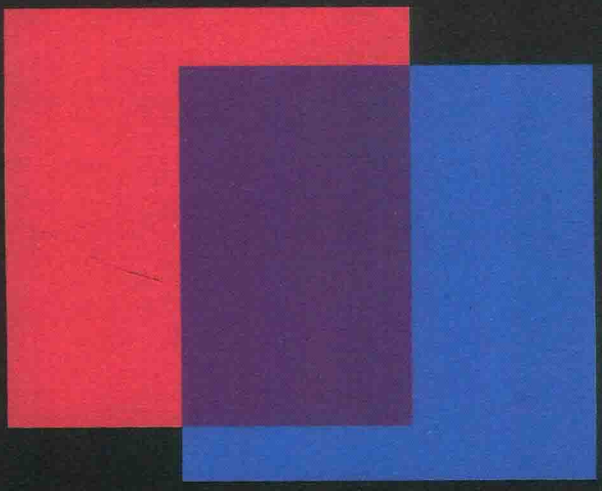
INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM

CURTIS A. BRADLEY



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Curtis A. Bradley

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INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM

For Kathy, David, and Liana

Preface

THIS BOOK CONSIDERS the role of international law in the U.S. legal system. As will be shown, this role is defined by a mix of constitutional, statutory, judicial, and executive branch materials. Consequently, the international law that is applied in the United States has a distinctly American gloss. This gloss does not mean that the role of international law in the U.S. legal system is insignificant, but it does mean that this role is mediated by a variety of domestic legal and political considerations. Much of this book is dedicated to exploring these considerations.[1]

The book is designed to be accessible by lawyers, law students, and judges who do not have any particular expertise in the subject, while also providing a starting point for more specialized research. It is hoped that non-U.S. readers with legal training will also find the book to be a useful window into how the United States processes and applies international law. Although I have written numerous academic articles concerning the topics covered in this book, the chief aim of the book is to describe the central currents of the law rather than to argue a particular position. In the places where I offer a view

[1] This book is focused on the United States. For more general treatments of international law in domestic legal systems, with discussions of the practices of other countries, see, for example, ANDRE NOLLKAEMPER, NATIONAL COURTS AND THE INTERNATIONAL RULE OF LAW (2011), and INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS: INCORPORATION, TRANSFORMATION, AND PERSUASION (Dinah Shelton ed., 2011). For comparative assessments of the specific role of treaties within domestic legal systems, see, for example, NATIONAL TREATY LAW AND PRACTICE (Duncan B. Hollis et al. eds., 2005), and THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY (David Sloss ed., 2009).

about a contested issue, I make clear that I am doing so, and also point out contrary arguments.

While taking into account a wide range of interpretive materials, the book emphasizes considerations of constitutional structure and history. As for structure, the book focuses in particular on the Constitution's separation of powers among the three branches of the federal government and the federalism relationship between the national government and the state governments. Although these considerations have long played an important role in how international law is applied within the United States, they have sometimes been given too little attention in the academic literature. The book also emphasizes history, since it is impossible to understand international law's role in the U.S. legal system without having a sense of how particular practices by U.S. governmental institutions relating to international law have evolved and developed.

The book assesses the domestic status of all the major forms of international law. Most readers are presumably familiar with treaties, which are express agreements among nations that are intended to create obligations under international law.[2] Probably less familiar is customary international law, which is the law of the international community that results from the practices of nations followed out of a sense of legal obligation.[3] Treaties and customary international law have essentially the same weight under international law and are equally binding on nations. A small number of international norms, which are sometimes treated as a subset of customary international law, have a special status. These norms, referred to as "peremptory norms" or "*jus cogens* norms," are said to arise from nearly universal practice and to be absolute in their character, such that they do not permit any exceptions, even in times of emergency.[4] In addition to these sources, international institutions, which are typically established by treaties, sometimes have the authority to issue binding orders and decisions, and these too are part of the international law considered in this book.[5] The focus of the book is primarily on "public

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[2] *See* Anthony Aust, Modern Treaty Law and Practice 16–24 (2d ed. 2007). Treaties can also be concluded with, or between, international organizations. *See id.* at 18.

