FEDERAL COMMON LAW AND ARTICLE III: A JURISDICTIONAL APPROACH TO ERIE

The courts of a federal government, like all courts, are instruments for securing justice; but unlike other courts, they are also instruments for making major adjustments in the relationship between states and the nation. In Erie R.R. v. Tompkins the United States Supreme Court made an historic adjustment in this relationship by denying the existence of a general federal common law and by overruling Swift v. Tyson, the case often cited as the source of such law. The Court also required federal courts to follow the common law, as well as the statutory law, of the states in which they sat. Despite the importance of this adjustment there remains a controversy as to its basis: does the Constitution limit the substantive power of federal courts to make common law; or is there no such limitation, the decision being based only upon statutory interpretation or a policy against forum shopping? The Court in Erie declared that "the unconstitutionality of the course [previously] pursued" compelled the decision, but this statement has been described as dictum and it appears that the Court has rarely referred to the constitutional nature of the case in the years following the decision. In a recent article Judge Friendly defended the view that Erie rests upon constitutional grounds, and drew from a survey of the subsequent cases the following conclusion:

The complementary concepts — that federal courts must follow state decisions on matters of substantive law appropriately cognizable by the states whereas state courts must follow decisions on subjects within the national legislative power where Congress has so directed — seem so beautifully simple, and so simply beautiful, that we must wonder why a century and a half were needed to discover them, and we must wonder

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2. 304 U.S. 64 (1938).
4. As an illustration of this controversy compare 1A Moore, Federal Practice ¶ 0.304 at 3050 (2d ed. 1961) ("it is unsound to make the Erie doctrine a rule of constitutional limitation") with Friendly, In Praise of Erie — And of the New Federal Common Law, 39 N.Y.U.L. Rev. 383, 384-98 (1964) ("the constitutional ground taken in Erie was . . . the only tenable one . . .:" id. at 386).
5. 304 U.S. at 77-78.
7. Clark, supra note 6, at 278. Bernhardt v. Polygraphic Co., 350 U.S. 198 (1956), presents one of the few references by the Supreme Court to the constitutional issue in the Erie decision. And in this case the Court narrowly construed a statute to avoid that issue. Id. at 202.
8. Friendly, supra note 4, at 384-98.
even more why anyone should want to shy away once the discovery was made.\textsuperscript{9}

Shortly after Judge Friendly wrote this article the Supreme Court handed down the decision in \textit{Banco Nacional de Cuba v. Sabbatino},\textsuperscript{10} a case which does not seem to comport with the "beautifully simple" system Judge Friendly described and which has been read by at least one commentator as an indication that the Court's attitude toward \textit{Erie} may be undergoing a basic change.\textsuperscript{11} The impact of \textit{Sabbatino} in the context of continuing uncertainty about the foundation of \textit{Erie} calls for a further inquiry into the relationship of federal common law to the Constitution.

The plaintiff in \textit{Sabbatino}, a Cuban government agency suing in federal court, claimed title to a shipment of sugar previously nationalized by Cuba and asked that effect be given to that nationalization. In holding for plaintiff, the Court applied the act of state doctrine:

Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.\textsuperscript{12}

Relying on its own interpretation of the doctrine, the Court refused to consider itself bound by \textit{Erie} to follow the doctrine as applied by the courts of New York, the state in which the case arose.\textsuperscript{13} Such a reference to state law was held unnecessary since it seemed "fair to assume that the Court did not have rules like the act of state doctrine in mind when it decided \textit{Erie R. Co. v. Tompkins}."\textsuperscript{14} Instead the Court felt:

\[\ldots\] constrained to make it clear that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law.\textsuperscript{15}

While this statement refers to the act of state doctrine, it implies that all questions of foreign relations law are issues of federal common law.\textsuperscript{10} Although

\textsuperscript{9} Id. at 422 (emphasis added).
\textsuperscript{10} 376 U.S. 398 (1964). Friendly was aware of this decision but did not incorporate it into his article. Friendly, \textit{supra} note 4, at 408 n.119.
\textsuperscript{13} The Court recognized that the conclusion in the case might have been the same even if a reference to state law were required, since the courts of the state in which the case arose had previously enunciated the act of state doctrine. 376 U.S. at 425.
\textsuperscript{14} Id. at 425.
\textsuperscript{15} \textit{Ibid}.

