared. See *id.* at 19, 86; cf. *Hewlett v. Schadel*, 68 F.2d 502, 504-05 (4th Cir. 1934) (explaining his justification of the *Erie* doctrine). Although Parker thought that *Erie* was wrongly decided, he concluded that the case made no practical difference in most cases and its correctness was chiefly a "matter of history or legal theory." Parker, *supra*, at 19.

55. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78-79 (1938).

56. HOLLAND, *supra* note 51, at 49.

57. *Id.*

bind them based on an arbitrarily selected conception of law. Both alternatives are unacceptable, as described in the Sections below.

A. *Erie's Conception of Positivism*

Neither *Erie's* holding nor its reasoning has anything to do with a theory of law, as Part I argues. However, Brandeis invoked positivism in the course of the opinion, relying on the conception stated in Holmes's dissent in *Black & White Taxicab*.⁵⁸ Holmes's conception, shared by John Austin,⁵⁹ was the classical version of positivism, according to which laws are the orders of a sovereign backed by force.⁶⁰ Law, for Holmes, is the "articulate voice of some sovereign or quasi-sovereign that can be identified."⁶¹ Neither Holmes nor Brandeis seemed inclined to qualify or amend this account of law. Neither had any need to do so, as Austin's version suited their purposes.⁶² Because general federal law is common law, the authority to create it must have a sovereign source in either constitutional or congressional provisions. Finding no constitutional or congressional authority, Holmes and Brandeis concluded that no general federal common law exists.⁶³ The fact that it also has no source in other sorts of social practices is superfluous and anachronistic.

The same reasoning would conclude that governments are not bound by customary international law. Because nations are sovereigns not subject to coercive orders of others nations, they are sovereign with respect to each other. Thus, rules between nations based on state practice cannot have the status of law. They therefore cannot create legal obligations for governments. For classical positivists who drew this conclusion, customary international law,

58. *Erie*, 304 U.S. at 79.

59. AUSTIN, *supra* note 21, at 123-24.

60. See *supra* text accompanying note 56; see also *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting), *superseded by statute*, Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, 86 Stat. 1251.

61. *Jensen*, 244 U.S. at 222 (Holmes, J., dissenting); *cf. id.* at 221 ("The only authority available is the common law or statutes of a State."); *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting) ("But [law] does issue ... from the state courts as well as from the state legislatures. When we know what the source of the law has said that it shall be, our authority is at an end.").

62. See AUSTIN, *supra* note 21, at 123-24.

63. *Erie*, 304 U.S. at 78, 79; *Jensen*, 244 U.S. at 222 (Holmes, J., dissenting).

strictly speaking, was a misnomer.⁶⁴ Although these rules demand the compliance of nations, the rules do not count as law. They have no legal status because they are not backed by effective sanctions. A nation might resolve to comply with customary international law, but absent rules of state behavior backed by sanctions for noncompliance, these rules lack a sovereign source and are therefore not law.⁶⁵ Domestic law might incorporate customary international law so that its requirements are given effect by being enforced domestically. In this case, the requirements become law for those subject to them. However, they do not bind the government. In Thomas Hollands's words, the law of nations is the "vanishing point of Jurisprudence."⁶⁶

In passing, classical positivists complain about the vagueness of the content of customary international law and the diffuse character of the demand for compliance among nations.⁶⁷ The basis of their objection, however, is the source of customary international law. Its norms are not those of a sovereign to which sanctions for noncompliance are attached. The norms are unaccompanied by sovereign coercion. The behavioral regularity among a diffuse group of nations, without sovereignty over other nations, will likely produce vague demands for state compliance. But the lack of sovereign coercion, not the vagueness of the demands, makes customary international law "improperly so called."⁶⁸

For an international law dualist, positivism presents a problem. Dualism about customary international law distinguishes custom-

64. See AUSTIN, *supra* note 21, at 123-24; JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 296 (J.H. Burns & H.L.A. Hart eds., 1970); HOLLAND, *supra* note 51, at 43.

65. See Roberto Ago, *Positive Law and International Law*, 51 AM. J. INT'L L. 691, 698 (1957). For the influence of classical positivism on the development of the laws of war, see STEPHEN C. NEFF, WAR AND THE LAW OF NATIONS 167-201 (2005). Neff's account draws on voluntarist elements of contract law held by nineteenth century positivists. *Id.*

66. HOLLAND, *supra* note 51, at 391-92.

67. AUSTIN, *supra* note 21, at 171 (noting the diffuse character of both positive morality and the law of nations' demand for compliance); cf. 2 JEREMY BENTHAM, *Principles of International Law*, in THE WORKS OF JEREMY BENTHAM 537, 540 (John Bowring ed., 1962) (proposing codification of unwritten established custom as a means of preventing war).

