

Articles

International Law in American Courts: A Modest Proposal

Lea Brilmayer†

[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.

Baker v. Carr, 369 U.S. 186, 211 (1962)

By this point, we are pretty much resigned to a certain level of public controversy over the proper role of our courts, in particular our federal courts.¹

† Nathan Baker Professor, Yale Law School. The author wishes to thank Geoff Hazard and Tom Franck for their comments. Harry Feder, New York University Law School Class of 1991, helped out with last-minute research assistance. Harold Koh improved the paper substantially with his reactions to an earlier draft; the article undoubtedly would have been improved further had I listened to his comments even more.

1. This article is concerned with the international judicial function of both the state and federal courts, even though much of the literature and some of the arguments below focus primarily on the role of federal courts. For discussions of the role of state courts in international law, see Burke, Coliver, de la Vega & Rosenbaum, *Application of International Human Rights Law in State and Federal Courts*, 18 TEX. INT'L L.J. 291 (1983) [hereinafter *Application of Human Rights Law*]; *Symposium on International Human Rights Law in State Courts*, 18 INT'L LAW. 59 (1984).

The question of the proper place for international law in American courts is not quite the same as the question of the role of our courts in the setting of foreign policy. "Foreign policy" includes much domestic legislation, such as the War Powers Resolution, and is thus a broader term than "international law." The argument that courts should not get involved in foreign policy implies that there are some domestic statutes (and constitutional provisions) that our courts should not enforce. On this point, see generally H. KOH, *THE NATIONAL SECURITY CONSTITUTION* chs. 6, 9 (1990).

Although there is a difference between the two, I will sometimes refer below to the obligation of courts to enforce international law as involvement with "foreign policy." This article nonetheless limits itself to the enforcement of international, as opposed to domestic, law.

Key Warren Court decisions sparked a fairly acrimonious debate over whether courts are appropriate vehicles for restructuring American society in the name of social justice, and some thirty or forty years later, this question still preoccupies academics, politicians, the press and public, and the judges themselves.² Few Americans openly doubt that judicial review of some sort is appropriate, but the extent to which courts should exercise the power is hotly disputed. We are all familiar with the arguments for and against judicial activism in a democratic society; the debate is a perennial part of our judicial politics, and shows no signs of going away.

A similar debate involves comparable questions about the proper role of the judiciary. Like the question of the legitimacy of judicial review, it pits idealists against realists, the courts against the elected branches, and high-minded principle against popular opinion. Also like the question of judicial review, it triggers both separation of powers objections and complaints that an overextended court may be wandering too far into the political arena. The issue I have in mind is the proper role of American judges in the enforcement of international law. Interest in this issue is more episodic than interest in the legitimacy of judicial review. The issue fades into the background when domestic issues dominate the headlines, reviving when war threatens or when international lawyers threaten litigation.³ The issues are similar in one respect, however, for debates over the propriety of international adjudication address many of the same conceptual issues raised by judicial review.⁴

The status of international law in federal courts is, if anything, more controversial than the status of constitutional law. *Marbury v. Madison*⁵ has been with us almost two hundred years and its basic holding is unlikely to be revisited. The American public does not, however, cherish international law in the same way as the United States Constitution. International law seems foreign and strange, and its potential beneficiaries include not only American hostages, but also sworn international enemies such as the Sandinistas or the Palestinian

the enforcement of international, as opposed to domestic, law.

2. It is sometimes surprising how involved the American public can become in issues of judicial philosophy. One thinks, for instance, of the newspaper attention paid to whether courts should run school or prison systems, of the debate over the proper role of the courts in defining the start (or end) of life, and (perhaps most spectacularly) of the Bork nomination's extended inquiry into the candidate's views on constitutional interpretation. The public's attention seems to go beyond specific substantive resolutions, and well into the more jurisprudential areas of constitutional law.

3. See, for example, the litigation sparked by the war in the Persian Gulf. *Wallace v. Bush*, No. C-91-0264-VRW (N.D. Cal. Jan. 29, 1991); *Pietsch v. Bush*, 755 F. Supp. 62 (E.D.N.Y. 1991); *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990); *Ange v. Bush*, 752 F. Supp. 509 (D.D.C. 1990).

4. The observation that constitutional law is similar in certain respects to international law is not a new one. See, e.g., Chayes, *A Common Lawyer Looks at International Law*, 78 HARV. L. REV. 1396, 1406-08 (1965) (separation of powers in domestic and international cases); Fried, *International Law—Neither Orphan nor Harlot, Neither Jailer nor Never-Never Land*, in K. DEUTSCH & S. HOFFMAN, *THE RELEVANCE OF INTERNATIONAL LAW* 124, 160 (1971) (neither judicial review nor international law has centralized enforcement mechanism).

5. 5 U.S. (1 Cranch) 137 (1803).

Liberation Organization.⁶ Constitutional law encourages attacks by the powerless and unpopular on the American "establishment," but international law goes one step further by aiding and comforting our enemies' attacks on the nation as a whole. Why should our courts go out of their way to make such attacks possible? Why not leave foreign policy to the President and Congress?

Some academics and judges indeed arrive at this conclusion, albeit via a more scholarly or judicious route.⁷ There is obviously more at stake in the academic discussions than the unpopularity of some international claimants, although that probably doesn't help matters. The main complaint seems to be that foreign policy is politics and, for this reason, within the domain of the elected branches. The claim that international law does not belong in our courts reflects assumptions that international law is different from domestic law in important ways. To the extent that international and domestic law are truly cut from different cloth, it might seem that decisionmaking bodies set up for enforcing one might not necessarily be well equipped to enforce the other. The case for excluding international disputes, conversely, is hard to make if the two bodies of law are, for most important purposes, indistinguishable. For this reason, notions of what international law is all about are central to arguments over whether it belongs in American courts. The first objective of this article is to examine and rebut the argument that international law claims are so different from domestic law claims that they are unsuited for domestic judicial resolution.

Two apparently distinguishing features of international law seem to support the argument for judicial reluctance to resolve international law claims. The first involves an assumption about the party structure of many international disputes, namely that they are disputes between states.⁸ The second relates to the source of international norms. Domestic law arises out of a positive law source backed by authority to enforce judgments. International law, by contrast, arises out of either natural law or the consent of states.⁹ According to this argument, international "law" is really more a matter of diplomacy and the power politics of state interests than of legal principles, because it lacks an authoritative legal source. This "judicial restraint" argument relies heavily on a particular conception of international law, which I call the "horizontal" model.¹⁰ Under such a view, the nature of the parties and the sources of the norms involved allow a relatively strict separation between domestic law and international law. The

6. See, e.g., *United States v. The P.L.O.*, 690 F. Supp. 1243 (S.D.N.Y. 1988), *withdrawn*, 695 F. Supp. 1456 (S.D.N.Y. 1988); cf. *Palestine Information Office v. Schultz*, 853 F.2d 932 (D.C. Cir. 1988) (permitting closing of P.I.O.); *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.)*, 1986 I.C.J. 14.

7. See generally sources cited *infra* footnotes accompanying section I.B.

8. See *infra* section II.A.

9. See *infra* section II.A.

10. For a discussion of the difference between horizontal and vertical conceptions of international law, see L. BRILMAYER, *JUSTIFYING INTERNATIONAL ACTS* (1989).

common horizontal understanding of international law, therefore, makes our courts far less hospitable to international claims than they ought to be. There is another way of understanding international law, however, that fits it more securely into traditional notions of the proper American judicial function. Under this model, which I refer to as “vertical,” individuals are as much proper parties to international disputes as states. There is, therefore, no strict separation between international and domestic cases. International cases are not necessarily more “political” or less “legal” than domestic ones. As a result, there is no particular reason why international cases should not be welcome in domestic courts.

The second objective of this article is to show that the distinction between horizontal and vertical interpretations of international law is already implicit in the case law. In this sense, the horizontal/vertical distinction is old wine in new bottles. As we look, below, at the sorts of cases that have been brought successfully in domestic courts, we will find that these are cases in which the vertical elements predominate over the horizontal ones. This is so because the jurisdictional avoidance devices that eliminate certain international cases from our courts’ dockets are usually triggered when a party raises a “horizontal” issue. Reluctance to apply international law results from forcing international disputes into a horizontal mold, thereby characterizing international disputes in such a way that they appear unsuited for domestic adjudication.

This article has a third objective as well, namely, to justify the distinction between vertical and horizontal perspectives of international law and to show why cases with predominately vertical elements have a superior claim to be heard in American courts. The vertical model of international law provides much the same sort of justification for international adjudication as the *Marbury* “case or controversy” model provides for constitutional adjudication. Under the traditional *Marbury* model, courts decide issues of constitutional law only when traditional cases cannot be resolved without disposing of these abstract legal issues first. Asking whether international law norms “belong” in American courts is like asking whether constitutional norms “belong” in American courts. The answer is “obviously, yes . . . under the appropriate circumstances.” International issues, like constitutional issues, must be presented in a judicially cognizable form. In constitutional law, *Marbury* means that there must be a case or controversy. In international law, I will argue, the case or controversy must touch on the international law rights of individuals and not merely on the rights of coequal sovereign states.

To substantiate these claims, I need to address the following questions. First, what kinds of cases with international elements are our courts currently willing to resolve? What, in other words, is the current status of international law in our courts? Second, in what way does the traditional horizontal model conceive of international cases as distinct from domestic cases, and how does the vertical view differ? Third, how and why do current jurisdictional avoidance

devices differentiate between predominately vertical and predominately horizontal disputes? We will return, fourth and finally, to our initial starting point, namely, the similarities between the rhetoric of judicial modesty as employed in international and constitutional adjudication. The vertical model does for international law what the *Marbury* model does for constitutional adjudication: it provides an admittedly modest rationale for why such cases should be heard. Allowing international law into court in some cases does not have to open the door to international litigation of all sorts. While some, no doubt, would be dissatisfied with this modest proposal because its rationale is limited, it is offered primarily to refute the claim that international cases are, categorically, too political for domestic adjudication.

I. THE CURRENT STATUS OF INTERNATIONAL LAW IN AMERICAN COURTS

International law has a variety of potential uses in American courts. One of the respects in which the potential uses vary concerns the different ways in which international law relates to the decisions of the popularly elected branches of government.¹¹ The relationship to elected branch policy is significant because some uses of international law raise “the countermajoritarian difficulty,” to use Alexander Bickel’s term, while others do not.¹² In international adjudication, a court may or may not become involved in a critical assessment of government actions. And if it does, the criticized actions may be those of the American government or of a foreign state. When American courts rely on international law, then, there are at least three possible ways that the international and domestic norms might fit together.

First, international law could be used to override domestic law or policy formulated by the elected branches. For example, an American citizen might file suit seeking to challenge the legality of the American mining of Nicaraguan harbors, or the legality of the Vietnam war.¹³ Second, international law might be used to evaluate the legitimacy of actions undertaken by other nations. For example, a victim of foreign human rights abuses might bring suit in an

11. While “elected branches” in the foreign policy context usually means the President and Congress, it can also include the elected branches of state governments. Foreign policy, of course, is primarily the prerogative of the federal government; in fact, there are constitutional limits on the abilities of states to get involved in international relations. *See, e.g., Japan Lines, Ltd. v. County of Los Angeles*, 441 U.S. 434, 451 (1979); *Zschernig v. Miller*, 389 U.S. 429, 440-41 (1968).

12. Bickel’s classic discussion of the “countermajoritarian difficulty” is found in A. BICKEL, *THE LEAST DANGEROUS BRANCH* ch. 1 (1962).