\textsuperscript{16} Professor Henkin views the possible implications of \textit{Sabbatino} as extending beyond foreign relations law, but he suggests other factors which may limit the effect of the decision to this area of law. Henkin, \textit{supra} note 11, at 817-19. See also, Friendly, \textit{supra} note 4, at 408 n.119, viewing \textit{Sabbatino} as fashioning a federal law of foreign relations.
it had long been urged that federal courts should fashion foreign relations
law without reference to state law, it was not until Sabbatino that this was
done.

Foreign relations law is not the first area in which the Supreme Court has
declared Erie inapplicable. In Hinderlider v. La Plata River & Cherry Creek
Ditch Co., decided the same day as Erie, the Court held that an interstate
stream must be apportioned between two states according to federal common
law. In the following years federal common law was held to govern other
cases such as those concerning federal government checks, labor-management
relations, and admiralty. These cases fall into three general categories. First,
in cases concerning federal statutes, federal common law guards the interest
derived from the statute; in some cases the federal common law is a form of
statutory construction, and in others an implementation of a legislative
scheme. Second, in cases involving disputes between states, an independent
federal common law is applied since it is thought inappropriate that the law of
either state should govern. Third, in cases of admiralty, federal common law is
created to effectuate the intent of the grant of admiralty and maritime jurisdic-
tion in Article III — the creation of uniform admiralty law. The previous

17. See, e.g., Jessup, The Doctrine of Erie Railroad v. Tompkins Applied to Inter-
324, 331-32 (1937); United States v. Pink, 315 U.S. 203, 233-34 (1942), indicating complete
federal supremacy over the states in the field of foreign relations.

18. See remarks of Rudolph Schlessinger in INTERNATIONAL LAW IN NATIONAL COURTS
107 (Third Cornell Summer Conference on Int'l Law 1960) for statement reflecting
pre-Sabbatino uncertainty as to whether a federal court would be required by Erie
to apply the state version of the act of state doctrine. See also Bergman v. De Sieyes, 170 F.2d
360 (2d Cir. 1948) (state court's interpretation of international law binding on a federal
court deciding a diversity case).

R.R. v. Tompkins and the Uniform General Maritime Law, 64 Harv. L. Rev. 246 (1950),
for a discussion of the impact of Erie upon admiralty law.

For a collection of cases which have departed from the rule of Erie, see Friendly,
supra note 4, at 408-16; Kurland, The Romero Case and Some Problems of Federal
Jurisdiction, 73 Harv. L. Rev. 817, 827-28 (1960).

23. Included within this category would be cases involving treaties. See, e.g., Board
25. Clearfield Trust Co. v. United States, 318 U.S. 363 (1943), is an example of
26. Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957), represents the use of
federal common law to carry out a legislative scheme. See Id. at 456-57.
27. Henkin, supra note 11, at 817.
28. Jurisdiction over admiralty was given to the federal courts by the Constitution
in order that uniformity of admiralty law could be attained. Southern Pac. Co. v. Jensen,
244 U.S. 205, 215, 217 (1917). This jurisdictional grant gives federal courts the right
qualifications of *Erie*, so characterized, indicate that the decision in *Sabbatino* not to apply state law is an important new development in federal common law. There was no statutory issue in the case nor any indication from Congress that the Court should make federal law. And, of course, the case involved neither disputes between states nor admiralty law.

The Court justified its creation of a new exception to *Erie* by referring to various statutory and constitutional provisions reflecting "a concern for uniformity in this country's dealings with foreign nations . . . ." While these provisions evidence a federal interest in foreign affairs, the Court did not consider them to require the application of the act of state doctrine. The making of federal common law based upon such provisions evidencing a federal interest allows the Court to go beyond the previous exceptions to *Erie*; neither a statement of congressional policy — as in cases involving statutes — nor an express grant of Article III jurisdiction — as in admiralty or disputes between states — is required to justify this creation of law. Although this to make admiralty law. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 360-61 (1959). Without this power to make law it would be impossible for the Supreme Court to impose a uniform law.

29. Prof. Henkin states: "For the first time the Court [in *Sabbatino*] . . . concludes that federal courts may make common law without authorization from Congress." Henkin, *supra* note 11, at 815. However, he acknowledges that federal common law could be made in disputes between states and in admiralty. *Id.* at 816 n.34. Thus, Henkin's categorization of the pre-*Sabbatino* exceptions to *Erie* is the same as ours.