68. AUSTIN, *supra* note 21, at 123-24, 171; see 2 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 567 (Robert Campbell ed., 4th ed. 1879) ("Much of the positive law in any community is Custom turned into Law by the adjection of the legal sanction.... But the Sovereign makes it law, not by the mere description, but by the sanction with which he clothes it.").

ary international law from domestic law.⁶⁹ Customary international law and domestic law are parts of distinct legal systems, so customary international law is not self-executing.⁷⁰ It becomes part of domestic law only by implementing legislation or otherwise incorporating it into domestic law.⁷¹ The problem lies with its status as international law binding on the government. If the classical conception of positivism underlies *Erie's* holding, the same conception must apply to both domestic and international law. Applied outwardly to international law, however, customary international law loses its status as law because nations, as independent sovereigns, are not subject to the coercive orders of other nations.⁷² The rules reflected in regular state behavior that comprise customary international law do not have coercive sanctions attached to noncompliance.⁷³ They are not coercive orders issued by nations over the potentially noncompliant nation.⁷⁴ Thus, customary international law is law “improperly so called” even at the national level.⁷⁵ Its demands do not legally bind governments outwardly in its relations with other governments. Dualists must find this consequence unacceptable because they assume that customary international law binds governments.⁷⁶

B. Mixed Conceptions of Positivism

To avoid the conclusion that customary international law is law “improperly so called,” a different version of positivism applicable at the international level might be adopted. Section A argued that if *Erie's* holding relies on classical positivism and customary international law's legal status depends on the same conception of law, customary international law does not even bind the federal government in its relations with other nations. The intermediate step in that argument might be denied. That is, one could maintain that a

69. See HANS KELSEN, *PURE THEORY OF LAW* 328-29, 333 (Max Knight trans., 1967).

70. *Id.*

71. *Id.*; J.G. Starke, *Monism and Dualism in the Theory of International Law*, 17 BRIT. Y.B. INT'L L. 66, 67, 70 (1936).

72. See *supra* text accompanying note 21.

73. See *supra* notes 65-66 and accompanying text.

74. Cf. AUSTIN, *supra* note 21, at 123-24, 171.

75. *Id.* at 123-24.

76. Starke, *supra* note 71, at 70.

different version of positivism underlies customary international law. Of course, the conception of law supposedly underlying *Erie* could differ from that applicable at the national level. In its most general form, *Erie* requires constitutional or congressional authority for a federal court to make common law.⁷⁷ The same requirement holds when a federal court incorporates customary international law as federal common law with domestic effect.⁷⁸ Different limitations might apply when customary international law applies to the government, creating obligations to other nations. Accordingly, these limitations might rely on a version of positivism different from classical positivism.

1. *Hart's Practice Version*

The version of positivism needed to leave customary international law binding at the national level finds law in social facts other than coercive sanctions. Hart's conventionalist account provides a well-known version of this type of positivism. According to Hart, law is social practice of a particular sort; a convergent practice among officials by which they apply the same conclusive criteria for a norm to constitute law in the community.⁷⁹ Hart called the rule that describes the conclusive criteria officials use the "rule of recognition."⁸⁰ The rule specifies how to identify legal norms.⁸¹ In everything but name, it is customary law. The law of the community consists of both the rule of recognition and the norms that satisfy it. On Hart's account, a legal system exists when there is a rule of recognition and when the underlying valid rules are generally followed by those subject to them.⁸² Unlike classical positivism, Hart's account of positivism does not recognize coercive orders as the social facts relevant to law.⁸³ Instead, he focuses on the convergent behavior of

77. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938).

78. See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 816, 852-53 (1997).

79. See HART, *supra* note 48, at 94-95, 110.

80. *Id.* at 94.

81. *Id.* at 94-95, 110.

82. *Id.* at 100.

83. Compare HOLLAND, *supra* note 51, at 391 (classical positivism), with HART, *supra* note 48, at 94-95, 110.

officials in which officials use the same criteria of validity to test rules and evaluate other officials' behavior.⁸⁴

Hart's view about the character of the required convergent practice among officials changed over time. In *The Concept of Law*, Hart defined the practice as one of convergent behavior as stated above.⁸⁵ The rule of recognition describes the conclusive criteria that officials frequently use in validating norms and assessing other officials' performance.⁸⁶ Later Hart interpreted the social practice to involve a convention among officials in which officials coordinate their behavior with one another.⁸⁷

A convention is a narrower social practice than a convergence in behavior, which does not require interdependent action.⁸⁸ Officials might follow the same rules without coordinating their behavior with the behavior of other officials. This is because a rule can set a standard of compliance that guides behavior without convention being the reason officials comply with the rule. Officials can have a range of reasons for complying with the rule unrelated to the actions of other officials. They can follow the same rules without conditioning their action on the behavior of others. Behavior in common need not be the result of coordination. In identifying law with a social convention, Hart unnecessarily limited his account and left unexplained some important facts about law.