13. *See, e.g., Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985) (challenging funding of Contras as violation of international law); *Da Costa v. Laird*, 471 F.2d 1146 (2d Cir. 1973) (challenging legality of mining harbors and air and naval station in North Vietnam); *Chaser Shipping Corp. v. United States*, 649 F. Supp. 736 (S.D.N.Y. 1986) (seeking tort liability for mining of Nicaraguan harbor); *see also Mottola v. Nixon*, 464 F.2d 178 (9th Cir. 1972); *Massachusetts v. Laird*, 451 F.2d 26 (1st Cir. 1971); *Holtzman v. Schlesinger*, 361 F. Supp. 553 (E.D.N.Y. 1973), *rev’d*, 1484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); *Head v. Nixon*, 342 F. Supp. 521 (E.D. La. 1972); *Davi v. Laird*, 318 F. Supp. 478 (W.D. Va. 1970).

American court in order to obtain damages against the state actors that allegedly committed the abuses.¹⁴

Third, international law can be used to supplement existing law. Here, the use of international law is apparently consistent with the decisions of the elected branches; international law fills an area that domestic law has left blank. International law might provide a new norm (either a cause of action or a defense) which has no parallel in existing law. For instance, customary law might spell out the rights of foreign diplomats present in the United States.¹⁵ Alternatively, international law might aid in the interpretation of existing norms, either statutory or constitutional. Under the dictum that Congress is presumed to adhere to international law unless clearly indicated otherwise, our courts have brought international law to bear on the interpretation of statutes, for instance, in determining a statute's extraterritorial reach.¹⁶ International law might also be used to interpret vague constitutional provisions such as due process or cruel and unusual punishment.¹⁷

Although only the first of these categories of uses of international law raises "countermajoritarian" problems,¹⁸ the first and second of them can overlap. They overlap when a court's evaluation of the legality of actions undertaken by a foreign power overrides the judgments that our own elected branches have made about the legitimacy of the foreign government's activities. The two categories should not, however, be automatically equated. Where Congress and the executive have taken no position on the matter, judicial declarations that foreign countries' acts are contrary to international law are not inconsistent with domestic popular will. When our courts adjudicate human rights abuses in other nations, for instance, inconsistency with elected branch preferences should not simply be presumed.

The first and third categories arguably overlap as well, even though it seems that supplementing or interpreting legislation is unlikely to override the will of Congress and the executive. Phillip Trimble has argued, for instance, that this last use of international law is scarcely different from using international

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

15. *See, e.g.,* *Respublica v. DeLongchamps*, 1 U.S. (1 Dall.) 111 (1784). The rights of diplomats are now codified in the 1961 Vienna Convention on Diplomatic Relations, concluded Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 (ratified by U.S. on Dec. 13, 1972); *Vienna Convention on the Law of Treaties*, art. 28, U.N. Doc. A/C.39/27 (1969).

16. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987) [hereinafter RESTATEMENT] (U.S. statutes should, if possible, be construed so as not to conflict with international law or international agreements); *Lauritzen v. Larsen*, 345 U.S. 571 (1953) (interpreting reach of federal law according to this principle).

17. *Application of Human Rights Law*, *supra* note 1, at 322; Note, *Custom and General Principles as Sources of International Law in Federal Courts*, 82 COLUM. L. REV. 751, 753, 765 (1982).

18. If international law is used to fill in vague constitutional norms, such as cruel and unusual punishment, then this is "countermajoritarian" in the domestic but not the international sense, for the court is relying on positive American law.

law to override popular choice.¹⁹ Trimble criticizes the reliance on customary international law in interpreting the reach of statutes on the grounds that customary international law does not have the solid foundation in American majority preference that treaties do. But this concern should not be overstated. It is only inconsistent with majority preference to limit extraterritorial applicability of American law where there is in fact a statutory preference on the subject. Typically, Congress has not specified extraterritorial reach, leaving the entire matter to the courts.²⁰ There is no need for courts to defer mindlessly to supposed American “interests” in having American law applied, when the “interests” are not a product of preferences expressed through democratic processes.²¹

International law is not the countermajoritarian threat that it is sometimes depicted to be. Overt clashes between our courts and the elected branches may be the most exciting area of international law. But many applications of international law do not concern such hot political topics. Having recognized the potential uses to which international law might be put, we can ask to what extent this potential has been fulfilled. Here, we find a state of virtual schizophrenia. For every claim that international cases are welcome in American courts, there is a corresponding claim that they are not. On the one hand, certain kinds of international law cases are routinely heard, and it is easy to find strongly worded judicial declarations that international law is as enforceable in our courts as any other sort of law. On the other, an array of avoidance devices restricts adjudication of international claims, and some academic commentary and judicial opinions assert in the strongest terms that our courts should approach international claims with extreme caution. We will consider the positive and negative arguments in turn.

A. *The Positive Case for Adjudication of International Issues*

There is some support in the constitutional text for federal court adjudication of international issues; Article III itself lists several types of international cases suitable for federal judicial resolution.²² With regard to the enforcement

19. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 675-76 (1986) (“When actual congressional intent is ambiguous or absent, the creation of such a presumption is the same as creating a rule that the government regulatory scheme cannot violate international law [This] entail[s] restraint or limitation of political branch action and authority by the judiciary.”).

20. See, e.g., *N.R.D.C. v. Nuclear Regulatory Comm’n*, 647 F.2d 1345, 1357 (D.C. Cir. 1981) (courts should follow unequivocal congressional mandate but can accommodate interests where congressional directive is vague).

21. See Brillmayer, *The Extraterritorial Application of American Law: A Methodological and Constitutional Appraisal*, LAW & CONTEMP. PROBS., Summer 1987, at 35.

22. 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;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

of treaty law, in addition, there seems to be little dispute. The supremacy clause specifically provides that treaties, which are confirmed by the Senate, are part of the supreme law of the land.²³ Customary international law—norms, that is, established by state custom rather than by explicit agreement²⁴—are not similarly honored by the constitutional text, although it is assumed by many that they should be equally enforceable.²⁵ This position was starkly set out in the oft-cited case of *The Paquete Habana*, in which the Supreme Court wrote, “International law is part of our law, and must be administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.”²⁶

The American Law Institute projects an equal air of certainty in its *Restatement (Third) of the Foreign Relations Law of the United States*.²⁷ Section 111 specifies that treaties and customary international law alike are enforceable in our courts:

(1) International law and international agreements of the United States are law of the United States and supreme over the law of the several states.

(2) Cases arising under international law or international agreements of the United States are within the Judicial Power of the United States and, subject to Constitutional and statutory limitations and requirements of justiciability, are within the jurisdiction of the federal courts.

A number of academic commentators have favored this position as well.²⁸ “Every student of international law,” asserts one, “knows that the federal courts in the United States apply rules derived from international law.”²⁹ Domestic

U.S. CONST. art. III.

23. “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land” U.S. CONST. art. VI, cl. 2. “The President . . . shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur” U.S. CONST. art. II, § 2. Note that this does not automatically mean that the role of treaties in our courts is not problematic. After all, the Constitution is also part of the supreme law of the land, and yet judicial review has not escaped academic criticism. *See, e.g.*, A. BICKEL, *supra* note 12.

24. For general discussions of customary international law, see W. FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 121 (1964); M. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* 35-41 (1988); Note, *Custom and General Principles as Sources of International Law in American Federal Courts*, 82 COLUM. L. REV. 751 (1982).

25. *See, e.g.*, Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1564-67, 1569 (1984) (customary international law overrules prior legislation). The *Restatement* holds that a treaty overrides prior inconsistent legislation, but that it is unclear whether customary international law does. RESTATEMENT, *supra* note 16, § 115 comment d.

26. 175 U.S. 677, 700 (1900).

27. RESTATEMENT, *supra* note 16.

28. *See, e.g.*, W. FRIEDMANN, *supra* note 24, at 146 (describing important role of national courts, although conceding that they may be limited by national prejudice). For an excellent background discussion, see Lillich, *The Proper Role of Domestic Courts in the International Legal Order*, 11 VA. J. INT'L L. 9 (1970).

29. Sprout, *Theories as to the Applicability of International Law in the Federal Courts of the United States*, 26 AM. J. INT'L L. 280, 280 (1932).

judges are said to have a "dual function" in that they enforce both national and international law.³⁰ Some go so far as to assert that legislative or executive action that violates international law is, in some circumstances, unconstitutional.³¹ Others have somewhat more restrained conceptions of the judicial function that nonetheless include a heavy measure of judicial responsibility.³² It should perhaps therefore come as no surprise that American courts routinely enforce international claims of varying shapes and sizes.³³ International law can grant the plaintiff a cause of action, provide the defendant with a defense,³⁴ or act as the basis of a counterclaim.³⁵ The following brief sampler will outline three areas of applicability of customary international law—expropriation cases, human rights cases, and extraterritorial jurisdiction cases—and some examples of the applicability of treaty law.³⁶

1. *Expropriation*

International law arguably prohibits uncompensated takings of private property.³⁷ Many expropriation cases have involved claims against the Cuban government since Fidel Castro came to power.³⁸ American litigants have raised expropriation claims both as plaintiffs, asserting a cause of action, and as defendants, attempting to set off the value of expropriated property against a claim brought by the foreign government.³⁹ Following the famous *Sabbatino* case, some expropriation claims have been blocked by the "act of state" doctrine, under which our courts are prohibited from inquiring into the legality of

30. Scelle, *Le Phénomène Juridique du Dédoublément Fonctionnelle*, in RECHTSFRAGEN DER INTERNATIONALEN ORGANISATION: FESTSCHRIFT FÜR HANS WEHBERG 324 (1956).

31. Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1075 (1985) (violation of international law constitutional only where Congress and President agree, and where norm violated is not "fundamental" one such as prohibition on torture, assassination of civilians, aggression, or war crimes).

32. Falk, for instance, believes in judicial review for consistency with international law so long as there is "an effective consensus of states" supporting the international norm. R. FALK, *THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER* 12 (1964). Franck argues that our courts should defer to executive branch foreign policy only when national interest would otherwise be impaired. Franck, *The Courts, the State Department, and National Policy: A Criterion for Judicial Abdication*, 44 MINN. L. REV. 1101 (1960); cf. Franck, *Courts and Foreign Policy*, 83 FOREIGN POL'Y 66 (1991).

33. For discussion of the various explanations of why international law is domestically enforceable, see Sprout, *supra* note 29, at 280.

34. For example, a defendant may rely on international law to argue that American law may not be applied to the case. See, e.g., RESTATEMENT, *supra* note 16, § 403.

35. Cf. *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972) (prohibition on expropriation relevant to counterclaim).

36. There is one additional type of customary international law case that should be mentioned due to its past importance: prize cases. See, e.g., *The Nereide*, 13 U.S. (9 Cranch) 388 (1815) (ship transporting for enemy not prize to captor).

37. As the Supreme Court has recognized, there is at least as much dispute over the antiexpropriation principle as over any other principle of international law. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964).

38. In addition to *Sabbatino* itself, see *Alfred Dunhill of London v. Cuba*, 425 U.S. 682 (1976); *First Nat'l City Bank*, 406 U.S. 759.

39. See, e.g., *First Nat'l City Bank*, 406 U.S. 759.

the domestic acts of other nations.⁴⁰ The impact of the act of state doctrine in expropriation cases has been substantially reduced, however, first by statute, and then more importantly by case law.⁴¹

There is substantial dispute over what international law requires in expropriation cases. "Apart from the use of force," says Oscar Schachter, "no subject of international law seems to have aroused as much debate—and often strong feelings . . ."⁴² According to western, free market nations, international law prohibits takings of private property of aliens without adequate compensation. Under this view, compensation is adequate only if it is prompt, adequate in amount, and in a form that is economically usable by the alien.⁴³ Some communist and Third World nations have taken a different view, arguing that adequacy of compensation should be evaluated in terms of the local law of the expropriating state.⁴⁴ But uncertainty about what international law requires does not affect the point made here, which is that American courts adjudicating expropriation claims do so according to international law (as they understand it).⁴⁵ As with other types of international issues discussed below, dispute over the content of international law does not necessarily imply a dispute over its relevance.