It has been suggested that cases in which the United States is a party constitute another exception to *Erie*. *Kurland, supra* note 22, at 828; and Note, *Exceptions to *Erie* v. *Tompkins*: The Survival of Federal Common Law*, 59 Harv. L. Rev. 966, 969-70 (1946). However, this is only a subcategory of cases involving statutes, for when the federal government sues a private litigant its rights will be ultimately grounded in a statute. See, e.g., *ibid*, which treats *Clearfield* as such an exception, and compare the Court's view of *Clearfield* expressed in *Sabbatino* — the rights involved in *Clearfield* being ultimately grounded in a federal statute. 376 U.S. at 426.

30. Henkin, *supra* note 11, at 814-15. Since Congress did not direct the Court to make law, *Sabbatino* does not fit into Friendly's system. See quote accompanying note 9 supra. Moreover, his system failed to account for the other situations in which federal courts had fashioned an independent law without prior congressional action — admiralty and disputes between states.

31. Although *Sabbatino* does not fall within one of the three previous exceptions to *Erie*, it is not the first case in which the Court has refused to follow state law because of the existence of a "federal interest" not dependent upon federal statutory or constitutional provisions. See, e.g., *Byrd v. Blue Ridge Rural Elec. Co-op.*, Inc., 356 U.S. 525, 538 (1958), where a "strong federal policy" dictated against following the state rule, although the policy was not required by the Constitution or a federal statute. *Cf. United States v. Standard Oil Co.*, 332 U.S. 301, 307 (1947) (dictum); *United States v. 93.970 Acres*, 360 U.S. 328, 332-33 (1959).

32. 376 U.S. 398, at 427 n.25.

33. As the Court makes clear: "The text of the Constitution does not require the act of state doctrine . . . ." *Id* at 423.

34. This basis is similar to that used by Justice Brennan in his dissent in *Wheeling v. Wheeler*, 373 U.S. 647, 653-67 (1963). He suggested that federal courts could make federal common law concerning the rights, duties, and immunities of federal officers
theory of federal common law seemingly invites further departures from *Erie*, it is difficult to determine its actual impact upon that case since the Court did not adequately explore the relationship of the theory to the principles underlying *Erie*. The theory used in *Sabbatino* may thus justify the concern expressed for the vitality of the rule of *Erie*.35

An analysis of the jurisdictional implications of *Sabbatino*, however, clarifies the principles of *Erie* and illustrates that the theory of *Sabbatino* conforms to these principles. These jurisdictional implications derive from the fact that in *Sabbatino* the Court indicated it would impose the act of state doctrine upon state courts.36 Such imposition of the act of state doctrine reveals that the Court still adheres to a major policy of *Erie*. This policy, that all courts, federal and state, sitting in the same jurisdiction apply the same law, was designed to prevent forum shopping — the selection of the forum, federal or state, offering the most favorable substantive law.37 While the Court in *Erie* implemented the policy against forum shopping by requiring federal courts to follow state common law,38 another means might have been possible. Federal common law could have been imposed upon state courts.39 However, since the general federal common law promulgated under *Swift* had never been imposed upon the states,40 it was unlikely that the Court considered this alternative. In *Sabbatino*, on the other hand, the Court followed the pattern of the other exceptions to *Erie* by indicating that it would impose the federal rule upon the states.41

because these were governed by "a matrix of federal statutory and constitutional principles." *Id.* at 665-66. Thus, a theory of federal common law which allows it to be made upon such a basis might be called a "matrix theory."

35. See Henkin, *supra* note 11. Baltimore & O. R.R. v. Baugh, 149 U.S. 368, 378-79 (1893), utilized a similar theory to justify a federal court's reference to "general law" instead of state law when deciding a case involving an accident on an interstate railroad. *Baugh* was the very case which the plaintiff relied upon in *Erie* to compel reference to the general law and which the *Erie* Court refused to follow. 304 U.S. at 68. Thus, the use of this theory in *Sabbatino* to justify an independent federal law appears to be an added ground for concern about the *Erie* doctrine.

36. See 376 U.S. at 425 n.23:

> We need not now consider whether a state court might, in certain circumstances, adhere to a more restrictive view concerning the scope of examination of foreign acts than that required by this Court.
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> The only implication reasonably drawn from this is that the Court did consider and decide that a state court might not adopt a less restrictive view — *i.e.*, that it must follow the *Sabbatino* act of state doctrine as a minimum. Cf. Henkin, *supra* note 11, at 806.