The details of Hart's version of positivism are unimportant here. The only point needed is the claim that law is possible only in cases involving a convergent social practice among officials in using a conclusive rule for validating norms as law.⁸⁹ For this claim to be true, it is not necessary to determine the character of this practice—whether the behavior involved in the practice must be conventional or merely convergent. A determination that the practice need

84. HART, *supra* note 48, at 110.

85. *Id.*

86. *Id.*

87. H.L.A. HART, *Postscript*, in *THE CONCEPT OF LAW*, *supra* note 48, at 238, 255-56; see COLEMAN, *supra* note 18, at 93 (explaining Hart's view); Kenneth Einar Himma, *Inclusive Legal Positivism*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 125, 129-30 (Jules Coleman & Scott Shapiro eds., 2002) (same).

88. For criticism of Hart's rule of recognition as a social convention, see SHAPIRO, *supra* note 34, at 108-09; Julie Dickson, *Is the Rule of Recognition Really a Conventional Rule?*, 27 *OXFORD J. LEGAL STUD.* 373, 375, 381-82, 402 (2007).

89. See *supra* text accompanying notes 79-80.

not involve commands to which coercive sanctions are attached is enough. If law consists of social practice among officials of using certain criteria of validity, along with rules that are valid according to the criteria generally followed by the population to which they apply, then legal norms need not be coercive in nature. Thus, Hart's account of law, unlike classical positivism, is not dependent on coercive rules issued by a sovereign.

Hart's practice version of positivism has obvious difficulty accounting for customary international law. International law is not a system of norms in which officials and subjects are divided. Instead, there are only states subject to norms of behavior. Customary international law is also not a system with even a rule of recognition because no conclusive criteria exist to validate the norms that bind nations. The regularity in state practice instead creates a disparate set of norms of customary international law to obligate nations. For both reasons, international law does not constitute a central case of a legal system, and its rules are not paradigms of legal rules. Hart acknowledges this but maintains that international law is nonetheless a simple system of law that resembles domestic legal systems.⁹⁰ The resemblance lies in the content of some of its rules. Simple systems of law have no general standard of validity. They contain only sets of rules treated as binding, supported by strong, but diffuse, social pressure for compliance. International law rules are legal in character if they are accepted as binding by states, creating pressure for other states to comply. For Hart, the set of international law rules resembles the rules of domestic legal systems in that both include morally neutral norms.⁹¹ These rules are solutions to pure coordination problems.

In fact, the resemblance counts against some customary international law. Rules that are solutions to pure coordination problems are self-enforcing. Once established, the individual interest of the parties is not served by deviating from them. Parties, therefore, will depart from the rules only by mistake or ignorance. For this reason, social pressure for compliance with purely coordinating rules is unnecessary. Thus, in legal systems without a rule of recognition, such rules are not legal norms. Many rules of customary interna-

90. HART, *supra* note 48, at 227, 234, 236.

91. *Id.* at 228-29.

tional law have moral content, including the rules of war,⁹² immunities of ambassadors,⁹³ confiscation of property of foreign citizens of warring states,⁹⁴ and state expropriation of private property within its territory. Such rules do not serve the interests of all states, and unilateral deviation from them can benefit the deviating state. To be effective, these rules must be supported by strong international pressure. However, some customary international law rules are purely coordinating standards. Examples include the determination of the middle of inland waterways by their navigation,⁹⁵ the taxation of a foreign country's assets in the host country,⁹⁶ and the precedent and protocol accorded foreign representatives.⁹⁷ These rules lack strong pressure for compliance because they are self-enforcing. Without a rule of recognition operating at the international level or officials to identify the rules as customary international law, the rules are not part of international law. By contrast, a domestic legal system's rule of recognition can count purely coordinating rules among its rules, even when these coordinating rules are not enforced.

2. *Mixed Conceptions and Their Problems*

Suppose that Hart's practice version of positivism is correct in its broad outlines. One could believe that *Erie* relies on a classical version of positivism, whereas the practice version validates customary international law at the international level. *Erie* requires that the domestic application of customary international law have a domestic sovereign source,⁹⁸ whereas its application to nations might have an

92. See *The Paquete Habana*, 175 U.S. 677, 708 (1900) (coastal fishing vessels not subject to capture as war prize).

93. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 349-50, 364-65 (7th ed. 2008) (diplomatic immunities).