[3] *See, e.g.*, Restatement (Third) of the Foreign Relations Law of the United States § 102(2) (1987) (defining customary international law as the law of the international community that "results from a general and consistent practice of states followed by them from a sense of legal obligation"); Statute of the International Court of Justice, art. 38(1), June 26, 1945, 59 Stat. 1055, 1060 (including, in the sources of international law to be applied by the International Court of Justice, "international custom, as evidence of a general practice accepted as law").

[4] *See, e.g.*, Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 331 ("For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.").

[5] Legal issues associated with delegations of authority by the United States to international institutions are considered in Chapter 4. International tribunals also sometimes invoke general principles common to the major legal systems in order to help them resolve disputes. *See, e.g.*, Statute of the International Court of

international law"—that is, the law governing the relations among nations and to some extent the relationship between nations and their citizens. Nevertheless, the book also touches on issues of "private international law"—that is, the law governing the transborder relations of private parties—such as the law concerning the enforcement of foreign judgments. Despite its name, "private international law" is primarily made up of rules of domestic law except to the extent that those rules have been incorporated into treaties.

The intersection between these sources of international law and the U.S. legal system has become increasingly important. Both treaties in general, and treaties that establish international institutions, have proliferated since the establishment of the United Nations system at the end of World War II. Moreover, these treaties, especially multilateral treaties ratified by a large number of countries, are often cited as evidence of new norms of customary international law. The scope of international law's coverage has also expanded significantly, such that it now frequently overlaps with domestic law. Nowhere is this expansion more evident than with the rise of international human rights law, which regulates how a nation (including the United States) interacts with its own citizens. Perhaps not surprisingly, therefore, U.S. courts, including the U.S. Supreme Court, have seen a surge of cases in recent years raising issues of international law. Indeed, the Court has decided a number of cases relevant to the subject of this book since the publication of the first edition, including *Kiobel v. Royal Dutch Petroleum* (concerning the territorial reach of the Alien Tort Statute), and *Bond v. United States* (concerning the relationship between the treaty power and federalism).

Sometimes the heightened focus on international law by the U.S. judiciary has been controversial, as has been the case with the Supreme Court's citation of foreign and international materials in some of its constitutional interpretation decisions.[6] The "war on terrorism" following the attacks of September 11, 2001, generated additional controversies surrounding the proper role of international law in U.S. decision making.[7] The United States has also had an uneven relationship with international institutions, as

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Justice, *supra* note 3, art. 38(1) (listing among the sources of international law "the general principles of law recognized by civilized nations").

[6] *See, e.g.*, Graham v. Florida, 560 U.S. 48, 80–82 (2010) (invoking international practice and treaty provisions in support of the conclusion that imposing life sentences without parole on juvenile offenders violates the prohibition in the Eighth Amendment to the U.S. Constitution on cruel and unusual punishments); Roper v. Simmons, 543 U.S. 551, 578 (2005) (taking into account "the overwhelming weight of international opinion against the juvenile death penalty" in concluding that the execution of juvenile offenders violates the Eighth Amendment). This issue is discussed in Chapter 5.

[7] *See, e.g.*, Al-Bihani v. Obama, 590 F.3d 866, 871 (D.C. Cir. 2010) (contending, in a case involving the detention at Guantanamo Bay of an individual captured during the fighting in Afghanistan, that "[t]he international laws of war as a whole have not been implemented domestically by Congress and are therefore not a source of authority for U.S. courts"). *But cf.* Al-Bihani v. Obama, 619 F.3d 1, 1 (D.C. Cir. 2010) (declining to grant en banc review of the earlier decision's treatment of international law because "the panel's discussion of that question is not necessary to the disposition of the merits"). International law issues relating to the war on terrorism are discussed in Chapter 10.

evidenced, for example, by its decision not to join the International Criminal Court.[8] These and other examples reveal recurring tensions between the international legal system and the U.S. domestic legal system. It is important to be aware of these tensions in order to fully understand international law's role in the United States, and the book therefore highlights them when addressing the particular topics where they are most implicated.