37. For the view that *Erie* was based upon policy rather than "juristic symmetry," see Shulman, *The Demise of Swift v. Tyson*. 47 YALE L.J. 1336, 1346 (1938).


41. The quote from Friendly (text accompanying note 9 *supra*) illustrates the pattern of imposing exceptions of *Erie* upon state courts. The state courts' attitudes toward
Since an imposition of federal law can be enforced only by reversing a state decision which fails to comply with it, the imposition in Sabbatino implied that the Supreme Court believed it had jurisdiction of cases in which state courts refuse to apply the act of state doctrine. If this jurisdiction in fact exists, it must be found ultimately in the clause of Article III which states that:

The judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority . . . .

Moreover, the Court must have believed that the act of state doctrine arose under the "laws of the United States." There was clearly no treaty involved in the case. And the doctrine did not arise under the Constitution despite the fact that it had become a matter of federal common law and might be considered supreme by virtue of Article VI section 2.

The declaration of Oetjen v. Central Leather Co., 246 U.S. 297 (1918), a case which employed the act of state doctrine but did not impose it upon the states, are illustrative of what would probably have been the reaction of state courts to Sabbatino had it not imposed the doctrine upon the states: Monte Blanco Real Estate Corp. v. Wolvin Line, 147 La. 536, 566, 85 So. 242, 243 (1920); M. Salimoff & Co. v. Standard Oil Co., 262 N.Y. 220, 223-24, 186 N.E. 679, 681 (1933). But cf. Companie Minera v. Bartlesville Zinc Co., 115 Tex. 21, 30-31, 275 S.W. 388, 391 (1925).

42. Cf. Friendly, supra note 4, at 411.

43. See Cornell Conference, op. cit. supra note 18, at 84-85, for a description of a hypothetical case in which a state court refused to apply the act of state doctrine and thereby vexed the State Department.

44. This is the only clause in Article III to which reference is made in 28 U.S.C. § 1257. Section 1257 is the only statute which allows Supreme Court review of state court decisions. Robertson & Kirkham, Jurisdiction of the Supreme Court § 3 (Wolfson & Kurland ed. 1951). Therefore, this can be the only clause of Article III to which reference may be made by the Court in determining the basis of its constitutional jurisdiction, since such jurisdiction may be utilized only if provided for by statute. Wiscart v. D'Auchy, 3 U.S. (3 Dall.) 320, 326 (1796); Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1868); Robertson & Kirkham, op. cit. supra, at § 1. But cf. Merry, Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis, 47 Minn. L. Rev. 53 (1962) (exception and regulation power of Congress relates only to issues of fact and not law); Crosskey, Politics and the Constitution 618 (1953) (exception and regulation power of Congress relates only to the allocation of cases within the federal court system, not to removal of cases from the system).

45. If an expression by the State Department, reflecting the national will as to the act of state doctrine, could be considered a "treaty," then there would be a "treaty" issue in the case. See Jaffe, Judicial Aspects of Foreign Relations 60-61 (1933).

46. The Court states expressly that "[t]he text of the Constitution does not require the act of state doctrine . . . ." 376 U.S. at 423.

47. The Court seems to have accepted, by implication, the proposition that federal common law is supreme by virtue of Article VI. See Kossick v. United Fruit Co., 375 U.S. 731, 738-39 (1961). But compare Hart, The Relations Between State and Federal Law, 54 Colum. L. Rev. 489, 500 (1954) (supremacy clause limited to laws passed by Congress); Henkin, supra note 11, at 816 & n.34 (question whether supremacy clause extends to federal common law not founded in statutes or the Constitution).
Article VI that a given rule of law is supreme could not, without more, render a case involving the rule one arising under the Constitution. If all cases involving rules embraced by the supremacy clause were cognizable as cases arising under the Constitution, the other categories of the “arising under” clause of Article III — laws and treaties — would be superfluous. If all statutory issue was involved in the decision, the Court in suggesting it would have jurisdiction based upon the “laws of the United States,” must have rejected the traditional theory that “laws” in Article III relates only to statutes. Instead, the Court apparently accepted the view, stated in Justice Brennan’s dissent in *Romero v. International Terminal Operating Co.*, that the term “laws” comprehends federal common law, as well as federal statutes. While the Court may have previously accepted this proposition, *Sabbatino* makes this acceptance more apparent.

