IN THE novel Scoop, one of Evelyn Waugh’s characters is in the habit of responding with “Up to a point” when he means “No, not at all.” In its ordinary, non-literary meaning, the phrase “up to a point” describes how Steven Walt’s scholarship reflects his training and interest in analytic philosophy. Before going to law school, Walt received a doctorate in philosophy and taught the subject. His purely philosophical publications, such as “Hegel on War: Another Look” and “Dispositions, Functional Explanation and Historical Materialism,” date from that time. But most of Walt’s scholarship since then concerns commercial and contract law, addressing legal questions on which philosophy has no bearing. Titles such as “The Current State of Debate Over the Incorporation Strategy in Contract Law,” or “Underestimation Bias and the Regulation of Secured Consumer Debt” do not promise discussion of matters of philosophical psychology or metaethics. However, Walt has published other articles that address the bearing of jurisprudential issues on particular legal doctrines, drawing again on analytical philosophy—up to a point. These works are in an area that could be described as applied jurisprudence.

Walt joined the Virginia faculty in 1993, after three years at the University of San Diego, and before that, two years at the Wharton School. Walt’s work exhibits a rare combination of traits: He is prolific, writing in a wide variety of areas, but his work is also exceptionally careful. In his years on the faculty, Walt’s colleagues have come to know him as a polymath, widely read and informed about intellectual develop-
ments in many different fields.

Walt’s legal scholarship addresses a diverse range of issues in commercial and contract law. He has written on domestic and international sales law, commercial paper, secured transactions, bankruptcy, and bank insolvency. Several of his pieces have also been in the field of contract theory. Walt is the co-author (with William D. Warren) of two popular casebooks: *Secured Transactions in Personal Property* (8th ed. 2010) and *Payments and Credits* (8th ed. 2010). He also has authored (with Clayton P. Gillette) a book on sales law, *Sales Law: Domestic and International* (revised ed. 2009). Walt is completing a casebook, *Commercial Sales Transactions* (forthcoming, 2013), on the same subject and a treatise (with Clayton P. Gillette) on the U.N. Convention on Contracts for the International Sale of Goods.

Walt’s work in jurisprudence centers on the relevance of philosophy to particular legal questions. He asks whether the resolution of these legal questions requires courts or scholars to take a position on philosophical issues. In law and life, beliefs about what are uncontroversially philosophical questions might have practical implications. For instance, the belief that the self exists simply as a set of different experiences might change one’s attitude about one’s own survival. Closer to the law, the interpretation of statutory or constitutional provisions containing ostensibly moral terms might depend on the existence of moral facts. The practice might require taking a metaethical position on the nature of moral judgments. Or criminal liability might depend on the causation of harm, which in turn requires a metaphysical account of causation. Whether and how philosophical issues are relevant to a legal question obviously depends on the particular legal issue or doctrine in question.

Walt’s work, however, often points out the ways in which jurisprudence is not relevant to the resolution of certain legal questions. In three papers, for different purposes, Walt considers the limit on the common lawmaking authority of federal courts declared in *Erie Railroad Co. v. Tompkins*. *Erie* prohibits federal courts from making federal common law unless such authority is delegated to them by constitutional
provision or congressional enactment. Commentators and some courts tend to think that the limitation relies on legal positivism—that is, the claim that law is explained by social facts such as the declarations of a legal authority. Positivism is a view about the nature of law. It figures into Justice Louis Brandeis’ opinion in *Erie*, which invokes positivism to support the Court’s holding that there is no general federal common law. Positivism is hard-nosed, modern, and seemingly correct, making it appear to be a part of *Erie’s* rationale. Contrary to this commonly held belief, Walt argues, positivism is not relevant to *Erie’s* holding. Positivism, in fact, has nothing to do with its limitation on judicial common lawmaking authority.

In two articles, “*Erie* and the Irrelevance of Legal Positivism” (with Jack Goldsmith), 84 Va. L. Rev. 673 (1998) and “Why Jurisprudence Doesn’t Matter for Customary International Law,” __Wm. & Mary L. Rev. __ (2012), Walt shows why *Erie’s* holding does not rely on a jurisprudential claim about the nature of law. Legal positivism’s truth is neither sufficient nor necessary to the case’s result. Positivism is not by itself enough to justify *Erie’s* limitation on federal common lawmaking authority. This is because positivism is consistent with a variety of different constitutional roles for federal courts. For example, Article III’s grant of diversity jurisdiction might give federal courts the authority to independently determine state law, just as Article III’s grant of admiralty jurisdiction is understood to give federal courts the authority to make admiralty law. Nor does positivism, together with specific constitutional limitations, explain *Erie’s* holding. Constitutional limitations alone might justify the holding, Walt argues, but positivism is superfluous to the case’s rationale. The reason is because if positivism is true as a claim about the nature of law, it is a necessary truth. But constitutional limitation on federal judicial lawmaking does not rely on positivism’s necessary truth any more than it relies on any other necessary truth, such as “2 + 2 = 4” or “Bachelors are unmarried males.” If the justification for *Erie’s* result included the statement “2 + 2 = 4,” the statement, though true, would obviously be superfluous to the
justification. Positivism is superfluous to *Erie*’s rationale in exactly the same way.