In international law scholarship, the terms "monism" and "dualism" are sometimes used to describe possible relationships between international law and domestic law.[9] Although there is much uncertainty surrounding these terms, in essence the distinction is as follows: The monist view is that international and domestic law are part of the same legal order, and that international law is automatically incorporated into each nation's legal system. By contrast, the dualist view is that international law and domestic law are distinct, and that each nation determines for itself when and to what extent international law is incorporated into its legal system.[10] It is not clear how useful these categories are. In a sense, every nation is dualistic, in that one must consult the nation's domestic law in order to determine international law's status within that system. At most, the terms "monism" and "dualism" describe tendencies within particular legal systems. At first glance, the U.S. legal system might appear to have monist tendencies, in that the U.S. Constitution provides that treaties are part of the supreme law of the land,[11] and the Supreme Court has described customary international law as "part of our law."[12] As will be seen, however, in practice the U.S. legal system leans decidedly in the dualist direction. At the same time, international law has important effects in U.S. law that are not fully captured by looking only to whether international law is given direct effect in U.S. courts.

The United States' dualist tendencies likely stem from a variety of factors. There is a perception, at least in some circles, that international law can conflict with American democratic values.[13] There have also long been anxieties in the United States about

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[8] *See* Curtis A. Bradley, *U.S. Announces Intent Not to Ratify International Criminal Court Treaty*, ASIL INSIGHT (May 2002), *at* http://www.asil.org/insights/volume/7/issue/7/us-announces-intent-not-ratify-international-criminal-court-treaty. The U.S. relationship with the International Criminal Court is discussed in Chapter 4.

[9] For background on the monist and dualist perspectives, see JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 48–50 (8th ed. 2013); LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 64–68 (1995); 1 OPPENHEIM'S INTERNATIONAL LAW 53–56 (Robert Jennings & Arthur Watts eds., 9th ed. 1992); J.G. Starke, *Monism and Dualism in the Theory of International Law*, 17 BRIT. Y.B. INT'L L. 66 (1936).

[10] *See* Curtis A. Bradley, *Breard, Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529, 530 (1999).

[11] *See* U.S. CONST. art. VI, cl. 2.

[12] The Paquete Habana, 175 U.S. 677, 700 (1900).

[13] *See, e.g.*, John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 STAN. L. REV. 1175 (2007) (discussing "democracy deficit" in international law); Jed Rubenfeld, *Unilateralism*

excessive entanglements with foreign powers, anxieties that can be traced back to President George Washington's Farewell Address in 1796, in which he stated that it was the policy of the United States to "steer clear of permanent alliances with any portion of the foreign world."[14] Furthermore, the United States has frequently thought of itself as singular—a "city on a hill"—and there have been fears that international law might erode some of the nation's unique values, such as its commitment to a particular conception of rights.[15] The superpower status of the United States has further complicated its views of both the benefits and costs of international legal constraints.[16]

None of this means that the United States has been opposed to international law. Indeed, it has often taken the lead in efforts to establish new treaty regimes and international institutions, and it has been a frequent participant throughout its history in international arbitration. It also receives many benefits from international law, on a wide range of issues, including issues relating to trade, national security, and the protection of its citizens abroad. Rather, it would be more accurate to describe the U.S. approach to international law as selective and pragmatic, an approach that looks for what international law can accomplish rather than assumes that it is desirable in the abstract. One element of this approach is a preference for political branch control over how international law operates within the U.S. legal system. Thus, although judges play a role in applying international law in the United States, they typically do so in a manner that is heavily informed by the decisions and actions of Congress and the executive branch.

It is too simplistic, however, to treat the U.S. approach to international law as a unitary phenomenon. Different institutional actors in the United States interact with international law in different ways and sometimes have divergent approaches to it.

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and Constitutionalism, 79 N.Y.U. L. Rev. 1971 (2004) (discussing tensions between international law and democratic constitutionalism).