The Court’s understanding of “laws” as including federal common law, as well as statutes, is supported by ample evidence. In the latter part of the eighteenth century “everyone understood decisional principles to be ‘laws’”; *Doucette v. Vincent*, 194 F.2d 834, 841, 845 (1st Cir. 1952), took the position that a claim under federal admiralty law was one arising under the Constitution. Not only does this position encounter the objection raised above, but it also elevates the duty to comply with the law of admiralty to a constitutional duty — an unrealistically high level. *The Expansion of Federal Question Jurisdiction to Maritime Claims*, 66 Harv. L. Rev. 315, 325 (1952). And see *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 393 (1959) (dissent), where it was contended that cases of admiralty were cognizable by federal courts as cases arising under the laws of the United States. Although the four dissenting Justices were aware of the *Doucette* case, id. at 388, and agreed with its result, only two chose to follow its rationale.

48. *Doucette v. Vincent*, 194 F.2d 834, 841, 845 (1st Cir. 1952), took the position that a claim under federal admiralty law was one arising under the Constitution. Not only does this position encounter the objection raised above, but it also elevates the duty to comply with the law of admiralty to a constitutional duty — an unrealistically high level. *Note, The Expansion of Federal Question Jurisdiction to Maritime Claims*, 66 Harv. L. Rev. 315, 325 (1952). And see *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 393 (1959) (dissent), where it was contended that cases of admiralty were cognizable by federal courts as cases arising under the laws of the United States. Although the four dissenting Justices were aware of the *Doucette* case, id. at 388, and agreed with its result, only two chose to follow its rationale.

49. *Friendly*, supra note 4, at 393-94; *Hart & Wechsler, The Federal Courts and the Federal System* 19 (1953) (the change in Article III from “laws passed by the legislature of the United States” to “laws of the United States” was only a change in wording). This traditional theory allows for the imposition of most post-*Erie* federal common law — that which is based upon statutes.


51. *Id.* at 393. Although the dissent discussed the term “laws” as used in 28 U.S.C. § 1331, this discussion is relevant to the use of “laws” in Article III, since it was recognized that the language of the statute was derived from Article III. *Id.* at 393 n.5. See also Forrester; *The Nature of a “Federal Question,”* 16 Tul. L. Rev. 362, 374-75 (1942), for historical evidence that § 1331 was derived from Article III.

52. The Court’s opinion in *Wheldin v. Wheeler*, 373 U.S. 647 (1963), written by Justice Douglas, one of the dissenters in *Romero* who there accepted the view that “laws of the United States” included federal common law, did not dispute the contention of the dissenters that “laws” includes federal common law (id. at 664-65) but rather refused to create the federal common law upon which jurisdiction could be based. *But cf.* Fitzgerald v. United States Lines, 374 U.S. 16, 17 n.3 (1963).

53. One basis for this understanding is the Constitution’s reliance upon common law definitions. *Brant, Mr. Crosskey and Mr. Madison*, 54 Colum. L. Rev. 443, 444 (1954).

and early congressional legislation reflected this understanding. In section 25 of the Judiciary Act of 1789 reference is made in the first clause to "statutes" of the United States, in the second to "a statute of any State" and to "laws" of the United States, and in the third to "statutes" of the United States. If the framers of section 25 had considered "laws" and "statutes" to be synonymous, they would surely have used either the term "laws" or "statutes" consistently throughout the section. And in section 34 of the same act, the phrase "laws of the several states" was apparently intended to comprehend both statutes and common law. Additional support for an interpretation of "laws" as including federal common law is found in the history of the drafting of Article III. The "arising under" clause originally read, "arising under laws passed by the legislature of the United States," but the phrase "passed by the legislature" was omitted when Article III was adopted.