94. Cf. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428-30 (1964) (disputing limitations on a state's power to confiscate property in its territory).

95. See *Louisiana v. Mississippi*, 516 U.S. 22, 25 (1995); *New Jersey v. Delaware*, 291 U.S. 361, 379 (1934) (stating the "thalweg" rule).

96. See *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 125, 147 (1812); *Republic of Argentina v. City of New York*, 50 N.E.2d 698, 704 (N.Y. 1969).

97. See G.F. MARTENS, *A COMPENDIUM OF THE LAW OF NATIONS* 226-27 (1802) (protocol of newly arriving ministers); MONSIEUR DE VATTEL, *THE LAW OF NATIONS* 460 (J. Chitty ed., 1858) ("minister" ranks just below ambassador).

98. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938).

international source. This view retains *Erie*'s supposed commitment to positivism while also preserving the dualist's position that customary international law binds nations. It is a mixed view in that different conceptions of positivism apply to domestic and international law. However, the mixed view is ad hoc. It draws on two different theories of law in order to preserve dualism. To see this, consider a passage in which Professor Weisburd invoked the practice conception of positivism at the international level:

[T]he human authority that creates customary international law is the collective international community. That community makes law by employing mechanisms as positivistic as those the states employ. Thus, applying rules developed under the authority of the international community hardly amounts to resurrecting the concept of general law. Rather, such an approach incorporates the insight from *Erie*, that human agency creates law, and looks to the appropriate agency to determine a particular law's content.⁹⁹

There are two problems with Weisburd's position. One is identified by Professors Bradley and Goldsmith: *Erie* requires a domestic law source of authority, state or federal, for a federal court to apply customary international law.¹⁰⁰ Because the international community by itself is not such a source, the court cannot rely on customary international law unless authorized by constitutional or statutory provisions.

The second problem is that the conception of positivism invoked by Weisburd is ad hoc. His position implicitly invokes two different conceptions of positivism: one applicable internationally and the other domestically. Recognition of customary international law rules by nations can constitute law, according to the practice conception of positivism.¹⁰¹ However, *Erie* supposedly relies on classical positivism as a conception of law, which requires a sovereign authority whose directives are backed by effective sanctions.¹⁰² According to

99. A.M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT'L L. 1, 51 (1995).

100. See Bradley & Goldsmith, *supra* note 78, at 853.

101. HART, *supra* note 87, at 233-35 (describing and endorsing the view of international law as a set of customary rules binding on states).

102. See *supra* text accompanying notes 20-22.

Erie, customary international law is not an authoritative source of law domestically because the international community does not exercise effective control over domestic matters in the United States. Its norms are not by themselves domestic authority for federal courts. Thus, for customary international law rules to have legal authority both internationally and domestically, they must satisfy two different conceptions of law: the classical and practice versions of positivism.

Reliance on different conceptions of law at the domestic and international levels is arbitrary. A conception of law states conditions of legality that apply to any legal system. Its conditions do not change at the border. Of course, the same version of positivism could be applicable both domestically and internationally. However, classical positivism does not count customary international law norms as law and therefore considers them not legally binding on states. This conception of law is inconsistent with international law dualism, which recognizes that states can be bound by customary international law.¹⁰³ More plausible is the practice conception. It can consider customary international law rules to be law at both the domestic and international levels, as they might be supported by state pressure for conformity and satisfy the rule of recognition operative in a domestic legal system. But reliance on this conception requires giving up the sort of positivism to which *Erie* is supposedly committed.

There is nothing in itself objectionable about concluding that a different conception of law underlies *Erie*'s limitation on federal judicial law making than the conception apparently relied on in the case. Brandeis could simply have been wrong about the correct version of positivism. However, unlike classical positivism, the practice version of positivism does not limit the sort of authority acknowledged by the rule of recognition.¹⁰⁴ Thus, it does not require that the

103. Kelsen, *supra* note 69, at 333.

104. Hart, *supra* note 48, at 94 (stating the rule of recognition consists in some feature or features that conclusively identify primary rules of obligation); *id.* at 247 (noting that criteria of legality can include principles of justice, moral values, or pedigree). The practice version does not by itself require the criteria of legality to have any particular content. Whether it includes moral principles or values, or nonmoral facts such as enactment in accordance with a prescribed procedure, depends on the particular social practice among officials. Exclusive positivism limits criteria of legality to social facts, while inclusive positivists allow it to have any content. *See supra* note 34. Although exclusive and inclusive positivism disagree about

power to make a federal rule of decision be authorized by the Constitution or a federal statute. A rule of recognition could count the rule as law even when not authorized by political actors. Instead, constitutional restrictions alone put these limits on a federal court's authority to make law. This again shows that jurisprudential views about the nature of law are silent in *Erie*.