Positivism is thus not sufficient to justify *Erie*’s limitation on judicial common lawmaking authority, but it is also not necessary to the holding. *Erie*’s limitation can hold even if positivism is false. For instance, suppose certain sorts of moral facts, not social facts, necessarily determine whether a norm is a legal norm. Although this is a stylized version of natural law, it is a coherent view about the nature of law. And on this view, positivism is false. Nonetheless, *Erie*’s limitation still could apply. A federal court would need constitutional or congressional authority to create norms, even when the norms created are consistent with morality. This possibility shows that *Erie*’s holding depends only on constitutional allocations of lawmaking authority, not jurisprudential views about the nature of law.

Walt has also explored the separate, historical question of whether a then-contemporary legal theorist endorsed positivism while disagreeing with *Erie*’s holding. It is one thing to demonstrate that positivism plays no role in *Erie*’s rationale. It is another to find working positivists at the time who rejected *Erie*. In “Before the Jurisprudential Turn: Corbin and the Mid-Century Opposition to *Erie*,” 2 Wash. U. Juris. Rev. 75 (2010), Walt documents Arthur Corbin’s long-held nonjurisprudential objections to *Erie*. While Corbin rejected the classical version of positivism, according to which law consists of authoritative commands, he advocated two claims in articles published before *Erie* was decided. One is the view that law consists of behavioral regularities of legislatures and courts. The other is that the behavior of private persons in some fashion defines morality, while legal relations are defined by the conduct of officials. Because private behavior defines morality, law and morality are separable. Both views are consistent with the standard (but still controversial) understanding of positivism’s core claims: that law is explained by social facts and that it need not have a moral content.

Corbin’s commitment to positivism, however, stood alongside nonjurisprudential objections to *Erie*’s holding. These objections appear in writings spanning several
decades. But the exact basis of Corbin’s opposition is unclear, says Walt. In different places Corbin gave different, brief reasons why the authority of federal courts to determine state law was not limited by the determinations of a state’s highest court. His complaints are an unsorted mixture of practical concerns, constitutional considerations, and certain basic entitlements of litigants. Corbin thought the alleged lack of vertical uniformity between federal and state courts on matters of state law was exaggerated. He took Article III’s jurisdictional grant to give federal courts law-making authority. And he seems to have believed that litigants possess the right to have a court decide their case by the best legal reasons available to it. Based on these considerations, Corbin concluded that federal courts have the authority to make independent judgments about state law. Initially his opposition focused on a quartet of cases decided by the Supreme Court in 1940, which together suggested that federal courts must follow the interpretation of state law given by even inferior state courts whose judgments have no precedential effect. Corbin was not mollified when the Court later made it clear that *Erie* requires a federal court to defer only to state supreme court determinations of state law; the clarification left unaffected his nonjurisprudential considerations favoring the authority of courts to make independent judgments about state law. Corbin therefore counts as a positivist whose opposition to *Erie* was based on nonjurisprudential grounds. For him, positivism’s truth is not a sufficient rationale for *Erie*’s holding.

“Why Jurisprudence Doesn’t Matter for Customary International Law” argues that the irrelevance of jurisprudence for judicial common lawmaking has implications for customary international law. The same considerations that limit the authority of federal courts to make common law also limit their authority to recognize customary international law. Because constitutional limitations or statutory enactments restrict a federal court’s authority to rely on federal common law, they also restrict the court’s authority to rely on customs among states. Walt argues that conceptions of law, including positivism, play no role in this position.
They are neither necessary nor sufficient to limit a court’s reliance on customary international law. In some sense, Walt explains, this is not surprising. After all, customary international law (where it exists) is, by definition, a type of custom—a regularity of behavior among states in which they comply with a norm from a sense of obligation. But customs by themselves have no legal effect. They have legal effect domestically only when recognized by a legal system through constitutional provision, statute, or decisional rule.

Finally, Walt extends what might be called his “irrelevance thesis” beyond conceptions about the nature of law. In “Why Jurisprudence Doesn’t Matter for Customary International Law,” he argues that views about the identity of legal systems say nothing about the relation of international law to domestic law. International legal theorists distinguish between two views about the character of international law. Monists maintain that the legal order consists of a single legal system of which domestic legal systems are a part, while dualists allow a plurality of distinct legal orders, including international law. At bottom they disagree over a requirement of legal validity. Monists maintain that legally valid rules cannot impose inconsistent demands on those subject to them, as is possible if international and domestic legal rules are parts of different legal systems. Dualists, for their part, allow the possibility of conflicting legal rules. Corresponding to this divide is a difference in views about the incorporation of international law into domestic law. Monists believe that international law is self-executing in domestic law because it is part of the same legal system; dualists hold that international law has no application domestically until incorporated into domestic law. Theorists’ difference in views about the incorporation of international law into domestic law appears to be tied to different conceptions of a legal order.