While it seems reasonable to conclude from this evidence that the framers intended the word "laws" to include common law, it is unclear whether their reference was to all common law, only a limited area of common law, all common law which federal courts would have the power to make, or only a limited part of such federal common law. If the framers' reference was to all common law and was, therefore, not limited, federal judges would be free to create law in any case regardless of the issues involved. The very act of creating law would simultaneously vest the court with jurisdiction since the newly created law would arise under "the laws of the United States." Under this view of "laws" the only limit to federal jurisdiction would be the self-restraint exercised by federal courts. But the Constitution did not leave the scope of federal jurisdiction to the discretion of federal judges; Article III prescribes the limits of the federal judicial system. Therefore, "laws" could not refer to all common law. Nor could the framers have intended "laws" to refer only to certain of the classes of the common law which federal courts might make. If this were the intent of the framers, they must have conceived of a bifurcated system of federal common law in which some classes of laws could be the

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55. 1 Stat. 73, 85 (1789).
56. 1 Stat. 73, 92 (1789).
59. From this omission Justice Brennan seems to have drawn the conclusion that "laws" was broadened to include common law. Romero v. International Terminal Operating Co., 358 U.S. 354, 393 n.5 (1959) (dissent). There is little history to illuminate the framers' intent in making this omission. It is unexplained in Madison's notes. Crosskey, op. cit. supra note 54, at 621.
60. Assuming arguendo that the law which federal courts have the power to make is less than all common law.
61. Robertson & Kirkham, op. cit. supra note 44, at § 1 and especially n.4. A few commentators have doubted that Article III prescribes limits to federal jurisdiction. See, e.g., Crosskey, op. cit. supra note 54, at 618-20.
basis of jurisdiction under the “arising under” clause and other classes could not. Not only does an intent to create this bifurcated system seem unlikely, but also there is no evidence in the constitutional history to support this theory. Two alternatives remain: the framers intended “laws” to refer either to a limited area of common law or to all common law which a federal court would have the power to make. A brief analysis demonstrates that these alternatives are in fact coextensive. If federal courts were given jurisdiction only over a limited area of common law, the framers must have contemplated that the courts would have the substantive power to make law in that area. This area of common law, moreover, would be the only one in which federal courts would have the power to make common law. A contrary view, allowing the creation of common law beyond the jurisdictional limits of the “arising under” clause, would again require the adoption of the bifurcated system—a highly implausible result. This reasoning demonstrates that the jurisdictional grant over cases involving federal common law and the substantive power of federal courts to make that law should be viewed as coextensive. Therefore, the discovery of the limited area of common law referred to by the framers in the phrase “laws of the United States” would also delineate the substantive power of federal courts to make law, i.e., all common law which a federal court has power to make.

Professor Crosskey has concluded from his extensive research that the limited reference for “laws” was the common law of England. He maintains that this law was generally regarded as the law of the civilized world and furnished the area of common law to which the framers referred in Article III. Professor Crosskey’s conclusion has, however, been widely assailed. First, this theory would render the remaining jurisdictional grants of Article III practically meaningless, for almost every case would arise under “the laws

62. Under such a bifurcated system of federal common law, the Supreme Court would not have jurisdiction to impose upon state courts some of the law which it could create. Thus, in these areas state and federal law would differ, allowing parties to forum shop. Since both Erie and Sabbatino express an anti-forum shopping policy, it is doubtful the Court would accept this bifurcated system unless it were supported by compelling historical evidence. See text accompanying notes 37-41 supra.

63. A grant of federal jurisdiction over an area of law (as opposed to controversies between specified parties) in which federal courts lacked the power to make common law would seem unreasonable. Jurisdiction was given over specific areas of law in order that such law could be made uniform. See, e.g., Southern Pac. Co. v. Jensen, 244 U.S. 205, 215, 217 (1917) (admiralty jurisdiction granted in order that a uniform maritime law might be created). To make that law uniform, the Supreme Court must have the power to create it. Moreover, the grant by the Constitution of jurisdiction over a specific area of common law has been found to be the justification for federal courts to make law in that area. See Romero v. International Terminal Operating Co., 358 U.S. 354, 360-61 (1959) (admiralty).

64. Crosskey, op. cit. supra note 54, at 621-25. He qualified this by stating the reference was the English common law “so far as that law was ‘applicable to American conditions’.” Id. at 623.
of the United States. Under Crosskey's theory the grant of jurisdiction over controversies between citizens of different states was designed only to provide an impartial forum for the rare case involving "strictly local laws." Accepting this view, it becomes difficult to understand why these grants were the subject of extensive discussion during the ratification debates. Second, Crosskey's theory assumes that the English common law was observed throughout the United States in 1787 as a single body of common law which could be incorporated into the phrase "laws of the United States" in Article III. There is strong evidence, however, that after the Declaration of Independence no single body of general common law existed in the United States but instead, there had developed thirteen separate systems of common law.