2. *International Human Rights*

Like the expropriation cases, human rights cases fall generally into the second of our categories of uses of international law, the one which assesses the international legality of activities of other nations.⁴⁶ The best known case, *Filartiga v. Peña-Irala*, involved human rights abuses in Paraguay.⁴⁷ Other cases have addressed alleged human rights offenses in Chile, Israel, and

40. See *Sabbatino*, 376 U.S. 398. This doctrine dates back to *Underhill v. Hernandez*, 168 U.S. 250, 253 (1897), and *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303 (1918).

41. See 22 U.S.C. § 2370(e)(2) (1988) (Second Hickenlooper Amendment) (discussed in Halberstam, *Sabbatino Resurrected: The Act of State Doctrine in the Revised Restatement of U.S. Foreign Relations Law*, 79 AM. J. INT'L L. 68 (1985)); *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 110 S. Ct. 701 (1990) (no application to bribery case); *Alfred Dunhill*, 425 U.S. 682 (no application to commercial debts); *First National City Bank*, 406 U.S. 759 (creating "Bernstein" exception).

42. Schachter, *Compensation for Expropriation*, 78 AM. J. INT'L L. 121, 121 (1984).

43. RESTATEMENT, *supra* note 16, § 712. See also the general discussion of the *Restatement* standard in Schachter, *supra* note 42, at 122.

44. RESTATEMENT, *supra* note 16, § 712 reporter's note 1. See generally Dolzer, *New Foundations of the Law of Expropriation of Alien Property*, 75 AM. J. INT'L L. 553 (1981). Dolzer argues that the western standard and the Third World standard are both unrealistic. *Id.* at 568-71.

45. See RESTATEMENT, *supra* note 16, § 444 (for statutory reasons, act of state doctrine not applicable to expropriation cases).

46. This is not to say that the United States has never violated human rights, but that when such abuses are litigated in American courts, they are typically brought as domestic constitutional challenges. *But see, e.g., Fernandez v. Wilkinson*, 505 F. Supp. 787 (D. Kan. 1980), *aff'd on other grounds*, 654 F.2d 1382 (10th Cir. 1981).

47. 630 F.2d 876 (2d Cir. 1980).

Argentina.⁴⁸ Not all claimants have been successful in convincing American courts to award recovery, but this has sometimes been due to a judge's understanding that the international law at issue did not provide the desired protection, rather than because of hostility to international law per se.⁴⁹

Human rights cases are different from expropriation cases in one important respect: the claims against the foreign state may be brought by citizens of that state, rather than by aliens. Only in relatively recent times has it come to be accepted that a state's treatment of its own people might give rise to a violation of international law.⁵⁰ Some still argue that a state's treatment of its own nationals is a matter within the state's own domestic jurisdiction, rather than an issue for international law enforcement in American courts.⁵¹ Adjudication of such cases in American courts is possible because the Federal Alien Torts Claims Act gives federal courts jurisdiction over violations of "the law of nations."⁵² Although the Act clearly contemplates some role for American federal courts, this role is not yet precisely defined.

3. *Extraterritorial Jurisdiction*

The third area of domestic applications of international law involves extraterritorial application of local law. International law typically is used to interpret the extraterritorial reach of statutes that do not specify their international scope. The assumption is that unless it clearly indicates otherwise, Congress should be presumed to have acted in accordance with international law.⁵³ Litigation over extraterritoriality is an instance in which international law is employed consistently with domestic law, except in those rare instances where Congress has stated a preference for a certain extraterritorial scope. In these cases litigation would fall into the first category of uses of international law.⁵⁴

48. *E.g.*, *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984); *Siderman v. Argentina*, No. CV. 82-1772-RMT (C.D. Cal. Mar. 12, 1984); *Letelier v. Chile*, 502 F. Supp. 259 (D.D.C. 1980).

49. *Siderman* was reversed at the request of the State Department. See Bazyle, *Litigating the International Law of Human Rights in U.S. Courts: Siderman v. Argentina*, INT'L PRAC. NOTEBOOK, July 1985, at 1. Jurisdiction was declined in *Tel-Oren*. Judge Edwards' opinion in that case purported to apply international law, but to find that it provided no cause of action against terrorism.

50. M. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 174 (1988) (describing Nuremberg Trials as turning point).

51. See, e.g., Rubin, *Professor D'Amato's Concept of American Jurisdiction is Seriously Mistaken*, 79 AM. J. INT'L L. 105 (1985).

52. 28 U.S.C. § 1350 (1988).

53. RESTATEMENT, *supra* note 16, § 114; *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

54. It seems well established that Congress may, if it chooses, specify greater extraterritorial scope than international law would allow, since Congress generally is held to have the power to violate international law. RESTATEMENT, *supra* note 16, § 115(1)(a); see also *The Chinese Exclusion Case*, 130 U.S. 581 (1889); *Head Money Cases*, 112 U.S. 580 (1884). There may nonetheless be constitutional limits imposed by the due process clause. See generally Brilmayer, *supra* note 21; Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law*, 83 AM. J. INT'L L. 880 (1989). Brilmayer & Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. __ (forthcoming, 1992).

Although the relevance of international law to this area is well settled, there is almost as much dispute about what international law requires in this context as there is in the expropriation and human rights cases. The new *Restatement of Foreign Relations Law* takes a strong stand on the proper extraterritorial scope of American law and applies a "reasonableness" test that purports to adhere to modern American choice of law scholarship.⁵⁵ The *Restatement's* balancing test has provoked a great deal of controversy.⁵⁶ But the question of the validity of the *Restatement* approach is different from the question of whether domestic courts use international law to resolve issues of extraterritorial scope. It may be that a majority of American courts reject the *Restatement* standard, as one author claims,⁵⁷ but this does not amount to a rejection of international law. What this position represents, instead, is a sense that the *Restatement* does not capture accurately what international law requires. Extraterritoriality is one area in which international law has had a clear and continuing impact.⁵⁸

4. *Treaties*

A fourth, and relatively uncontentious, application of international law in American courts involves the enforcement of treaties. The applications of treaty law in domestic courts are too numerous to list. Many transnational disputes implicate treaties of Friendship, Commerce, and Navigation.⁵⁹ International conventions address the taking of evidence and service of process in other

An interesting question is whether it should be considered a violation of popular will for a court to reject a proposed executive branch interpretation (as when the executive brings a criminal prosecution). It would seem not, because in purely domestic cases executive branch interpretations of statutes are not binding in court.

55. See RESTATEMENT, *supra* note 16, § 403; see also Lowenfeld, *Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for Their Interaction*, 163 RECUEIL DES COURS 311 (1980).

56. See, e.g., Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280, 317 (1982) (criticizing balancing); Maier, *Resolving Extraterritorial Conflicts, Or, "There and Back Again,"* 25 VA. J. INT'L L. 7 (1984); Trimble, *supra* note 19, at 696.

57. Trimble, *supra* note 19, at 698-99, 702-04.

58. Trimble argues that there are few cases in which the Supreme Court has invalidated the application of American law. Trimble, *supra* note 19, at 699-700. But this is not the test for whether international law has relevance to the issue of extraterritoriality. For one thing, when international law is used to interpret the extraterritorial reach of statutes, as in *Lauritzen v. Larsen*, 345 U.S. 571 (1953), international law may be "applied" without invalidating any American action. In addition, the fact that courts uphold extraterritorial jurisdiction in many litigated cases, see Trimble, *supra* note 19, at 702-03, does not mean that the *Restatement* test is mistaken or irrelevant. It may only mean that the cases that have so far been brought, and over which the court had adjudicative jurisdiction, were cases in which the *Restatement* test was satisfied.

59. See, e.g., *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1813); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796).

nations.⁶⁰ Treaties regulate the rights of aliens, diplomats, and migratory birds.⁶¹

Treaties have the status of law in the United States because they are adopted by the President with the advice and consent of the Senate and because they are recognized in the supremacy clause.⁶² For this reason, they override any inconsistent state statutes or common law and any prior federal legislation.⁶³ A subsequent inconsistent federal statute overrides a treaty as a matter of domestic law, although if such a statute amounts to a breach of international obligation the enacting state may still be liable internationally.⁶⁴ Treaties are routinely enforceable in domestic courts, with a few important qualifications. First, some courts have held certain treaty claims nonjusticiable on grounds of standing or as political questions. Second, as a general rule, the treaty must either be "self-executing" or have been implemented by domestic legislation. We will return to these qualifications below;⁶⁵ here we need only note that large numbers of treaties meet these standards, and that the authoritative status of treaties in American courts is relatively unproblematic.

B. *The Argument Against Adjudication of International Issues*

If one were to focus only on the positive side of the balance, one might assume that the enforcement of international law in domestic courts is fairly uncontroversial. Many authors and judicial sources support it, and our courts routinely adjudicate certain types of cases. But there is another side of the picture. We have already briefly mentioned some of the limitations: the act of state doctrine, the standing and political question doctrines, and the limited enforcement of treaties that are not self-executing. As with the positive case, the negative case is both academic and judicial.

The basic complaint of the academics seems to be that making foreign policy is essentially a political, rather than a judicial, function.⁶⁶ Separation of powers is the key issue.⁶⁷ Sometimes the objection is framed in terms of

60. See, e.g., *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988); *Société Nationale Industrielle Aérospatiale v. United States District Court*, 482 U.S. 522 (1987).

61. See, e.g., *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982) (employment discrimination); *Asakura v. Seattle*, 265 U.S. 332 (1924) (rights of aliens); *Missouri v. Holland*, 252 U.S. 416 (1920) (migrating birds).

62. U.S. CONST. art. II, § 2, cl. 2; art. VI, cl. 2.

63. RESTATEMENT, *supra* note 16, §§ 111-12, 115(2).

64. *Id.* § 115(1)(b).

65. See *infra* text accompanying notes 123-24.

66. See Katzenbach, *Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*, 65 YALE L.J. 1087, 1155 (1956) ("What among the United States are problems of 'law' tend to take on a strong 'political' coloration when viewed in a context of divided power. For courts to seek political guidance in the resolution of political problems would be to act intelligently and rationally."); Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 575 (1966); Trimble, *supra* note 19, at 706.

67. Trimble, *supra* note 19, at 706; cf. Maier, *The Role of International Law in Human Rights Litigation in the United States*, 82 AM. SOC'Y INT'L L. PROC. 456 (1988).

the "countermajoritarian difficulty,"⁶⁸ even though, as we have seen, not all international disputes pit the courts against the elected branches. Another way of making the argument alleges a lack of judicial competence. Courts are required to decide on the basis of principle, while foreign policy (it is said) is best established through bargaining and diplomacy.⁶⁹ Courts also are thought to lack the factfinding abilities of Congress and the executive.⁷⁰ International law, it is sometimes added, has its own processes of dispute resolution, which are better suited to dealing with international controversies.⁷¹ All in all, in matters of foreign policy, it is crucial for the nation to be able to "speak with one voice."⁷² "[A] state which does not speak with a single voice or, at least, with a single mind, cannot address itself effectively to any problem of international law."⁷³ The courts should not undercut the elected branches by volunteering their own, potentially conflicting, opinions on what international law requires.

In certain circumstances, the courts have agreed with the academics arguing for restraint. We have already listed several types of international disputes that our courts currently entertain, but there are other types of cases in which American courts routinely defer to the elected branches.⁷⁴ One issue that our courts rarely address is the recognition of foreign governments.⁷⁵ Another is the permissibility of military hostilities under international law; repeated attempts to challenge the legality of the Vietnam war were rebuffed in the 1960's and 1970's.⁷⁶ A third type of case that our courts have refused to entertain involves determination of disputed territorial boundaries.⁷⁷ Sometimes

68. Trimble, *supra* note 19, at 707.

69. *Id.* at 708-09.

70. See Scharpf, *supra* note 66, at 567; Trimble, *Foreign Policy Frustrated—Dames & Moore, Claims Court Jurisdiction and a New Raid on the Treasury*, 84 COLUM. L. REV. 317, 320 (1984); Trimble, *supra* note 19, at 713.

71. Scharpf, *supra* note 66, at 575 ("The international order has its own processes for the settlement of disputes between nations.").