[14] George Washington, *Farewell Address* (Sept. 19, 1796), in The Washington Papers 321–22 (Saul K. Padover ed., 1955). For discussion of the historical context of the address, see Samuel Flagg Bemis, *Washington's Farewell Address: A Foreign Policy of Independence*, 39 Am. Hist. Rev. 250 (1934).

[15] *See, e.g.*, Paul W. Kahn, *American Exceptionalism, Popular Sovereignty, and the Rule of Law, in* American Exceptionalism and Human Rights (Michael Ignatieff ed., 2005). The phrase "city on a hill" comes out of the New Testament, from a parable in Jesus' Sermon on the Mount. The Puritan John Winthrop used the phrase in a 1630 sermon that he wrote while sailing from England to the new Massachusetts Bay Colony. In the sermon, Winthrop advised his fellow colonists that they would be a "city upon a hill" and that "the eyes of all people are upon us." This phrase has subsequently been used by U.S. political figures, including most notably by President Ronald Reagan. *See* Steven G. Calabresi, *"A Shining City on a Hill": American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law*, 86 B.U. L. Rev. 1335, 1370–73 (2006).

[16] *See* Robert Kagan, Of Paradise and Power: America and Europe in the New World Order 10–11 (2003) ("When the United States was weak, it practiced the strategies of indirection, the strategies of weakness; now that the United States is powerful, it behaves as powerful nations do."). *Cf.* Anu Bradford & Eric A. Posner, *Universal Exceptionalism in International Law*, 52 Harv. Int'l L.J. 1, 5 (2011) (arguing that "the United States is no more exceptional [in its treatment of international law] than any other powerful country").

Moreover, there are sometimes variations in approach between the two major political parties and, relatedly, between different presidential administrations. Even within the executive branch, it is not unusual for different departments and agencies to vary in their approaches to international law. Sometimes this variation can be settled by the courts, but many issues concerning the relationship between international law and U.S. domestic law will rarely if ever be the subject of judicial determination.

Although the focus of this book is on the U.S. domestic legal system rather than on the substance of international law, it is worth keeping in mind that international law is affected by U.S. practices. The interpretation and application of international law by the United States can contribute to international law's development, both by adding to the state practice that is consulted in determining the content of customary international law, and by potentially influencing the actions and views of other nations. Conversely, U.S. legal doctrines that restrict the domestic status of international law may in some instances have the effect of limiting its development and enforcement more generally. This book does not take a position on the desirability of these effects on international law, but it does point out in various places that more is at stake than purely domestic considerations.

The book begins in Chapter 1 with an overview of some of the doctrines that govern the role of U.S. courts in adjudicating foreign affairs-related disputes. It then turns in Chapter 2 to consider the status of treaties in the U.S. legal system. Chapter 3 separately discusses the nature and domestic status of "executive agreements." The book then moves in Chapter 4 to consider the constitutional and other issues associated with delegations of authority by the United States to international institutions. Next, Chapter 5 discusses the domestic status of customary international law, and the somewhat related issue of judicial reliance on foreign and international materials in constitutional interpretation. The book then addresses the extraterritorial application of both constitutional and statutory law in Chapter 6, a topic that intersects in a variety of ways with international law, especially customary international law. Turning to a topic of considerable recent debate, the book in Chapter 7 discusses the phenomenon of international human rights litigation under the Alien Tort Statute. The book then addresses in Chapter 8 the immunity of foreign governments and their officials in U.S. courts. In Chapter 9, the book considers the application of extradition treaties in the U.S. legal system, as well as other forms of criminal law enforcement. Finally, Chapter 10 addresses the relationship between international law and the war powers of Congress and the president, as well as the role of international law in the war on terrorism. Each of these chapters has been updated since the publication of the first edition to take account of new legal materials and controversies, as well as recent scholarship.