It might be denied that reliance on the Constitution avoids a commitment to a conception of law. After all, the Constitution itself might not be legal authority. To know whether it is legal authority, one has to know what counts as law. Someone might doubt that the Constitution is law. To eliminate this doubt, it must be shown that the Constitution can have legal authority. To demonstrate that it does requires a theory of law—an account of the features that give norms legal authority.

This denial misunderstands both the dispute in *Erie* and the justification of conceptions of law. The issue in *Erie* is not whether a constitutional limit on federal judicial law making is authoritative.¹⁰⁵ Both advocates and opponents of the power of federal courts to create general law agree that this limit would be authoritative. They disagree only over whether the Constitution limits this power when it is not exercised based on congressional or other political authority. More importantly, the doubt relies on an inappropriately high standard of justification. It demands a conclusive demonstration that the Constitution can be legally authoritative. The demand sets a higher standard for justification than is required for justification in other domains, including law. The best evidence for climate change or evolution does not show, or purport to show, that it is impossible for atmospheric temperatures or species characteristics to remain unchanged. The demand-and-answer route eventually leads to a regress or a circle. Eventually, the same demand to justify a constitutional consideration can be made of any other consideration, beginning the regress in justification.

the allowable criteria, their dispute concerns the conditions necessary for a social practice. See COLEMAN, *supra* note 18, at 108. Roughly, exclusive positivism maintains that the convergence required for a social practice depends on criteria based only on social facts. Inclusive positivism denies this. The disagreement therefore is over the conceptual constraints on a social practice, not over the practice version of positivism.

105. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 77-78 (1938) (“But the unconstitutionality of the course pursued [that is, by the doctrine of *Swift*] has now been made clear and compels us to act.”).

Alternatively, the authority that justifies a constitutional consideration itself relies on the Constitution, thereby making the justification circular. Consistently applied, the demand for a conclusive demonstration leads to skepticism about reliance on any purported source of legal authority.

With few additional assumptions, any plausible theory of law can count the Constitution as a source of law. Reliance on the Constitution can be among the social facts that determine law (positivism), and the Constitution's provisions can be consistent with morality (natural law). Whether the recourse to the Constitution in fact is part of a social practice that is the source of law or consistent with morality is a further question. This is a sociological matter, dependant on prevailing social practices for positivism, and substantive morality for natural law.

III. PRIORITY AND SELF-EXECUTING LAW

A final question about customary international law is whether it applies domestically without being incorporated by domestic law. For instance, suppose a contract between state *A* and state *B* includes a particular term and provides that *A*'s law controls the agreement. The term is enforceable under state *A*'s law but invalid according to customary international law, which *A* has not incorporated into its law. Is customary international law self-executing so that, notwithstanding *A*'s law, the contract term is invalid? This conflict is often described as one involving two different ways of conceiving the relation between domestic and international legal systems—legal monism and dualism.

Legal monism is the view that domestic and international law form a single legal order.¹⁰⁶ International law, according to most monists, has priority over domestic law, so that *A*'s law includes customary international law without incorporation.¹⁰⁷ Dualism

106. See Kelsen, *supra* note 69, at 328-29; 1 HERSCH LAUTERPACHT, *International Law and the Law of the State*, in INTERNATIONAL LAW 151, 152-53 (E. Lauterpacht ed., 1970); Hans Kelsen, *Sovereignty and International Law*, 48 GEO. L.J. 627, 629 (1960); Catherine Richmond, *Preserving the Identity Crisis: Autonomy, System and Sovereignty in European Law*, 16 LAW & PHIL. 377, 407-11 (1997).

107. See, e.g., Bruno Simma, *The Contribution of Alfred Verdross to the Theory of International Law*, 6 EUR. J. INT'L L. 33, 44 (1995); Starke, *supra* note 71, at 75-76.

views domestic and international legal systems as distinct orders, so that customary international law is effective domestically only if incorporated in accordance with domestic law.¹⁰⁸ For dualists, domestic law has priority over international law.¹⁰⁹ Monism is thought to support invalidating the term in *A* and *B*'s contract, whereas dualism allows enforcement of the term.