72. *Id.* at 573; see also Trimble, *supra* note 19, at 715.

73. Franck, *supra* note 32, at 1103.

74. See generally *id.* at 1102, 1104, 1110, 1119 (problems with our courts' entertaining territorial disputes, issues of a new government's right to sue, and cases involving status of hostilities).

75. See, e.g., *Ex parte Republic of Peru*, 318 U.S. 578 (1943); *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937). But see *Upright v. Mercury Business Machs. Co.*, 213 N.Y.S.2d 417 (1961); *Salimoff & Co. v. Standard Oil*, 262 N.Y. 220 (1933). See generally Lubman, *The Unrecognized Government in American Courts: Upright v. Mercury Business Machines*, 62 COLUM. L. REV. 275 (1962).

76. See generally L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 214 (1972); Henkin, *Viet-Nam in the Courts of the United States: "Political Questions"*, 63 AM. J. INT'L L. 284 (1969); Lillich, *supra* note 28, at 37; Schwartz & McCormack, *The Justiciability of Legal Objections to the American Military Effort in Vietnam*, 46 TEX. L. REV. 1033 (1968).

In a number of older cases, our courts have entertained issues of the legality of wars. See H. KOH, *supra* note 1, at 81-82. The international issues were raised in the context of traditional "vertical" cases, as opposed to the challenges to the Vietnam War. See *infra* note 113.

77. See, e.g., *Jones v. United States*, 137 U.S. 202 (1890); *Williams v. Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415 (1839); *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829); *De La Croix v. Chamberlain*, 25 U.S. (12 Wheat) 599 (1827).

the refusal to adjudicate is phrased in terms of standing; more often, in terms of the political question doctrine.⁷⁸ These opinions reflect the same concerns that motivate the academics, namely, that foreign policy is a political rather than a judicial function and that courts are not institutionally well equipped to make foreign policy decisions.⁷⁹ The familiar "passive virtues" rhetoric reveals a general philosophy of judicial modesty that goes beyond specific doctrinal limitations to what sometimes seems almost an allergic reaction to anything international. As Judge Aubrey Robinson was reported to have put it: "I'm nothing but a trial judge in one federal court. I don't run the universe, and I have nothing to do with international affairs."⁸⁰ This is a far cry from the ringing endorsement of *The Paquete Habana*.

II. INTERNATIONAL LAW: TWO CONCEPTIONS

How is it possible that such wildly divergent positions coexist? I would argue that these opposing views of whether international law belongs in our courts rest on rather different notions of what "international law" consists. The judges who welcome international disputes into American courts seem to have different sorts of international issues in mind from those who characterize it as "too political" for judicial resolution. The phrase "international law" conjures up competing images.

Opposition to domestic adjudication of international cases is founded on a set of assumptions about the nature and purposes of international law, assumptions which are taken for granted in certain quarters and which (if true) would make international cases ill suited for domestic judicial resolution. If "international law" is defined this way, then almost as a definitional matter, it does not belong in our courts. But this is not the only possible image of international law. Otherwise interpreted, international law cases turn out not to be so different from domestic ones, and there is no reason that our domestic courts cannot accommodate them. Blanket hostility to international law turns on an overly narrow notion of what international law is and does. It is only under one particular (although admittedly historically respectable) understanding that international law cases are entirely different from domestic ones.

78. See generally Tigar, *Judicial Power, the 'Political Question' Doctrine, and Foreign Relations*, 17 UCLA L. REV. 1135 (1970); see also *infra* text accompanying notes 120-21 (analyzing cause of action doctrine as similar in function to standing doctrine).

79. See *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918).

80. Wash. Post, Oct. 5, 1989, at A39, col. 1, quoted in Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law, Continued*, 84 AM. J. INT'L L. 444, 452 n.35 (1990).

A. *The Horizontal Model of International Law*

What characteristics, then, have traditionally been used to characterize a case as “international”? Under one common conception, the most important earmarks of an international dispute are its distinctive party structure and the source of the norms applied. The difference in party structure results from the assumption that international law necessarily involves disputes between states. The difference in source of norms lies in the fact that international law is thought to be based either on a natural law of interstate relations or upon the consent of the nations involved. As we will see, both of these assumptions flow from a horizontal understanding of international law. While the horizontal model has never managed completely to extinguish its competitors, in certain time periods, and with certain scholars, it has supplied the dominant paradigm.⁸¹

1. *Party Structure*

International law, as the name suggests, has often been assumed to regulate only the relations between states. It was not always this way, for before Bentham coined the phrase “international law,” the phrase used was “law of nations,” which included disputes between individuals as well as disputes between states.⁸² But Bentham’s phrase suggested a narrowed scope for the discipline. Individual human beings were thought by some scholars not to count as proper subjects of international law.⁸³ Where an individual was injured, any international law claims on behalf of the injured individual had to be brought by the nation of which the victim was a citizen.⁸⁴ If that state declined to pursue the matter, or if the victim were stateless, then no international remedy would be found. Where that state did pursue the matter, it had the authority to settle the claim as it chose, even to bargain the claim away for unrelated foreign policy concessions.⁸⁵ And in cases in which where damages *were* paid, they were paid to the state (which typically, although not necessarily, forwarded the proceeds to the victim).⁸⁶ The entire focus was on the rights and remedies of states.⁸⁷

81. See *infra* text accompanying note 98.

82. See generally Janis, *Jeremy Bentham and the Fashioning of “International Law,”* 78 AM. J. INT’L L. 405 (1984).

83. See, e.g., P. JESSUP, A MODERN LAW OF NATIONS 2, 8, 15 (1952) (traditional international law applicable only to states); L. OPPENHEIM, 1 INTERNATIONAL LAW 4, 18 (1905); Butler, *The Individual and International Relations*, in THE COMMUNITY OF STATES (J. Marall ed. 1982).

84. RESTATEMENT, *supra* note 16, pt. VII introductory note.

85. See W. FRIEDMANN, *supra* note 24, at 238 (states need discretion to settle claims); P. JESSUP, *supra* note 83, at 9, 97-98 (states have no duty to prosecute individual claims).

86. Trimble, *supra* note 70, at 331.

87. Even today, individuals have virtually no right to appear before most international tribunals such as the World Court. I.C.J. STAT., art. 34(1); Borchard, *The Access of Individuals to American Courts*, 24 AM. J. INT’L L. 359 (1930).

If international law consists exclusively of disputes between states, then it seems quite a different sort of creature from domestic law, which governs disputes between individuals. How much these differences matter is a topic of some debate. The argument over whether international law is comparable to domestic law, despite the differences between state and individual actors, can be phrased in terms of what has come to be known as the "domestic analogy."⁸⁸ Under the domestic analogy, international law is said to bind state actors in the same way that domestic norms bind individual actors. The evident difficulty with the domestic analogy is that no world government exists to enforce international norms the way that domestic governments enforce domestic norms.⁸⁹ "Those who see international law as a unique kind of law, having a 'specific character,' tend to speak negatively of the domestic analogy . . ."⁹⁰ For those rejecting the domestic analogy, the consequence is that international and domestic law seem wholly separate and dissimilar.

2. *Source of Norms*

From the horizontal perspective, the difference in party structure between domestic and international disputes gives rise, in addition, to a difference in the source of norms for domestic and international disputes. International norms are horizontal as well; they must be appropriate for regulation of relationships between equals. But given that no world government exists, what could be the source of these norms? An authoritative, centralized institution creates and enforces domestic norms and gives them secure legal status. In contrast, no authoritative source or enforcer of international norms exists at present. This second distinguishing feature of international law arguably makes it unsuited for domestic judicial resolution.

Some who are captive to the more traditional view of international law have concluded that international norms cannot count as "law" because there is no centralized enforcement mechanism.⁹¹ Even one who stops short of this extreme positivist conclusion is entitled to entertain some doubts about whether and why international norms are authoritative. And the explanation clearly cannot be as straightforward as in the domestic context, where the centralized mechanisms of government seem to provide a relatively simple response.

Originally, the solution was thought to lie in natural law.⁹² There was a natural law of interstate relations somewhat comparable to the natural law

88. See generally H. SUGANAMI, *THE DOMESTIC ANALOGY AND WORLD ORDER PROPOSALS* (1989); Dickinson, *The Analogy Between Natural Persons and International Persons in the Law of Nations*, 26 *YALE L.J.* 564, 567 (1916).

89. See Dickinson, *supra* note 88, at 574-75 (discussing Wolff and Vattel).

90. H. SUGANAMI, *supra* note 88, at 169.

91. See, e.g., J. AUSTIN, *PROVINCE OF JURISPRUDENCE DETERMINED* 201 (1954).

92. W. FRIEDMANN, *supra* note 24, at 75-77 (describing movement from natural law to consent); Sprout, *supra* note 29, at 280.

governing interpersonal relations. This explanation worked well enough at a time when the international community was fairly homogeneous, composed of western, Christian, "civilized" nations.⁹³ As generalized normative agreement, which had been the glue of natural law theory, began to dissolve, the international community began to search for a new theory which could provide a source for international norms. Consent seemed the best available alternative because in the absence of a centralized enforcement mechanism, law cannot be imposed on states against their wishes. Consent can be expressed either through treaties or through the acquiescence reflected in customary international law.⁹⁴ True, the consent principle itself reflects a "natural law" principle, *pacta sunt servanda*,⁹⁵ but as this is a very thin sort of natural law to have to rely on, consent seems to be a relatively unproblematic basis. Treaties, especially, seemed for this reason to have fairly secure status. Customary international law is founded upon a less explicit form of consent, namely state practice (including acquiescence in the practice of other states). Today, consent remains the primary basis, albeit not the only one, of international law.⁹⁶

The fairly clear division between domestic and international norms under the traditional horizontal model supports an approach to international law known as "dualism." The dispute between the so-called "monists" and "dualists" concerns whether or not international law is part of domestic law.⁹⁷ While monists do not separate international law from domestic law, dualists recognize them as two distinct categories. The dualist position is consistent with the horizontal tradition in international law, for the separation of the two bodies of law stems from a traditional assumption that international law is law between states, involving distinctive entities and distinctive authoritative sources. Moreover, a dualist is less favorably disposed toward domestic adjudication of international disputes, for the dualist sees international law as clearly separable from the domestic law that local courts are created to enforce. Myres McDougal explains the difference in a passage worth quoting at length:

The dualist or pluralist theories, still perhaps the most popular of all theories, while not explicitly denying that international law is law and commonly conceding a wide scope to inclusive decision, exhibit as their most distinctive characteristic, an attempt to rigidify the fluid processes of world power interactions into two absolutely distinct and separate systems or public orders, the one of international law and the

93. H. STEINER & D. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* 372 (3d ed. 1986).

94. M. JANIS, *supra* note 24, at 35 (describing use of custom); Note, *Custom and General Principles as Sources of International Law in American Federal Courts*, 82 COLUM. L. REV. 751 (1982).

95. W. FRIEDMANN, *supra* note 24, at 85 (need for already existing rule that promises must be kept).

96. Some norms are *jus cogens*, or nonderogable, so that the consent of states is irrelevant. See generally Meron, *A Hierarchy of Human Rights*, 80 AM. J. INT'L L. 1, 13-14 (1986).