After the Declaration of Independence the only existing common law which was uniformly observed throughout the nation and which could be incorporated into the Constitution was that dealing with the relationship between the thirteen sovereign states — the law of nations — for it was the only law observed in common by each of these sovereigns. Crosskey himself makes this clear by quoting from Edmund Randolph, an active participant in the drafting of Article III, to the effect that the common law was made part of "the laws of the United States" by the Constitution. Yet, Crosskey states, Randolph was not aware of the "obvious" corollary of this proposition which would give federal courts jurisdiction over all general common law cases. But Randolph was not as obtuse as Crosskey believes, for Randolph did not conceive that the national common law was a general common law but rather that "the national common law [was] ... the law of nations." This law of nations referred not only to public international law, but also to private international law, as well as to all other legal interactions between sovereigns.

65. Professor Crosskey admits his interpretation of "laws" would give federal courts jurisdiction over all cases of general common law. Crosskey, op. cit. supra note 54, at 640.
66. The phrase is Crosskey's. Id. at 641. The content of the phrase seems to relate to state statutes and constitutions and "uncommon state common law." Id. at 647.
67. Friendly, The Historic Basis of Diversity Jurisdiction, 41 HAV. L. REV. 483, 487-92 (1928). It would also be difficult to understand why the first Congress gave federal courts original jurisdiction in diversity cases but not in cases involving federal questions. See Frank, Historical Bases of the Federal Judicial System. 13 LAW & CONTEMP. PROBS. 3, 28 (1948).
68. For an excellent summary of this evidence, see Goebel, Ex Parte Clio, 54 COLUM. L. REV. 450, 459-67 (1954).
69. Id. at 469.
70. See Warren, The Making of the Constitution 327-31 (1928) for a brief summary of Randolph's participation in the early stages of drafting of Article III.
71. Crosskey, op. cit. supra note 54, at 626-27.
72. Id. at 629.
73. Id. at 630.
74. Id. at 570. Crosskey's inclusion of general commercial law within the law of nations is probably unjustified. See Goebel, supra note 68, at 456-59.
It is hardly surprising that "laws of the United States" should have included the law of nations. Since in 1787 a violation of the law of nations was a justified cause of war, it would be consistent with, and indeed demanded by, the purposes of union to include such law within federal jurisdiction. Charles Pinckney's proposed amendment to the Articles of Confederation which would have created federal appellate jurisdiction over cases "on the law of nations" arising in state courts reflected this understanding. And James Wilson, an important influence on the shape of Article III, expected national courts to enforce state court observance of the law of nations. Moreover, at least two writers of The Federalist agreed with Wilson. In Number 3, John Jay commended the Constitution for committing questions of "treaties, as well as the law of nations" to federal jurisdiction. Although he did not state the source of this jurisdiction, a charge which he later made to a jury may be explanatory:

"The objects of your inquiry are all offenses committed against the laws of the United States... [and] you will recollect that the laws of nations make part of the laws of the Nation."

Hamilton, concerned with the parochialism and prejudice state courts might show in cases of foreign relations, approved in Number 80 the grant of federal jurisdiction in "cases arising upon treaties and the laws of nations" as well as those that involve foreigners but "stand merely on the footing of the municipal law." Here Hamilton appears to have distinguished between federal question and diversity jurisdiction, placing cases involving treaties and the law of nations in the former category and those involving only municipal law in the latter. Since he considered federal courts to have jurisdiction over cases involving the law of nations independent of diversity of citizenship, it can only be assumed he found the source of this jurisdiction in the phrase "laws of the United States" where his co-author Jay apparently found it.

Not only was the understanding of "laws" as including the law of nations frequently voiced, but it was also acted upon by the members of the first Congress. In section 9 of the Judiciary Act of 1789 federal courts were given original jurisdiction "where an alien sues for a tort only in violation of the law of nations". For a later statement to the same effect, see The Paquete Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law").
of the law of nations or a treaty of the United States. This section was not based upon diversity jurisdiction, since Section 11 created jurisdiction in cases in which a foreigner "is a party." Accordingly the constitutionality of section 9 depends upon the existence of a law of nations jurisdiction, independent of diversity. Because this jurisdiction was created by a Congress many of whose members participated in drafting or ratifying the Constitution it is strong evidence of the intended meaning of Article III. In addition section 9 has been law since 1789 and, while only rarely invoked, it has been used without constitutional challenge as the basis of federal jurisdiction where the required diversity of parties has not existed.