Describing the disagreement over whether customary international law is self-executing in this way makes it seem as if the disagreement is conceptual in character. Monists and dualists disagree about the requirements necessary for qualification as a valid legal norm. Monists believe that legally valid rules cannot bind those subject to them to conflicting requirements, as can occur if international and domestic legal rules are part of different legal systems.¹¹⁰ They maintain that consistency in legal directives requires a single legal order consisting of international and domestic legal systems.¹¹¹ For any two rules to be legally valid, both must be part of the same legal system.¹¹² Dualists allow the possibility that valid legal rules conflict, thus creating the possibility of a plurality of independent legal orders.¹¹³ At the same time, monists usually claim that customary international law has domestic effect without domestic implementation.¹¹⁴ For their part, dualists frequently

108. See Kelsen, *supra* note 69, at 328-29, 333.

109. See Brownlie, *supra* note 93, at 32; Curtis A. Bradley, Breard, *Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529, 530 (1999); see also Simma, *supra* note 107, at 44-47; Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628, 635 (2007).

110. See, e.g., HANS Kelsen, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY 111-12 (Bonnie Litchewski Paulson & Stanley L. Paulson trans., 1992) [hereinafter Kelsen, PROBLEMS OF LEGAL THEORY]; Kelsen, *supra* note 69, at 328; Kelsen, *supra* note 106; cf. 2 HERSCH LAUTERPACHT, *Kelsen's Pure Science of Law*, in INTERNATIONAL LAW 404, 422 (E. Lauterpacht ed., 1975) ("The very conception of co-ordination and equality logically presupposes the existence of a higher authority establishing and realizing the relation of equality [among national legal systems]."); Starke, *supra* note 71, at 74 ("Two normative systems with binding force in the same field must form part of the same order."). In a later work Kelsen acknowledged the possibility of a conflict among norms. See HANS Kelsen, *Morality and Law*, in ESSAYS IN LEGAL AND MORAL PHILOSOPHY 233, 233 (Peter Heath trans., 1973). He never explains satisfactorily how norms in the same chain of validity can conflict.

111. See, e.g., Kelsen, *supra* note 69.

112. See Kelsen, *supra* note 106, at 629.

113. See Starke, *supra* note 71, at 69-75.

114. See *supra* text accompanying note 107.

maintain that customary international law is not self-executing.¹¹⁵ The different positions on self-execution might seem to follow from different claims about the conditions of legal validity made by monists and dualists.

This view about the relation of monism and dualism to the question of the self-execution of customary international law is mistaken. It conflates two different issues. Monism and dualism are views about the relation of the international legal system to domestic legal systems. They differ over the primacy that international law rules have over domestic law rules. Monism maintains that the norms of domestic legal systems in some way derive their validity from those of international law, whereas dualism claims that the validity of the norms of domestic legal systems are independent of those of international legal systems.¹¹⁶ A different issue is the priority of international law rules over those of domestic law—that is, whether international law rules apply domestically without domestic authority, regardless of how the norms of these systems derive their validity. This question concerns the manner in which international law is given effect domestically.

The difference between the validity of legal rules and their priority means that domestic law rules can derive their validity from international law while in some instances being prior to it. Although it is often assumed that derived rules must be inferior to the rules from which they originate,¹¹⁷ the assumption is unsound. Derived rules can sometimes be superior to the rules from which they derive. Kelsen, for instance, thought of derivation in terms of the delegation of rule-making authority from a higher to a lower level authority. For him, a lower-level rule is validly derived from a higher-level rule when it is created in accordance with the latter rule.¹¹⁸ If monism is correct, international law authorizes the enact-

115. See Margarita K. O'Donnell, *New Dirty War Judgments in Argentina: National Courts and Domestic Prosecutions of International Human Rights Violations*, 84 N.Y.U. L. REV. 333, 339 (2009).

116. See H.L.A. HART, *Kelsen's Doctrine of the Unity of Law*, in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 309, 320-21 (1983); J.G. STARKE, *STUDIES IN INTERNATIONAL LAW* 159 (1965); Kelsen, *supra* note 106, at 629.

117. See, e.g., NEIL MACCORMICK, *QUESTIONING SOVEREIGNTY* 105 (1999) ("The idea of [the European Community Law] being constitutionally dependent on the member states or any one of them is at the very least put in question by the claim of 'primacy' or 'supremacy.'").

118. See KELSEN, *PROBLEMS OF LEGAL THEORY*, *supra* note 110, at 63-64.

ment of domestic law rules. At the same time, international law might not consider its own rules to be self-executing. According to international law, without domestic recognition, its rules have no domestic application.¹¹⁹ In this case, although domestic law derives from international law, domestic law takes precedence over international law.