97. O'Connell, *The Relationship Between International Law and Municipal Law*, 48 GEO. L.J. 431, 432, 436 (1960). Oppenheim, for instance, believed that the two sets of laws were separate because international law regulated relations between sovereigns while domestic law was the law imposed by a sovereign on individuals. L. OPPENHEIM, 1 *INTERNATIONAL LAW* 20-21 (4th ed. 1920).

other of national law. Each system is, thus, alleged to have its own distinguishable subjects, distinguishable structures and processes of authority, and distinguishable substantive content. The subjects of international law are said to be states only (with occasional reluctant, contingent admission of international governmental organizations), while those of national law embrace individuals and the whole host of private associations. The sources of international law are found only in the customary behavior of states and in agreements between them, while the sources of national law are located in the state's structure of centralized and specialized institutions. The substantive content of international law is said to be rules regulating relations between states, while that of national law is that of rules regulating the interrelations of individuals and private associations.⁹⁸

B. *Vertical International Law*

The horizontal approach has been well established for a long time. It is not, however, the only way to understand international law. Historically, some authors have taken a less state-centric view, insisting that international law governs more than just the relations between states.⁹⁹ In recent years this position has gained popularity.¹⁰⁰ The phrase "international" has been characterized as misleading because it includes only disputes between states.¹⁰¹ As a substitute, authors such as McDougal, Jessup, and Friedmann suggest the term "transnational" law, which includes relations between individuals in different countries as well as relations between a state and the citizen of a foreign state. The new *Restatement of Foreign Relations Law* recognizes that international law grants rights to individuals;¹⁰² indeed, the emerging conventional wisdom seems to be that the old state-centric focus is too narrow for today's international problems. International law deals not just with "horizontal" relations between states, but also with "vertical" relations between states and people.

The new emphasis on vertical relations between states and people does not deny the relevance of horizontal relations between states. While the horizontal model seemed to attempt to exclude non-state actors, the vertical model does not, correspondingly, exclude all horizontal state/state relations from internation-

98. McDougal, *The Impact of International Law Upon National Law: A Policy-Oriented Perspective*, 4 S.D. L. REV. 25, 28-29 (1959).

99. See, e.g., W. FRIEDMANN, *supra* note 24, at 5, pt. IV (new subjects of international law); P. JESSUP, *supra* note 83, at 2 (modern international law should include rights of individuals as well as states); D'Amato, *Judge Bork's Concept of the Law of Nations Is Seriously Mistaken*, 79 AM. J. INT'L L. 92 (1985); Friedmann, *General Course in Public International Law*, 127 RECUEIL DES COURS 39, 91-109 (1970); McDougal, *International Law, Power and Policy: A Contemporary Conception*, 82 RECUEIL DES COURS 131 (1953); see also P. CORBETT, *THE GROWTH OF WORLD LAW* 184 (1971); Janis, *Individuals as Subjects of International Law*, 17 CORNELL INT'L L.J. 61 (1984).

100. See Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26, 26-27 (1952); Janis, *supra* note 82, at 409.

101. P. JESSUP, *TRANSNATIONAL LAW* 1 (1956).

102. See RESTATEMENT, *supra* note 16, pt. II, introductory note pt. VII, introductory note, § 1 comment a, § 703(3), § 906.

al law. The vertical approach is really an expansion of the horizontal model, for it recognizes that vertical as well as horizontal relations are important.¹⁰³ When it is brought to bear on domestic litigation of international issues, however, it does elevate vertical elements of litigation over horizontal elements in one important respect. As I will argue below,¹⁰⁴ it is the vertical elements of a case that make it suitable for domestic judicial resolution. The American notion of judicial function responds more favorably to issues of protecting individuals from state power than to issues of proper political relations between states. Increasing recognition that law is "transnational" as well as "international" thus results in a greater role for American courts.

What are the alternative normative sources for this new "transnational" law? Having argued elsewhere at some length about the features of this vertical model, I will only provide an outline here.¹⁰⁵ Vertical relations between a state and an individual traditionally have been the domain of political philosophy. Political philosophy addresses questions of the state's right to coerce individuals, the individual's obligation to obey the state, the propriety of civil disobedience, the retained individual or human rights that citizens possess against governments, and so forth. A vertical conception of international law emphasizes that transnational relationships implicate questions of state/individual legitimacy, as well as horizontal questions of law established between states by their consent. There are limits on what states may properly do to individuals, whether the individuals are citizens or noncitizens. For terminological purposes we might distinguish between purely vertical relationships, such as those between the state and its own citizens acting within its territory, and "diagonal" relations between the state and noncitizens or those acting outside state territory.¹⁰⁶ The distinction, however, is purely terminological. The point of a vertical analysis of international law is that state/individual relationships raise issues of the legitimacy of coercion even when they cross jurisdictional lines. The mere fact that diagonal relations cross state borders

103. L. BRILMAYER, *supra* note 10, at 47.

To be more precise, we might distinguish between vertical elements (or issues) of a case, vertical cases, and the vertical model of international adjudication. Vertical cases are ones in which the vertical elements predominate. Vertical elements are the issues in the case that pit the rights of individuals against the power of the state. The vertical model of international adjudication argued for here holds that vertical cases belong in American courts. All of these uses might be contrasted with the "vertical thesis," set out in *Justifying International Acts*. L. BRILMAYER, *supra* note 10. The vertical thesis is a normative proposition holding that international relations raise vertical issues that should be dealt with according to the dictates of domestic political theory.

104. See *infra* section III.B and text accompanying note 113.

105. The vertical approach to international law is set out in greater depth in L. BRILMAYER, *supra* note 10. Other authors use the terms "vertical" and "horizontal" in a different sense. Falk refers to international law as horizontal because there is no centralized enforcement mechanism. Falk, *International Jurisdiction: Horizontal and Vertical Conceptions of Legal Order*, 32 TEMP. L.Q. 295, 295-96 (1959); see also W. FRIEDMANN, *supra* note 24, at vii. Under this terminology, international law is vertical only if there are international dispute resolution processes available. Under the terminology used here, there is a vertical relationship between a state and an individual, even where no international enforcement mechanism exists.

106. L. BRILMAYER, *supra* note 10, at 84.

does not mean that they are automatically exempt from the norms of political propriety that would apply to purely vertical relationships.

1. *Parties*

Under the horizontal view, the proper subjects of international law are the states themselves. Individuals do not have rights; if they are protected, it is only because states have chosen to act on their behalf. Under a vertical perspective, both states and individuals have rights. In addition to the horizontal rights that states have against one another, states have rights against individuals so long as they are governing in politically legitimate ways. In many circumstances, individuals have duties to support particular governments, and the governments have correlative rights to enforce those duties.¹⁰⁷ In this respect, the vertical perspective is different from cosmopolitan theories of international relations, which assume that individuals are the sole important international actors, and that nation-states are obsolete.¹⁰⁸ Individuals, however, also have rights. They have rights not to be treated unfairly by states, either by denial of their civil rights and liberties or by the imposition of state authority beyond the bounds of legitimate sovereignty.

2. *Sources of Norms*

The horizontal view envisions international law as based upon an ethic of the proper treatment of coequal actors. The potential sources of norms are either a natural law of interstate relations or the consent of the states themselves. Unlike the horizontal view, however, a vertical view does not depend upon the "domestic analogy" between individual/individual ethics and state/state relations. The relevant comparison is, instead, between two vertical relationships, one involving a state regulating an entirely local dispute and the other involving a diagonal relationship in which a state coerces a noncitizen or a citizen acting outside the state's borders. Here, the fact that individuals are unlike states is of no importance, for a vertical approach does not rely on that analogy. Nor does it matter that there is no centralized enforcement mechanism to arbitrate diagonal disputes, for there is no enforcement mechanism in purely domestic vertical disputes, either.

Under a vertical theory, state consent is not the sole source of international norms. Governments are limited by basic principles of political legitimacy

107. It is, of course, not unusual for group entities to possess legal rights. Two obvious examples are corporations and labor unions. Indeed, we can model the relationship of such entities in horizontal/vertical terms. A labor union can deal with another labor union; this would be a horizontal relationship. If it deals with one of its members, the relationship is vertical. Note that a labor union can exercise legal rights that persons also have, as when it enters into a contract for the purchase of a building. Similarly, a state can engage in traditional private activities, such as commercial dealings.

108. L. BRILMAYER, *supra* note 10, at 30-31.

whether they consent to these limits or not, and regardless of the existence or nonexistence of centralized enforcement mechanisms. States, of course, do sometimes violate norms of political fairness; in this respect, domestic and international political activity are identical. But such disregard does not undercut the authoritative status of these limits. An extreme positivist might still claim that norms cannot be “law” without a centralized enforcement mechanism—although under this theory, one is entitled to ask why domestic vertical norms such as constitutional law, limiting the state, can be “law” if the only enforcer is the state itself. For our purposes, at any rate, the dispute over the use of the word “law” is primarily a semantic one. Even if they are not “law,” international limits possess normative force.

Some may find the argument that international law limits state conduct against individuals somewhat mysterious. Where do these limiting norms come from, and why should they be considered authoritative? Calling them “political theory” doesn’t really do much to address these concerns. But skeptics should think back to the comparison between domestic and international issues of individual/state relations. In the domestic context, few are skeptical about the existence of limitations on state authority. Assassination of one’s political opponents is out of bounds, as are torture and suppression of religious freedoms. There is nothing metaphysically suspect about recognizing comparable standards under international law. International political norms should have the same stature as domestic political norms.

These norms form a floor below which international behavior should not fall. There may be additional norms, however, which raise the standard of proper treatment above this floor. States may undertake by treaty to provide individuals with greater rights than the essential minimum. The resulting norms have both vertical and horizontal aspects because they regulate the relations between states and individuals as well as the relations between states. As with norms based directly on political fairness, there may be no centralized enforcement mechanism to back them up. Once again, however, the appropriate response to this positivist objection is that in purely domestic cases, there is no guaranteed enforcement mechanism to protect individuals from states.

The vertical perspective thus influences both the party structure of the dispute and its normative underpinnings. The issues of party structure and normative source, moreover, are linked. The reason lies in the general “standing” principle that (in American courts, at least) the party asserting a claim must be the rightsholder.¹⁰⁹ Because (under the vertical view) there are norms protecting the rights of individuals, individuals can be rightsholders and can initiate judicial action. A view of international law that limits normative inquiry to horizontal relations between states, in contrast, recognizes only cases brought by one state against another. The argument that international law contains

109. See *infra* discussion in Part III.A.

vertical as well as horizontal norms thus opens our courts to cases brought by individuals against states. Vertical norms make possible the vertical party structure.

Vertical and horizontal norms are both important elements of international law. The two approaches to international law are complementary, not inconsistent. Traditional analysis has focused more on international law's horizontal aspects, sometimes suggesting that this is all that there is. Vertical analysis insists that international law must be understood more broadly, as encompassing both sorts of issues. A particular international dispute may implicate both issues of state/state relations and issues of individual/state relations. As we will see below, our courts have responded to the presence of vertical issues in certain international cases with a greater willingness to entertain them. The exclusive horizontal focus of some international scholars has been implicitly rejected by our courts.¹¹⁰

III. THE INTERNATIONAL "PASSIVE VIRTUES"

The cases described earlier as involving adjudication of international law claims in American courts all have strong vertical elements. The three examples of customary law given were extraterritorial jurisdiction, expropriation, and human rights. Extraterritorial jurisdiction cases pose vertical questions because they involve one state's attempt to apply its law to an individual who either is not a citizen or whose activities occurred elsewhere. These cases raise issues of a given state's right to regulate a particular individual, and the opinions use language that is strikingly similar to the language of political philosophy, language concerning the importance of consent and the bonds and privileges of citizenship.¹¹¹ Expropriation and human rights cases raise vertical issues for the same reason. Both involve a state's attempt to deprive persons of individual interests—property interests, in the former case, and liberty interests not to be tortured or killed in the latter. It is something of a distortion to try to fit these cases into a horizontal mold, because it is clear in all of these cases

110. One argument that would reject a vertical analysis relies on the fact that such an analysis would draw into American courts disputes with little or no factual connection to the United States. A human rights violation in, say, Argentina might be litigated in the United States simply because the defendant was found and served with process there. But note that there must, of course, be personal jurisdiction over the defendant before the suit can proceed; thus, some connection between the defendant and the United States, at least, is assured. This problem is not different from objections to so-called "general jurisdiction" in traditional private cases, where a cause of action bearing no relationship to the forum is litigated there because the forum is the defendant's residence or the place where the defendant was served with process. In appropriate circumstances, and where an alternative forum is available, a forum *non conveniens* dismissal might be appropriate.