In light of this evidence, it would appear reasonable to conclude that the framers intended the phrase "laws of the United States" in Article III to comprehend statutes and at least part of the common law — the law of nations. Thus federal courts possess the substantive power to make law in this area, since the framers considered power to make law coextensive with their grant of jurisdiction. When viewed in this context, the decision in Sabbatino to create a federal law of foreign relations and to impose it on the states is within the Court's constitutional power. This interpretation of "laws" would, however, provide for little further expansion of federal common law. A Court concerned with meeting new national problems would

85. Id. at 77. Cf. 28 U.S.C. § 1350, the statute in its present form.
86. 1 Stat. 73, 78 (1789).
87. See Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57 (1884), for the weight to be accorded the contemporary construction of the Constitution by the first Congress. See also Hart, The Relations between State and Federal Law, 54 Colum. L. Rev. 489, 501 (1954) (the Judiciary Act of 1789 is a good index of the consensus of 1787). But cf. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), declaring Section 13 of the Act, 1 Stat. 81 (1789), unconstitutional.
89. While the Court has ruled that the act of state doctrine is not a principle of international law (376 U.S. at 421) this would not preclude it from being a doctrine of the law of nations, as that term was used in the eighteenth century, since that law referred to more than just international law. See note 74 supra and accompanying text. The Court's reference to a principle of conflict of laws — the refusal of one country to enforce the penal laws of another (376 U.S. at 421) — may indicate its conception of the basis of the act of state doctrine. And see Hatch v. Baez, 7 Hun. (N.Y.) 596, 599 (Sup. Ct. 1876).
90. Of course, under this interpretation federal common law could be developed in all fields comprehended by the law of nations. One of these fields would be conflict of laws. See note 74 supra and accompanying text. As a result, Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941) — holding a federal court must under Erie employ the conflicts law of the state in which it sits — could be overruled. Cf. Baxter, Choice of Law and the Federal System, 16 Stan. L. Rev. 1 (1963); Clark, State Law in the Federal Courts, 55 Yale L.J. 267, 286-87 (1946).
find its law-making powers substantially limited by importing into Article III only this limited reference to the law of nations. However, no compelling evidence exists that the law of nations was the only common law meant to be incorporated within the "laws of the United States;" the law of nations may be merely illustrative of the classes of common law committed to federal jurisdiction and, pro tanto, subject to creation by the federal judiciary. Moreover, an organic theory of the Constitution — one that views it as a living document which must grow to meet current needs — could properly treat the reference to the law of nations as illustrative rather than limiting. Under this view it is the policies embodied in the Constitution which remain immutable rather than the particular manifestations which these policies assumed when the Constitution was framed. The policies underlying law of nations jurisdiction are clear; the law of nations was incorporated into Article III because it was an area of law in which there was an important national interest — the peace and perhaps the very existence of the nation — depended upon its observance. There may be other areas of law that today affect important national interests and that should be similarly incorporated into Article III. These areas, if they exist, must be found in the Constitution, its delineation of federal concerns and the laws made pursuant to it. This is precisely the approach adopted by the Court in Erie; and finding no basis in the Constitution for a general common law of torts, this law was struck down. The Court's creation of common law in Sabbatino was based upon a similar process; the Court found in constitutional and statutory provisions the evidence of a strong national interest that justified the making of federal law. Thus, Erie and Sabbatino are based upon the common understanding that the power of federal courts to make common law must be determined by reference to the Constitution.

92. See notes 75 & 76 supra and accompanying text.
93. 304 U.S. at 78.
94. Not every reference to the Constitution will allow the making of common law, for not every subject included therein will be of important national interest. With this in mind, the overruling of Baltimore & O. R.R. v. Baugh, 149 U.S. 368 (1893), by Erie can be reconciled with the theory of common law used in Sabbatino. The Court in Baugh referred to the Constitution and found a national interest in interstate commerce before deciding not to apply state law. Id. at 378-79. The particular interest involved in the case was not, however, an important national interest — torts along interstate railroads hardly being as important to the nation as foreign relations. Thus Baugh's creation of federal common law in the absence of an important national interest was properly overruled. See note 35 supra.