For example, customary international law obligates a party to a treaty to comply with the treaty's terms. Suppose a state is a party to a treaty that has domestic application. Suppose, too, that the state's properly enacted legislation prohibits its enforcement domestically and that the treaty is not otherwise incorporated into domestic law. Although the state violates international law and remains obligated under the treaty, international law does not consider the treaty to have domestic effect. This situation is fairly described as one in which international law gives domestic law priority over its own rules.

Self-execution can be a norm of a single international and domestic legal order (monism) or a separate domestic legal order (dualism). Because the rule that determines whether international law is self-executing can be part of either sort of legal order, the unified character of the legal order is independent of the rule. For instance, as an analogy, the United States is a single legal order. The Supremacy Clause of Article VI of the Constitution makes federal law supreme over inconsistent state law.¹²⁰ Similarly, in the European Union community, its law is supreme over inconsistent national law.¹²¹ Consequently, federal law applies in states supplementing and displacing state law inconsistent with it. The fact that the United States is a single legal order does not prevent federal law from being self-executing.

A single legal order could contain a rule to the effect that international law does not have domestic effect unless incorporated into domestic law. For instance, Article VI's Supremacy Clause could have been different. It could have made state law supreme over federal law, displacing it when the two conflicted. Alternatively, the Clause could have stated a last-in-time rule, giving supremacy to

119. For an explanation of the relationship between domestic and international law, see J.G. STARKE, *INTRODUCTION TO INTERNATIONAL LAW* 71-94 (10th ed. 1989).

120. U.S. CONST. art. IV, § 2.

121. See Case C-6/64, *Costa v. ENEL*, 1964 E.C.R. 585, ¶ 3.

state or federal law according to the time of its enactment or judicial recognition. This alternative rule mimics the priority rule between treaties and federal legislation.¹²² These possibilities show that a single legal order can include a rule against self-execution.

Thus, the debate over whether distinct legal orders form a unified legal system has nothing to do with the way in which a rule applies within these orders. Whether the rule is self-executing within a legal system depends on the manner in which it applies there, not merely on the fact that it is part of a unified legal order. For this reason, if customary international law is self-executing, a rule in the relevant legal system allows for self-execution. The unitary character of the legal system by itself does not require it, nor does self-execution dictate the relation of international law to domestic law. Views that connect the place of international law in a legal order with its self-execution confuse the question of international law's primacy in justification with its priority over domestic law.

To be sure, if the validity of a state's legal norms do not derive from the validity of those of international law, monism is wrong, and domestic and international law are not part of the same legal system.¹²³ In that case, an international law rule providing for or against self-execution has no domestic legal effect without domestic recognition. But even if monism is correct, international law rules still might not have domestic effect, because the single legal system does not itself provide that its rules are effective domestically without domestic implementation. This requires a further step. True, working monists tend to assume that rules of customary international law are self-executing. Judge Lauterpacht's statement in the *Case of Certain Norwegian Loans* is representative:

The question of conformity of national legislation with international law is a matter of international law. The notion that if a

122. See Julian G. Ku, *Treaties as Laws: A Defense of the Last-in-Time Rule for Treaties and Federal Statutes*, 80 IND. L.J. 319, 325 (2005).

123. Kelsen's monism only requires that state and international legal rules be part of a single chain of validity. See, e.g., KELSEN, *supra* note 69, at 333-39. His theory therefore acknowledges that international legal rules can be derived from those of states. Some monists require that a state's legal rules be derived from rules of international law. See 1 LAUTERPACHT, *supra* note 106, at 152. For a position that allows European Union law and member states' laws to be derived from international law although not being derived from each other, see MACCORMICK, *supra* note 117, at 117-18.

matter is governed by national law it is for that reason at the same time outside the sphere of international law is both novel and, if accepted, subversive of international law. It is not enough for a State to bring a matter under the protective umbrella of its legislation, possibly of a predatory character, in order to shelter it effectively from any control by international law.¹²⁴

Lauterpacht does not explain why international law, even as part of a single legal system, has priority over inconsistent state law. Monism does not by itself require that customary international law “control” domestic law. This is a matter of the content of the customary international law, just as Article VI’s Supremacy Clause is part of the content of the Constitution. For this reason, positions on monism and dualism cannot always decide whether customary international law is self-executing.