111. See *Milliken v. Meyer*, 311 U.S. 457 (1940) (citizenship); *Blackmer v. United States*, 284 U.S. 421 (1932) (citizenship); *Cook v. Tait*, 265 U.S. 47, 56 (1924) (same); *United States v. Bowman*, 260 U.S. 94 (1922); *United States v. Bennett*, 232 U.S. 299, 307 (1914) (benefits theory); *Luria v. United States*, 231 U.S. 9, 22 (1913) (same). See generally Brillmayer, *Jurisdictional Due Process and Political Theory*, 39 FLA. L. REV. 293 (1987).

that the real harm is to an individual, not to the individual's state of citizenship (as the horizontal model would imply).

The fourth example involves the enforcement of treaties. Treaties give rise to vertical claims for a somewhat more complicated reason. While a treaty is an agreement between two states, some treaties vest rights in individuals directly and still others are implemented by domestic legislation which vests rights in individuals. These individual rights give rise to a vertical claim against the state breaching the treaty. We will see, in fact, when we return to the question of self-executing treaties, that treaties are enforceable in domestic courts only when they give rights to individuals—that is, when they create vertical claims by an individual against a state.¹¹²

The types of issues that courts are least likely to be willing to adjudicate are horizontal. We mentioned earlier that our courts have refused to adjudicate issues of recognition, territorial sovereignty, and international legality of hostilities. Such “nonjusticiable” disputes involve relations between states. Recognition is a perfect example; it is a paradigmatic case of state *A* versus state *B*, not a case of a state against an individual. Territorial sovereignty is also a case of inter-state relations, as when states make mutually inconsistent claims to land. Legality of international hostilities seems more complicated. A challenge might be brought by an individual who appears to be asserting a personal right, such as a right to refuse to serve in the military. But there is no international right not to be conscripted.¹¹³ The individual is really asserting the rights of the state which is suffering illegal aggression.

International disputes can have both horizontal and vertical elements, and indeed, they often do. For instance, violation of a treaty protecting refugees might both offend other signatories to the treaty and deny international rights to a specific individual. In such mixed cases, it is the vertical elements that make a claim judicially cognizable in American courts. A case is not automatically nonjusticiable simply because state interests are at stake. We will consider, in a moment, situations where there is a vertical element which is strongly outweighed by horizontal elements. These cases can trigger the political question doctrine, because the center of gravity is horizontal even though there are some vertical elements. The first question in adjudicating mixed cases must be whether a vertical element is present in the case. The second must be whether that vertical element is strongly outweighed by horizontal ones.

Assume, for example, that the United States takes offensive military action that is alleged to be in violation of international law. In the first case, the other

112. See *infra* text accompanying notes 123-24.

113. There are some older cases in which the Supreme Court has dealt with questions of the existence and consequences of a state of war. See, e.g., *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814), cited in *H. KOH*, *supra* note 1, at 81-82; *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1 (1801); *Bas v. Tigny*, 4 U.S. (4 Dall.) 37 (1800). These cases did not deal with the legitimacy of war under international law, but rather with rights of salvage. They demonstrate how a traditional vertical case can implicate international and foreign policy issues.

nation seeks to sue the U.S. in American courts, alleging that the military action is illegal. This is a purely horizontal claim, and would be disallowed. In the second case, suit is brought by an individual citizen of the invaded state, alleging that the invasion is illegal. This is still a horizontal claim, since the basis of the cause of action is the interstate norms prohibiting aggression.¹¹⁴ In the third case, suit is brought by an individual citizen who is alleging a violation of the rules prohibiting mistreatment of civilians or the waging of chemical warfare. Because these rules are oriented toward the protection of individuals, a vertical claim has been alleged.

What explains the fact that cases with predominately vertical elements seem to be routinely adjudicated in American courts while predominately horizontal cases are not? There are two parts to this question: How? and Why? The “how” is a question about mechanics, which asks, How are cases lacking vertical elements screened out? It provokes an examination of the doctrines that prevent litigation of predominately horizontal international claims. The “why” is a foundational question which asks, Why should there be systematic impediments to litigation of horizontal claims? It motivates a dissection of the philosophy underlying these doctrines.

In spelling out the how and the why of the ways that our courts systematically distinguish between horizontal and vertical international norms, the strong similarities between judicial limitations in the international context and in the context of judicial review of domestic constitutionality become apparent. The same doctrines limit access to the courts—standing and political question, in particular—and the same judicial philosophy accounts for the application of those doctrines. We are spelling out below, in effect, a catalog of international “passive virtues.”¹¹⁵

114. These examples illustrate how the precise shape of legal rules influence whether an issue is horizontal or vertical. If the laws prohibiting aggression are for the protection of states, the issue is horizontal; if they are designed for the protection of individuals, the issue is vertical. In *Justifying International Acts*, I attempt to show how many horizontal principles can be recast as vertical ones. See L. BRILMAYER, *supra* note 10, pt. II. There is, for example, a vertical way of explaining norms prohibiting state aggression. See *id.* ch. 5. The point is primarily an ethical one, however; it says that there are alternative ethical bases for international law. It remains the case, however, that an international law norm that we now have can best be characterized as horizontal even though an alternative hypothetical vertical justification could theoretically be found (or vice versa). Thus, while many norms could in theory be explained in either horizontal or vertical terms, in practice they are best described as one or the other.

Another point demonstrated by these examples is the similarity between the vertical/horizontal distinction and domestic standing analysis. One way of explaining the defect in the second example is that individual citizens are not within the “zone of interests” of norms prohibiting aggression, that individuals are not the true rightsholders. For a discussion of the relevance of the standing doctrine, see *infra* section III.A.

115. Bickel used the term “passive virtues” to connote a fair amount of discretion to choose whether to hear cases. By using his term, I do not mean to approve a standardless power to “duck issues” that are politically troublesome. See generally Gunther, *The Subtle Vices of the “Passive Virtues”—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964). To the maximum extent possible, I would seek to limit judicial discretion on jurisdictional threshold issues.

A. *Legal Doctrine: The "How?"*

The first avoidance device is the standing doctrine. The standing doctrine, arising out of the Article III case or controversy limitation,¹¹⁶ requires that a plaintiff be an individual who has suffered a legal injury and who can be compensated through judicial action. The third-party standing doctrine limits the extent to which a plaintiff may raise the rights of third parties, even when the plaintiff herself has suffered a legally cognizable injury.¹¹⁷

The reason that horizontal conceptions of international law typically structure cases in such a way that they fail the standing requirement is that, under the horizontal view, rights belong to states and not to individuals. This is true even when an individual has suffered in some way from the violation.¹¹⁸ Two consequences follow from this position. First, an individual coming into court requesting relief is really asserting the rights of a third party, rather than personal rights, because only a state can be a legal rightsholder. Second, the court cannot grant effective relief. The appropriate relief (under a horizontal view) would be to the state, because the state is the rightsholder. However, if the suit is initiated by an individual, no remedy granted to the individual would redress what is, supposedly, the real international wrong. In order to satisfy standing requirements, the rightsholder must be the individual initiating litigation.¹¹⁹

The vertical model, in contrast, recognizes individuals as rightsholders. Under a vertical model, therefore, there is no categorical impediment to international claims brought by individuals. There is only a question of whether some particular individual has a claim in some particular case. The standing doctrine limits adjudication to assertion of the individual's own rights. Persons instituting litigation are unable to use litigation to present far-reaching foreign policy issues touching on horizontal relations between states. The recognition that some international norms are vertical makes adjudication of some international cases feasible, but limits adjudication so that the more political horizontal issues are not addressed.

Two additional limits on international adjudication are closely linked to the requirement of standing. The first is the controversial requirement that there

116. Article III extends the judicial power of the United States to certain types of "cases" and "controversies." U.S. CONST. art. III. See generally Brillmayer, *The Jurisprudence of Article III: Perspectives on the Case or Controversy Requirement*, 93 HARV. L. REV. 297 (1979).

117. Brillmayer, *supra* note 116.

118. Compare Henkin's claim that our courts should not entertain expropriation cases because even if Castro had violated international law, this should only give rights to the United States and not to private claimants. L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 223-24 (1972).

119. One might ask whether the standing doctrine might not be satisfied where the other state itself brought suit. Even though standing would exist, the case would be a horizontal one of state/state relations. While in theory such examples would demonstrate a difference between the vertical model and the standing requirement, such cases rarely, if ever, arise. While one state might file a private law commercial claim in another state's courts, it would be unlikely to submit important foreign policy issues to the tribunals of its adversary.

be a private cause of action. The second is the requirement that treaties be either self-executing or legislatively enforced. The private cause of action requirement is a problem under the horizontal view of international law because an individual cannot be a rightsholder but can, at most, act as a sort of private attorney general to enforce principles of international law that bestow rights on states. For the same reason that the individual plaintiff has no standing, he or she has no private cause of action. This reasoning is at the bottom of Judge Bork's concurring opinion in the *Tel-Oren* case.¹²⁰ Judge Bork conceded that the federal courts might have jurisdiction to entertain cases based upon violations of the law of nations (as the jurisdictional statute provided). However, he denied that either the jurisdictional statute by itself or the mere existence of a violation of the law of nations in and of itself provided the plaintiff with a private cause of action.

Judge Bork's reasoning about private causes of action in *Tel-Oren* has been controversial, to say the least.¹²¹ The reasoning is somewhat idiosyncratic, and Anthony D'Amato has explained its problems in a way that highlights the difference between horizontal and vertical perspectives.¹²² Judge Bork, argues D'Amato, assumes that only states can be rightsholders under international law. If this is the case, D'Amato concedes, then individuals bringing claims under international law have no cause of action and the cases they bring must be dismissed. But this view of international law is overly narrow and outdated. When individuals bring cognizable claims under international law, the private right of action requirement is not an impediment to suit. And, concludes D'Amato, it should not simply be presumed *as a definitional matter* that international law bestows no rights on individuals. As D'Amato's reasoning demonstrates, the private cause of action theory poses no impediment to claims with predominately vertical elements. It adds little or nothing of importance to the analysis.

Under the requirement of self-executing treaties, a treaty that is not "self-executing" cannot be enforced by private parties unless it has been implemented by statute.¹²³ The mere fact that a treaty exists, and that if adhered to would work to the benefit of the plaintiff, does not necessarily give the plaintiff a right to prevail. The reason is that

[a] treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are party to it . . . [W]ith all this the judicial courts have nothing to do and can give no redress. But a treaty may also

120. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984).

121. *See, e.g.*, Note, 33 STAN. L. REV. 353 (1981).

122. D'Amato, *supra* note 99, at 98-104.

123. *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243 (1984) (Warsaw Convention self-executing); *Cook v. United States*, 288 U.S. 102 (1933) (liquor treaty self-executing); *Whitney v. Robertson*, 124 U.S. 190 (1888) (non-self-executing treaties require legislation for domestic enforcement).

contain provisions which confer certain rights upon the citizens or subjects of one of the nations . . . which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country The Constitution of the United States places such provisions as these in the same category as other laws of Congress.¹²⁴

The self-executing treaty requirement is related to the traditional horizontal assumption that, under international law, norms are typically for the benefit of states and not for the benefit of individuals directly. In order to establish an individual personal right to sue, the individual must be made, in effect, a "third-party beneficiary" of the treaty. The treaty must either have been designed to vest rights in individuals directly, without further domestic actions (i.e., it must be self-executing), or there must be some domestic legislation which creates individual rights, upon which the plaintiff can rely.

One similarity between standing (and related) doctrines in the domestic and the international contexts is that in both areas, there is a close connection between standing—a jurisdictional issue—and the legal merits of the case. To bar a case on standing grounds is, realistically, to deny the plaintiff a legal right, so that resolving the jurisdictional question in either context requires a close look at the merits. Assume, for instance, that an individual challenges a state's military actions as violations of the prohibition on use of chemical weapons in warfare. Whether this is domestically cognizable depends on whether the proscription on chemical warfare is vertical, at least in part, as opposed to purely horizontal. A court must decide whether the prohibition was designed to be invoked by individuals, rather than just by states. Was it?