* * *

It seems appropriate at the outset to situate this book against the backdrop of other work on the topic. It is self-consciously written in the tradition of Louis Henkin's magisterial treatise, *Foreign Affairs and the Constitution,* which was published in 1972 and

then republished in an updated form in 1996.[17] Professor Henkin, who passed away in 2010, was a towering figure in the field of U.S. foreign relations law, and I learned a tremendous amount from him, even when I sometimes reached different conclusions. Henkin's book was itself written in the tradition of work that had been done in the early twentieth century, most notably Quincy Wright's 1922 treatise, *The Control of American Foreign Relations*, and I have also benefited from that earlier work.[18] The present book, however, is somewhat narrower in focus than books on U.S. foreign relations law in that it covers only topics relating to the intersection of international law and U.S. law, not the law governing the conduct of U.S. foreign relations more generally.

Professor Henkin also served as the Chief Reporter for the American Law Institute's *Restatement (Third) of the Foreign Relations Law of the United States*, which was published in 1987. This two-volume work is an extraordinarily useful resource, and it has been highly influential with both courts and scholars, although it is increasingly being overtaken by subsequent legal developments. Despite its usefulness, it is important to keep in mind that the *Restatement (Third)* reflects in part the views and aspirations of its reporters, and some of these views and aspirations have been the subject of substantial debate. As a result, this book makes an effort to assess claims made by the *Restatement (Third)* on their own terms rather than taking them for granted. It also looks back to the *Restatement (Second)*, which was published in 1965, for insights that might have been lost in the later effort.[19] I currently have the privilege of serving as a Reporter for the new *Restatement (Fourth)* project on foreign relations law, but the views expressed in this book are not intended to reflect any positions that may be adopted as part of that project.

This book reflects ideas that I have been developing in my scholarship and teaching for two decades. In developing these ideas, I have benefited enormously from conversations and debates with colleagues from around the country and the world. Some of these conversations and debates have occurred in the annual scholarship workshop that is organized by the American Society of International Law's interest group on international law in domestic courts, an interest group that David Sloss and I had the pleasure of initiating in 2002. I have also learned a tremendous amount from my students, both inside and outside the classroom. To the extent that I have been able to achieve clarity of presentation in this book, it is due in large part to the refinement that comes with the give and take of teaching. My knowledge of the subject was also greatly enriched by the year I spent in 2004 in the Legal Adviser's Office of the U.S. State Department as their Counselor on International Law.

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[17] *See* Louis Henkin, Foreign Affairs and the Constitution (1972); *see and compare* Louis Henkin, Foreign Affairs and the United States Constitution (2d ed. 1996).

[18] *See* Quincy Wright, The Control of American Foreign Relations (1922). In the preface to his book, Professor Henkin noted that he was "much indebted" to Quincy Wright's treatise. See Henkin (1972), *supra* note 17, at viii.

[19] *See* Restatement (Second) of the Foreign Relations Law of the United States (1965). There was no *Restatement (First) of Foreign Relations Law.*

For their comments on drafts of the manuscript of the first edition of the book, I would like to thank Bill Dodge, Jean Galbraith, Larry Helfer, Suzanne Katzenstein, Julie Maupin, David Moore, Sai Prakash, David Sloss, Peter Spiro, Paul Stephan, David Stewart, Ed Swaine, Carlos Vázquez, Mark Weisburd, Ingrid Wuerth, and Ernie Young. In March 2012, Duke Law School hosted a symposium at which leading scholars of international law and U.S. foreign relations law discussed and commented on an early draft of the book manuscript for the first edition. I am grateful to the participants in that symposium for their valuable feedback, and for Duke's Center for International and Comparative Law for sponsoring it. After publication of the first edition, I received insightful comments from participants in an online symposium about the book hosted by the *Opinio Juris* blog in March 2013, and also from Ingrid Wuerth in her review of the book in the *American Journal of International Law*. For their comments on drafts of the second edition, I would like to thank Joseph Dellapenna, Bill Dodge, David Moore, Mike Ramsey, Paul Stephan, and Ingrid Wuerth.