IV. LEGAL ARGUMENT ABOUT CUSTOMARY INTERNATIONAL LAW

The conditions under which a custom exists, the custom’s interpretation, and its normative force all bear on the character of customs among states.¹²⁵ However, these are matters that bear on customs generally. They do not help answer the specific questions courts and other legal authorities have to answer about customary international law: its content, the legal obligations it creates, and its domestic law effect. The following questions should be asked: Which customs are part of customary international law? What obligations do they impose on states? And are those norms part of domestic law? Questions asking whether there are norms of customary international law, or whether customary international law is law, are far less appropriate. Jurisprudential theses about law, legal validity, and the relation between customary international law and domestic law do not help answer these legal questions. They either have nothing to say about the questions or are not needed to give legally acceptable answers to them. Whether international law is self-

124. *Certain Norwegian Loans (Fr. v. Nor.)*, 1957 I.C.J. 9, 37 (July 6) (Lauterpacht, J., concurring).

125. See Frederick Schauer, *Pitfalls in the Interpretation of Customary Law*, in *THE NATURE OF CUSTOMARY LAW* 13, 33 (Amanda Perreau-Saussine & James Bernard Murphy eds., 2007).

executing cannot be determined a priori based just on the relationship between international and domestic law. Similarly, legal rules can limit the authority of courts to rely on customary international law, regardless of the correct conception of law. Jurisprudence is irrelevant to both matters.

Jurisprudential theses about law, legal validity, and the unity of legal systems make conceptual claims. They describe features that norms or systems necessarily must have to be legal in character. By contrast, the answers to the questions usually raised by customary international law depend on facts about state practices and legal systems. They turn on contingent features of custom and legal systems, including international law. This is obviously true with respect to the content of customary international law. Custom creates norms that obligate members of a community; the obligation does not require recognition by a legal system. Because the norms arise from regularity in behavior among a critical mass in the community, their content depends on this regularity. Custom varies according to the behavior supporting it and so has no necessary content. The norms of customary international law, as custom, can and do vary over time.¹²⁶

For the same reason, custom has no necessary priority over other norms. While customary law, unlike simple custom, creates legal obligations, those obligations may not be superior to other legal obligations. Whether customary law operates only at the state level or also domestically can depend on the content of the particular custom. Although customary international law does not require recognition by a domestic legal system to create legal obligations, these obligations need not have priority over domestic law or automatic effect domestically. There is nothing in the bare notion of customary international law that gives it priority over inconsistent domestic law or makes customary international law applicable in domestic law without domestic implementation. The mere fact that international and domestic law are part of the same or different legal orders does not by itself give international law priority over domestic law or make it self-executing. Put another way, even if

126. See DAVID J. BEDERMAN, *CUSTOM AS A SOURCE OF LAW* 172-73 (2010); cf. Brian Tierney, *Vitoria and Suarez on Ius Gentium, Natural Law, and Custom*, in *THE NATURE OF CUSTOMARY LAW*, *supra* note 125, at 101, 103-04 (discussing the rule of law of nations permitting enslavement of captives).

customary international law and domestic law are parts of a single legal order, international law might give priority to domestic law over customary international law, or domestic law might give priority to customary international law over domestic law. The priority or effect of customary international law depends on particular facts: facts about the priority or effect international law gives it. This is a contingent matter.

Finally, if customary international law is not self-executing, so that its domestic application requires incorporation into domestic law, domestic law controls the recognition of customary international law. *Erie's* limit on federal judicial law making extends to customary international law, requiring a source of authority in federal or state law for its application. Customary international law might be federal law for purposes of the Supremacy Clause in Article VI of the Constitution. Alternatively, its recognition might be authorized by legislation.¹²⁷ In both cases, the limits on the judicial recognition of customary international law are constitutional or statutory, not jurisprudential.

CONCLUSION

Jurisprudence does not inform legal argument about the authority of customary international law, its status as law, or its priority over inconsistent domestic law. Conceptual views about law, legal authority, or the identity of a legal system do not limit the legal materials, admissible inferences from them, doctrine, or the standards of proof that figure in reasoning about customary international law and its application. Fairly understood, *Erie* requires congressional, executive, or state legislative authorization for customary international law to have domestic effect, and the basis of the requirement is constitutional not conceptual. Constitutional requirements, not views about legal authority, therefore determine customary international law's domestic legal effect. For the same reason, conceptions of law such as positivism do not dictate the domestic status or application of customary international law. Nor

127. See, e.g., Alien Tort Statute, 28 U.S.C. § 1350 (2006); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714 (2004) (granting judicial authority to create a federal cause of action under the Alien Tort Statute in a narrow range of circumstances).

do notions of a legal system compel any conclusion about the priority of international law over domestic law when they conflict. In each case jurisprudence does not help answer the questions courts and other legal authorities ask about customary international law.