To decide this question, one must ask about the goals and purposes of the prohibition in order to determine who has been granted legal rights. My own sense in this case would be that individual rights are at stake, so that the case is vertical and should be considered domestically justiciable (although we will consider in a moment the impact of the political question doctrine). Whether this sense is correct, the point here is that the threshold issue turns on close attention to the norms allegedly in question. While this is true, this does not mean that the question whether a vertical issue has been raised is identical to the merits. Dismissal on standing grounds would mean only that the norm in question does not create individual rights, leaving open the question whether the rights of other states have been infringed (a horizontal question). Just the same, it should not be pretended that it is possible to address the threshold claim without examining the content and the purposes of international norms.

The standing, private cause of action, and self-executing treaty requirements police the party structure of the dispute. Under a purely horizontal model, they exclude litigation of international claims because individuals are assumed not

124. *Head Money Cases*, 112 U.S. 580, 598 (1884).

to be rightsholders. Another doctrine that is encountered in international adjudication, the political question doctrine, turns less on party structure than on the nature of particular legal issues. There is some dispute over whether a political question doctrine really exists, especially as applied to international cases.¹²⁵ It is possible that when the political question doctrine is understood in a narrow (or, perhaps, some would say, precise) way that few, if any, cases can be found that truly apply it. Here, however, we can use the phrase "political question" in a somewhat broader sense, and the question is how it differentiates between horizontal and vertical elements in cases.

The essence of the political question doctrine is that an issue may have such large political ramifications that it would be inappropriate for it to be resolved in a judicial (as opposed to a legislative or executive) forum.¹²⁶ Political question cases often involve private rights; for if no private rights were involved, then the case could be barred under the standing doctrine and reliance on political question reasoning would be unnecessary. Some vertical elements, in other words, typically exist. The problem in political question cases, however, is that there are also strong horizontal elements. At a certain point, the horizontal elements of the case completely overshadow the vertical elements. The political question doctrine then holds that the case should not be resolved by the courts, which would be intruding into the forbidden realm of foreign policymaking. Reconsider our earlier hypothetical example about U.S. aggression. Assume that certain weapons were permissible only in a valid defensive war but not in a war of aggression. Deciding whether the individual would have a claim against the U.S. would then require a decision whether the war itself was legal under international law. A threshold issue would be whether the center of gravity of the case was the vertical issue or the horizontal one. How deeply would the court have to get into horizontal issues in order to resolve the vertical ones?

In comparison to the avoidance devices already discussed, the political question doctrine seems vaguer and requires a greater exercise of discretion by the judge applying it. While the proper individual elements of a case may be present, the case can be just "too political" for an appointed judge to handle. The political question doctrine requires ascertaining the center of gravity of the dispute, for it does not ask about the mere existence of an individual interest, but about how that individual interest fares against the international political interests of contending states. Such cases are, and should be, the most difficult ones to characterize as belonging or not belonging in American courts.

What these doctrines show is that to the extent a case is conceived in vertical terms, it is more likely to be considered for domestic adjudication. If

125. L. HENKIN, *supra* note 76, at 213; Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976); Tigar, *supra* note 78, at 1135.

126. Compare Bickel's observation that the political question doctrine is appropriate when consequences are simply too "momentous." A. BICKEL, *supra* note 12, at 184.

the standing requirement has been met, if the plaintiff has a private right of action, and if the treaty is either self-executing or executed by statute, then the case has vertical elements. The reason is that the case is now properly a case between a state and an individual, as opposed to merely a horizontal case between states. When courts impose requirements of standing, cause of action, or self-executing treaties, they are in essence demanding that vertical elements be identified. Cases between states do not belong in our courts; cases between a state and an individual typically do.

The next question to ask is, Why should this be the case? What motivates these doctrines? Why should courts limit themselves to disputes between a state and an individual? The answers academics have given about the proper role of courts in resolving foreign policy questions suggest a response. Examining the reasons that have been given to support judicial restraint, we see that they apply far more forcefully to horizontal than to vertical disputes.

B. *Jurisprudential Assumptions: The "Why?"*

Under a horizontal view, it seems fairly natural to deflect international issues to international fora. Since international law cases are very different from domestic cases, a forum set up primarily to resolve domestic cases is not likely to be well suited to international ones. International law disputes are distinctive because of their party structure and because of the source of international norms. The different source of norms is particularly important in determining the suitability of domestic courts because there seems to be a genuine issue whether domestic courts have either the right or the obligation to further norms that lack clear authoritative status.

The vertical view does not differentiate so sharply between domestic disputes and disputes with international overtones. Human rights, expropriation, and jurisdiction cases are not strikingly different from domestic cases involving issues of cruel and unusual punishment, takings, or due process. Cases involving self-executing treaties involve, essentially, the application of statutes. In terms of the party structure, both domestic and international cases involve disputes between a state and an individual. In terms of the source of the norms, both kinds of cases can raise questions of political fairness and the proper treatment of individuals. A court that feels comfortable adjudicating domestic cases involving individual political rights is unlikely to feel completely at sea when asked to adjudicate the vertical elements of an international dispute. It is not surprising, then, that the international disputes that courts have been most willing to address those with strong vertical overtones. Furthermore, a judge with deep feelings about domestic political norms is likely to be strongly motivated to take jurisdiction of international cases raising similar issues of political fairness.

Vertical international cases seem less like "high politics" than horizontal international cases and more like a matter of law. Horizontal approaches to international law stress the role of consent in norm formation; almost any principle can become law if adopted by the states in question. Norm formation is, for this reason, an essentially standardless process, for there are few if any limits on the law that can be created by agreement.¹²⁷ This anarchical society is a world of politics, not of law.¹²⁸ Vertical approaches to norm formation, in contrast, do not leave states free to do (or agree to) anything they want. Torture is not wrong simply because states have agreed that it is wrong. Torture is wrong as an ethical matter, regardless of state agreement. There is a minimum standard of decency—a floor—beneath which states may not go. In this more constrained world, there are prior "oughts." It is a world not only of state interests, diplomacy, and foreign policy, but of limits on what states are entitled to do. States may grant individuals rights by agreement, but individuals also have rights against states as a matter of political entitlement.

Judges may be reluctant to involve themselves actively in the making of foreign policy, on the grounds that foreign policy is best left to the political branches. While this is understandable, the resolution of issues of international law does not necessarily entail the formulation of foreign policy. When international adjudication focuses on the protection of the rights of individuals, as opposed to the assessment of the claims that states have against one another, judges should be less reluctant to intervene for two reasons. First, it is a traditional judicial role to protect individual rights, and second, the focus on the political rights of the litigants provides a rationale for a court's adherence to international law, even when international law opposes domestic policies.

1. *The Traditional Judicial Role and Individual Rights*

Courts should be less reluctant to adjudicate vertical international cases because these cases are more consistent with traditional conceptions of judicial protection of individual rights. A comparison of the role of the courts in international adjudication with the role of courts engaged in constitutional adjudication illustrates this point. In both contexts, courts are open to criticism as they move beyond the authoritative law developed by elected representatives, relying instead on judicially recognized norms that raise serious questions of separation of powers. Why, ask the skeptics, should the courts, rather than the legislature and executive, have the final say on whether a particular statute is consistent with the Constitution?¹²⁹ Similarly, why should the courts, rather than the legislature or executive, have the final say on international law?

127. But consider the concept of *jus cogens* norms. Some nonderogable norms have a large vertical component. Lobel, *supra* note 31, at 1138.

128. See generally H. BULL, *THE ANARCHICAL SOCIETY* (1977).

129. This was Bickel's point. A. BICKEL, *supra* note 12, at 3.

One traditional answer cites the court's role as protector of individual rights. Courts, under this view, are the only institution in government set up to be responsive to the complaints of individuals, for an individual can institute a court action and compel a defendant to respond. Elected representatives can choose to ignore, at relatively little cost, a politically unpopular complaint. Courts, in contrast, must entertain all plausibly legitimate claims, even those brought by powerless individuals with idiosyncratic views. The litigant may not prevail on the merits, but will at least get a hearing. Furthermore, courts, unlike the other branches of our government, are expected to offer principled explanations for their decisions. Certainly, we should not exaggerate this point, painting an oversimplified and unduly rosy picture of the judiciary. Nevertheless, it seems clear that our courts are far better situated to hear individual grievances than Congress, state legislatures, or the state or federal executives.¹³⁰

This is the domestic constitutional argument. A similar one can be made in the international context. While it is sometimes said that international law falls outside the scope of the judicial function or expertise,¹³¹ this depends on how one conceives of international law. When international law protects individual rights against governments, then enforcement of international law falls squarely within the traditional notion of judicial responsibility. Vertical cases allege state abuse of individual rights and interests. In contrast, if international law is conceptualized in horizontal terms, as involving disputes between two coequal nations, it is more closely analogous to disputes between coequal branches of government. As such, international law is less central to the traditional judicial framework. The domestic analogue of a horizontal international dispute is a separation of powers problem, as both involve disputes between coequal entities.¹³²

Horizontal disputes between coequal domestic or international governmental entities present less compelling cases for domestic judicial review.¹³³ Indeed, disputes between coequal actors in the international context seem even less amenable to local judicial resolution than domestic separation of powers issues, for in the domestic context, the courts can at least draw on shared cultural norms and constitutional commitments to make their judgments seem persuasive. Furthermore, where horizontal issues are involved, political and diplomatic channels for dispute resolution are available.¹³⁴ If one nation violates the

130. This is, of course, why the courts have been relied on so heavily in social reform litigation.

131. See *supra* section I.B.

132. Cf. H. STEINER & D. VAGTS, *supra* note 93, at 225 (intergovernmental disputes less likely to make it into court or to be affirmatively resolved by the court than ones involving private parties).

133. J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 2* (1980) (judicial review crucial for protecting individual liberties, but not federalism or separation of powers).

134. Compare the position that Abe Chayes took in 1965:

I suggest that most disputes between states, even when they involve important legal elements, are not justiciable—and for much the same reason that most disputes between organs of our government are not justiciable. . . . Institutional characteristics limit the range in which they can effectively exercise authority. If judges go beyond those limits, the result is likely to be not

rights of another, there are remedies such as international diplomacy, appeals to the United Nations, and international judicial action.

But individuals need access to courts because they are powerless to engage in international diplomacy. In part because conventional international remedies have for so long been closed to individuals, another remedy, domestic adjudication, must be open. If one accepts a vertical approach to international law—that individuals have rights against states that are protected by international norms—then domestic courts are the best vehicles for adjudicating those cases with strong vertical elements.

2. *Sources of Norms and the “Countermajoritarian Problem”*

There is a final reason that American courts should be more willing to adjudicate international disputes with vertical elements than cases with exclusively horizontal ones. The reason lies in the doubts that some have had about the sources of international law, coupled with a fear of “countermajoritarian” decisionmaking. This argument starts with the observation that international law is not grounded upon as secure a positive law foundation as is domestic law. When courts develop and apply international law, they are not following the lead of the elected branches, but are striking out on their own. And, it is added, this is anomalous in a democracy. The problem is thought to be particularly acute with norms of customary international law, for unlike treaties, they have not been passed on by the executive and the Senate. The conclusion of this line of argument is that courts should stay out of the business of developing customary international law, and should only wander into the international arena at the invitation of the elected branches.

One author has tried to ground this argument upon a full-fledged account of American political legitimacy. Phillip Trimble claims that notions of democratic theory embedded in our Constitution militate strongly against our courts’ hearing cases based on customary international law.¹³⁵ To use customary international law to limit popularly declared foreign policy, he says, is to impose upon the American people norms that they did not choose through the usual electoral processes. Trimble would have our courts adopt an exceedingly deferential stance, deferring not only to American international actions, but also to elected branch opinions about whether other nations’ actions comply with

vindication of the law, but erosion of judicial authority.

Chayes, *supra* note 4, at 1409. But note that Chayes later went on to advocate an ambitious model of domestic public law litigation. See text accompanying *infra* notes 142-47.