Special thanks are due to my close friend and frequent collaborator, Jack Goldsmith. I began thinking about the topics addressed by this book in conversations with Jack in 1993, when the two of us co-taught an international litigation course at the University of Virginia. At that time, we were both working for a large law firm in Washington, D.C., and we would drive to Charlottesville on Friday afternoons, and then return to D.C. the following day. (As strange as it may seem, our students would actually come to class both Friday night and Saturday morning.) The two-hour drives each way involved nonstop dialogue—and sometimes friendly argument—about the proper interaction between U.S. law and international law. Those drives, and the course we taught, eventually led us to write our first major law review article together, on the domestic status of customary international law.[20] After a number of other collaborations, we coauthored a casebook on U.S. foreign relations law, which is now in its fifth edition.[21] Inevitably, some of the ideas reflected in the present book stem from work that Jack and I have done together.

I would like to thank my dean at Duke, David Levi, for his extensive support and encouragement during the process of writing this book. I am also very grateful to Duke's library staff, which responded to my countless requests for books and documents with enthusiasm and good cheer. In addition, I would like to thank the student research assistants who helped me with the manuscript of the first edition, all of whom did truly excellent work: Chris Dodrill, Chris Ford, Rebecca Krefft, Tatiana Sainati, and Garrick Sevilla. Last but certainly not least, the book would not have been possible without the long-standing support and counsel of my wife, Kathy Bradley.

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[20] *See* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 815 (1997).

[21] *See* Curtis A. Bradley & Jack L. Goldsmith, Foreign Relations Law: Cases and Materials (5th ed. 2014).

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1 Courts and Foreign Affairs

INTERNATIONAL LAW INHERENTLY concerns foreign affairs. As a result, to understand the role of international law in the U.S. legal system, it is useful first to have a sense of some of the constitutional, statutory, and common law doctrines that govern the adjudication of foreign affairs–related disputes in the United States. This chapter begins by describing the subject matter jurisdiction of the federal and state courts and some of the "justiciability" limitations on the exercise of this jurisdiction. Next, it briefly considers the requirements for U.S. courts to exercise personal jurisdiction. The chapter then discusses the issue of choice of law in the federal and state courts, especially the *Erie* doctrine that requires that the federal district courts apply the law of the state in which they sit in cases not governed by federal law.

Turning more specifically to foreign affairs, the chapter considers the common law act of state doctrine, pursuant to which U.S. courts sometimes presume the validity of foreign government acts taken within the foreign government's territory. The chapter then describes other forms of deference or respect for foreign governments, as illustrated by the doctrines of *forum non conveniens* and comity-based abstention. Next, the chapter discusses the *Charming Betsy* canon of construction, which requires that courts construe statutes, where possible, to avoid violations of international law. The chapter then considers the deference that courts historically have given to the executive branch when deciding cases implicating foreign affairs.

The last part of the chapter provides a brief overview of the constitutional authority of U.S. government institutions other than the courts, and some of the considerations that courts take into account in assessing that authority. It begins by reviewing the powers of Congress and the president. It then considers the relationship between these powers, as influentially articulated by Justice Jackson in the *Youngstown* steel seizure case. Finally, it discusses federal preemption of state law.

Subject Matter Jurisdiction and Justiciability

The United States has both a federal court system and court systems in each of the states. The federal courts are courts of limited jurisdiction. They can hear a case only if it falls within the list of "Cases" and "Controversies" set forth in Article III of the Constitution.[1] In addition, except for certain cases that can be brought directly in the Supreme Court, the federal courts cannot hear a case unless it also falls within a congressional grant of subject matter jurisdiction.[2]

The two most important categories of Article III jurisdiction are federal question jurisdiction (cases "arising under this Constitution, the Laws of the United States, and Treaties") and diversity jurisdiction (controversies between parties of diverse U.S. citizenship or between U.S. citizens and foreign citizens). Congress has granted the federal courts jurisdiction in both of these categories, but its statutory grants have been construed to be substantially narrower than the bounds of what would be allowed under Article III. Thus, for example, Article III federal question jurisdiction may extend to any case in which there is a federal law "ingredient,"[3] including when the federal law arises only as a defense, but statutory federal question jurisdiction has been construed to exist only when the federal law issue appears on the face of the plaintiff's well-pleaded complaint.[4]

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[1] *See* U.S. CONST. art III, § 2 (listing the types of "Cases" and "Controversies" that fall within the judicial power of the federal courts); *see also, e.g.*, Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994) ("Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute...which is not to be expanded by judicial decree."); Verlinden B.V. v. Cen. Bank of Nigeria, 461 U.S. 480, 491 (1983) ("This Court's cases firmly establish that Congress may not expand the jurisdiction of the federal courts beyond the bounds established by the Constitution.").