Compare also the position of four Justices arguing that President Carter’s termination of our treaty with Taiwan was nonjusticiable in part because it was brought by Senator Goldwater (rather than a private litigant) and was really a dispute between coequal branches of government that had political means for protecting their interests. See *Goldwater v. Carter*, 444 U.S. 996, 1004-05 (1979).

135. Trimble, *supra* note 19, at 718.

international legal norms.¹³⁶ He would not even have our courts use international law to construe ambiguous statutes.¹³⁷

There are several problems with this line of argument. Some are equally pertinent under a horizontal or a vertical view. First, the countermajoritarian objection is seriously overstated. As we noted earlier, most uses of international law do not involve contradicting the wishes of the elected branches. Some involve interpreting or construing legislation consistently with legislative preferences; others involve evaluating the international legality of the actions of other nations on which our government has not taken a stand. In particular, use of the act of state doctrine to avoid application of international law results in protecting foreign legal processes, not domestic ones, from critical scrutiny. More generally, there is no countermajoritarian objection when our elected branches have simply taken no position. Courts construe statutes domestically without raising countermajoritarian hackles, and they use judicially created presumptions to do so.¹³⁸ Why should international construction be different?

Perhaps of equal importance, international law itself defines many of the powers that our elected branches exercise. For example, the power to control immigration is not named in the Constitution; yet it is assumed that our government must possess such a power because that power is an attribute of state sovereignty commonly recognized by international law.¹³⁹ Where powers are themselves inferred from international law, then a court must necessarily look to international law to determine whether a particular action falls within the power. It defies logic for the elected branches to rely upon international law to establish their powers while denying the relevance of international law to set their powers' limits.

In addition, the distinction between customary international law and treaty law may be overdrawn. In theory, at least, customary international law is established through state consent. To the extent that this is true, there is no more of a countermajoritarian difficulty with customary law than there is with treaties. As noted earlier, Trimble takes issue with particular norms of international law, such as the *Restatement's* rules on extraterritoriality.¹⁴⁰ He may be correct that these rules do not reflect state practice. But then his quarrel should be with the *Restatement* formulations themselves for not reflecting

136. *Id.* at 693-96 (criticizing adjudication of human rights cases).

137. *Id.* at 675-76.

138. See Kramer, *Rethinking Conflict of Laws*, 90 COLUM. L. REV. 277, 318 (1990) (discussing domestic canons of construction and arguing that they can be used in multistate cases also); Miller, *Pragmatics and the Maxims of Interpretation*, 1990 WIS. L. REV. 1179. Perhaps the explanation for Trimble's position lies in the fact that international law is used in international interpretation, and this fact alone makes the court's role countermajoritarian even if Congress has expressed no preference. But courts rely on many maxims of statutory construction, and it is not clear why international law should be any different. The point is that Congress can make its wishes known if it chooses.

139. *Lobel*, *supra* note 31, at 1131; see also *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); L. HENKIN, *supra* note 76, at 26-28 (inferred powers).

140. See Trimble, *supra* note 19, at 696-707.

accurately what international law requires—rather than with the idea that customary international law, correctly formulated, limits international actions.

Whether one takes a horizontal or a vertical view of international relations, then, the countermajoritarian objection is often wide of the mark. More to the present point, the countermajoritarian objection has even less force under a vertical conception of international law. The countermajoritarian difficulty is an objection based upon a political theory claimed to be grounded in democratic ideals. But conceding the importance of political theory to international relations actually works to undercut the argument that courts should refrain from adjudicating international cases. The whole point of a vertical approach is to bring political theory to bear on international disputes.

The countermajoritarian argument is thus flawed because it brings political theory to bear in a perverse and one-sided way. Trimble argues that norms of democracy and popular accountability are relevant to the role of our courts in international adjudication. But if democracy is really the main concern, then a far greater threat to “democracy” and popular accountability is found in the fact that American foreign policy affects persons who have no vote at all in American elections, namely, citizens of other states. One of Trimble’s own examples demonstrates how the democracy argument proves the opposite of what he suggests. Imagine that a court is faced with a problem of the applicability of American securities law to a transaction entered into in France. Assume that if the court were to construe the statute so as to maximize consistency with international law, then it would decide that the law should not apply. Trimble’s argument here is that it would be impermissibly countermajoritarian for the court to refuse to apply American law, because this would override congressional preference and impose upon the American people a norm to which they have not consented.

If democracy is the main consideration, however, then one ought to be equally concerned about the rights of the French citizens to whom American law might be applied. Surely they have not had any say in the adoption of American laws. A vertical analysis requires us to question seriously our right to apply American law to those who have not participated in its formation. If courts refuse to apply the law, they may frustrate the wishes of the American public (although in most cases, the public has no expressed wishes either way). But if they do apply the law, the result is at least as “countermajoritarian.” International law unavoidably deals with situations in which the interests of one nation or the other may conflict. To determine which nation’s interests should be honored, one must inquire into the respective rights of states to assert their authority in the international arena.

IV. IN SEARCH OF THE JUDICIAL ROLE

The similarity between international and constitutional adjudication has been noted by others.¹⁴¹ This is not surprising, considering the fact that the international avoidance techniques are the same “passive virtues” used in domestic judicial review. But there is more to the analogy than that. In fact, the similarities are pronounced enough that it is plausible to refer to the vertical model of international adjudication as a *Marbury*-style approach. Both the vertical and the *Marbury* models are paradigms of judicial modesty in a world where litigants press hot political issues upon the courts in search of authoritative declarations that certain governmental actions are illegal.

The key similarity lies in the fact that both models attempt to domesticate an essentially controversial judicial function. The *Marbury* model emphasizes that constitutional litigation is not inherently different from ordinary private litigation. When courts decide cases, they must declare what the law is. It just so happens that the law which they must declare sometimes turns out to be constitutional law. However, just like statutes and precedents, the Constitution is law. Minimizing the extent to which cases raising constitutional issues are perceived as different from cases which do not makes the judicial power to declare legislation unconstitutional seem less threatening.

The vertical model of international adjudication uses a very similar strategy. It emphasizes the similarities between domestic and international litigation. This model envisions international disputes as involving the same sorts of parties as domestic disputes and asks judges to declare principles of international law only when doing so is necessary to protect the rights of individual claimants. Declaration of international legal principles is not an end in itself, but an indispensable part of the performance of a traditional duty. In contrast, the horizontal model envisions international disputes as having a distinctive party structure, pitting one nation-state against another. Emphasizing the distinctiveness of international law and international adjudication unnecessarily takes the judge's function outside of the traditional judicial role, making it appear political and threatening.

One way to explain the traditional judicial role is in terms of the traditional private rights/public law dichotomy. Although this dichotomy is both slippery and subject to conflicting interpretations, an explanation in private/public terms is possible. Under a private rights model, courts exist primarily in order to resolve disputes between private parties about traditional private interests, such as property rights. Disputes over the legality of official action—public law issues—are resolved only to the extent that doing so is necessary to protect the private rights of individuals. Relations between the state and the individual are appropriate for judicial resolution because of the resemblance to disputes

141. See *supra* note 4.

between individuals. In the international context, we can take this analogy one step further. International disputes between a state and an individual are appropriate for judicial resolution because of their resemblance to domestic disputes between a state and an individual. Cases involving private rights of individuals are suitable for our courts, whether the defendant is another private party, the plaintiff's own state, or a foreign nation.

This way of phrasing the similarity between the *Marbury* and the vertical models raises an important question. The *Marbury* model is, of course, not the only approach to constitutional adjudication. Indeed, modern trends see it as somewhat dated. Professor Abe Chayes' acclaimed 1976 article about public law litigation argued that we have already moved far from the traditional, modest, *Marbury* model to one of "public law litigation."¹⁴² Under this model, litigants are likely to be as motivated by the desire to establish legal principles as by a need to protect their private rights. Harold Koh argues, similarly, that our courts are increasingly involved in the formulation of international legal norms.¹⁴³ His proposal for "transnational public law litigation" is modeled on Chayes' arguments in American constitutional law. Koh sees cases in our courts being used deliberately as vehicles for redressing international wrongs of both the United States and foreign governments. Under a public law model, an international case is important primarily as an occasion for judicial norm formulation; the real object, as Koh argues, is to provoke a political settlement through authoritative adjudication of international legal norms.¹⁴⁴ The trend that was started in domestic constitutional law is to be continued in international law.

Koh's analysis, like my own, highlights the connection between domestic constitutional litigation and international adjudication. Both interpretations see the international judicial role as modeled on the domestic constitutional counterpart. The difference between our two views lies in their determination of the proper function of U.S. courts. Koh ties their role in international adjudication to the politically more ambitious picture of constitutional adjudication that Chayes presents, while my more modest vertical proposal bases international adjudication on the traditional, *Marbury*-style model of constitutional adjudication. By emphasizing the link to a public law approach to domestic litigation, Koh makes his model of international law more politically ambitious but simultaneously leaves it more vulnerable to political vicissitudes. The ebb tide of the Burger and Rehnquist courts threatens to leave Chayes' public law model stranded (if in fact it has not done so already); it would leave a public law

142. Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

143. Koh, *Civil Remedies for Uncivil Wrongs: Combating Terrorism Through Transnational Public Law Litigation*, 22 TEX. INT'L L.J. 169, 200 (1987) [hereinafter Koh, *Civil Remedies*]; Koh, *The Responsibility of the Importer State*, in TRANSFERRING HAZARDOUS TECHNOLOGIES AND SUBSTANCES: THE INTERNATIONAL LEGAL CHALLENGE 170, 194 (G. Handl & R. Lutz eds. 1989) [hereinafter Koh, *The Importer State*].

144. Koh, *Importer State*, *supra* note 143, at 195.

model of international litigation stranded as well.¹⁴⁵ A more traditional, *Marbury*-style model of international law is not so affected by changing trends of judicial assertiveness. Such a conception locates international litigation well within the contours of the traditional judicial function.

The public law model potentially has both descriptive and normative aspects. Both Chayes (in the domestic context) and Koh (in the international context) seem to be arguing descriptively that litigants are increasingly motivated by public law concerns. Chayes goes on, however, to express support for public law litigation in the domestic context.¹⁴⁶ He applauds the distinctive nature of constitutional litigation, emphasizing how different it is from traditional private disputes.¹⁴⁷ What does this mean in the international context? Is the public law model normatively preferable to the private rights model? Should our courts move beyond entertaining cases with predominately vertical issues to include cases dominated by horizontal elements as well? Should we emphasize the similarities between international and domestic private law disputes, or celebrate their differences?

This article does not need to address these questions. Some of my views on the public law model of domestic constitutional adjudication have been set out in an earlier article,¹⁴⁸ but my points about international adjudication here are fairly modest. There are ways of understanding international law that fit it squarely into traditional forms of domestic adjudication. There is no reason categorically to exclude international claims from our courts. Even a restrained notion of judicial function has room for international adjudication. This discussion has tried to outline a theory of where our courts stand today, to rationalize the current stance and to defend it from the charge that it gives the courts too great a power. Whether an even more powerful notion of judicial function would be defensible or desirable is a question that can be reserved for another time and place.

International law is often thought of as high politics. It is anarchical, fit only for diplomatic give and take, and completely subordinate to the political self-interests of competing states. If this were the sum and substance of international law, then it would not be difficult to appreciate why our courts would be reluctant to get involved. But international law is not so easily dismissed. International law, like domestic law, is also about the relations between states and individuals. Although we have not traditionally built our theories of international law around these assumptions, courts have implicitly recognized this view by adjudicating vertical cases without reservation. We need not consider a new model of international adjudication to explain our judges' role; we need only to recognize explicitly the model that we already have.

145. See Koh, *Civil Remedies*, *supra* note 143, at 200 n.104 (recognizing influence of Burger Court on transnational public law litigation model).

146. Chayes, *supra* note 142, at 1313.

147. *Id.*

148. Brilmayer, *supra* note 116.