[2] *See, e.g.*, Kontrick v. Ryan, 540 U.S. 443, 452 (2004) ("Only Congress may determine a lower federal court's subject-matter jurisdiction."); Merrell Dow Pharms., Inc. v. Thompson, 478 U.S. 804, 807 (1986) ("Article III of the Constitution gives the federal courts power to hear cases 'arising under' federal statutes. That grant of power, however, is not self-executing...."); Owen Equipment & Constr. Co. v. Kroger, 437 U.S. 365, 372 (1978) ("[T]he jurisdiction of the federal courts is limited not only by the provisions of Art. III of the Constitution, but also by Acts of Congress.").

[3] *See* Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 823 (1824).

[4] *See* Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 152 (1908). Statutory federal question jurisdiction was not conferred with any permanence until 1875.

Article III diversity jurisdiction extends to any case in which there is "minimal diversity"—that is, diversity of citizenship between any plaintiff and any defendant in the case. The diversity jurisdiction statute, however, has been construed as requiring "complete diversity"—that is, ordinarily no plaintiff can share citizenship with any defendant, even if the other parties in the case are diverse.[5] The diversity statute also requires that the amount in controversy exceed a certain amount, currently $75,000.[6] A suit between foreign parties does not satisfy even the minimal diversity requirement of Article III, even if the parties are from different countries, and thus can be heard in the federal courts only if it falls within some other category of Article III jurisdiction (such as federal question jurisdiction).[7]

Unlike the federal courts, the state courts are courts of general jurisdiction. They can hear essentially all categories of cases, whether based on state law or federal law. Even suits against foreign governments can in theory be heard in state courts, although this is rare in practice. However, certain federal laws (such as federal criminal laws) can normally be applied only in the federal courts.[8] For the most part, the state judiciaries are formally separate from the federal judiciary. The state and federal judicial systems connect at the top, though, in that the U.S. Supreme Court has the authority to review decisions from the state courts relating to federal law.[9]

When a case is filed in state court, it may ordinarily be removed by the defendant to federal court if the case could have been brought in federal court in the first instance. Removal is not allowed on the basis of diversity jurisdiction, however, if one or more of the defendants is a citizen of the state in which the suit is brought.[10] Any suit brought against a foreign state may be removed by the defendant.[11]

Even when a federal court has subject matter jurisdiction over a case, it may find that the case is "nonjusticiable"—that is, not appropriate for judicial resolution. The federal courts, for example, are not allowed to give advisory opinions.[12] Related to this limitation, courts will dismiss a case if the plaintiff lacks a sufficient stake in the case to qualify for "standing." To have standing, the plaintiff must normally have suffered (or be

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[5] *See* Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 367–68 (1806).

[6] *See* 28 U.S.C. § 1332.

[7] *See* Mossman v. Higginson, 4 U.S. (4 Dall.) 12, 14 (1800); *see also* Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303, 304 (1809).

[8] It is unclear whether Congress could validly require state courts to hear federal criminal cases. *See* Anthony J. Bellia, Jr., *Congressional Power and State Court Jurisdiction*, 94 GEO. L.J. 949, 992–1000 (2006); Michael G. Collins & Jonathan Remy Nash, *Prosecuting Federal Crimes in State Courts*, 97 VA. L. REV. 243 (2011).

[9] *See* 28 U.S.C. § 1257.

[10] *See* 28 U.S.C. § 1441(b).

[11] *See* 28 U.S.C. § 1441(d).

[12] *See* Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948) ("This Court early and wisely determined that it would not give advisory opinions even when asked by the Chief Executive."). *See also* STEWART JAY, MOST HUMBLE SERVANTS: THE ADVISORY ROLE OF EARLY JUDGES (1997) (discussing the historical foundations of the disallowance of advisory opinions in the federal courts).