Walt, however, argues that this interpretation is a mistake. The dispute in fact is over the relation of international law rules to those of domestic law, and the priority of international law to domestic law is a question of priority among legal rules. This is because a legal order consisting of a single
legal system could give priority to domestic law over international law or, alternatively, it could give priority to international law over domestic law. The relation of rules of international law to those of domestic law thus does not turn on monism or dualism. The disagreement between monists and dualists instead is substantive, not conceptual, Walt shows. For this reason, conceptual considerations about the identity of legal systems cannot determine the relation between legal rules.

The three papers described reach the same conclusion: Specific legal questions are answered by substantive legal doctrine, not legal concepts or jurisprudential claims about them. The limits on a federal court’s power to make federal common law are constitutional limits, not those imposed by the nature of law. For his part, Corbin found that the Constitution in fact authorized federal courts to determine common law independently of the determinations of state courts. Moreover, Corbin’s jurisprudential commitments had nothing to do with this stance. Finally, whether customary international law has domestic effect turns on applicable constitutional or legislative enactments, not the existence of customary international law or its binding effect on nations. In Walt’s view, jurisprudence bears on the questions he discusses only “up to a point,” as Waugh’s character would put it.
Jurisprudential views are sometimes thought to affect case outcomes. Many commentators and some courts believe that *Erie Railroad Co. v. Tompkins* illustrates the point. *Erie* holds that federal courts generally must follow state decisional or statutory law except when inconsistent with constitutional law or federal statute. Legal positivism is a jurisprudential thesis about the nature of law. In its general form, the thesis asserts that law is explained in terms of social facts. Justice Brandeis’s majority opinion in *Erie* recites a classical conception of legal positivism, according to which law consists only of the authoritative declarations of a jurisdiction’s courts or legislature. It concludes that, subject to constitutional and federal statutory constraints, federal courts must apply state law as declared by state courts. Thus, the opinion itself suggests that this conclusion relies on a particular conception of law: legal positivism. It suggests that jurisprudence matters to *Erie*’s reasoning and outcome.

The suggested connection between legal positivism and *Erie*’s holding represents the “jurisprudential turn” in understanding *Erie*. Courts and commentators tend to read *Erie*’s result as depending on a commitment to a particular conception of the nature of law. With or without careful qualification, they frequently understand the case in this way. Consult a civil procedure casebook today and you are likely to find *Erie* described as endorsing a particular conception of the nature of law: legal positivism. [...] 

I think the jurisprudential turn in understanding *Erie* is a mistake. *Erie*’s result has nothing to do with jurisprudential positions about the nature of law. It does not rely in any way on legal positivism. *Erie*’s result instead turns only on constitutional matters, such as separation of powers or the constraints of federalism set by the U.S. Constitution. The
Federal Constitution, supplemented by state constitutional provisions, alone requires federal courts generally to follow state court determinations of state law. Correct jurisprudential positions about the nature of law have nothing to do with this requirement. Although Brandeis’s opinion recites a classical version of positivism, positivism is irrelevant to the court’s conclusion in the case. [...] This article presents an historical case against the jurisprudential turn in understanding *Erie*. It does so by focusing on Arthur Corbin’s opposition to *Erie* over a significant portion of his long academic life. Today Corbin is remembered primarily for his work in contract law, principally as the author of the multi-volume treatise *Corbin on Contracts* and the engineer of the *Restatement (First)* of Contract’s recognition of promissory estoppel as a basis of contract enforcement. Corbin’s writings on contract law sometimes still figure in the debate over their inclusion among the legal realist scholarship of the 1920s and 1930s. His work in federal courts scholarship is almost forgotten, perhaps because *Erie*’s result is accepted and its applications understood reasonably well. However, Corbin’s consistent and long-held opposition to *Erie* is articulated at points throughout his long working life, particularly between 1938 and 1964, when he stopped writing. It is anticipated in 1929, nine years before *Erie* was decided, in his criticism of Holmes’s dissent in *Black & White Taxi & T. Co. v. Brown & Yellow Taxi & T. Co.* In articles in 1938 and 1941, Corbin questioned *Erie*’s constitutional basis and found objectionable consequences in federal court deference to state court determinations of state law. *Corbin on Contracts* and Supplements to the treatise up to 1964 continued to question *Erie*’s result. Finally, in a 1953 book review, later approvingly cited in supplements to *Corbin on Contracts*, Corbin called for *Erie*’s overruling. In work outside of contract law between 1921 and 1964 Corbin endorsed views about the nature of law that fairly can be described as a version of legal positivism. Taken as a whole, Corbin’s work represents the position of a legal positivist at mid-century who opposed *Erie*’s result on constitutional and practical grounds. It provides historical evidence that *Erie*’s result does
Customary international law is puzzling in a way treaties are untroubling. Treaties are contracts, and the source of the obligations they impose on states, as well their content, presents no special legal problem. If there is a puzzle about how treaties can bind states, it is a general puzzle about how contracts can legally bind promisors. By comparison, the status of customary international law is controversial. Customary international law is created by the regular practice of states, and the extent of consensus required for a custom to exist is vague. Similarly, because customary international law does not have the canonical form of a treaty or statute, its content is uncertain. Even the extent to which states act merely in accordance with norms, rather than from a sense of obligation, is unknown and understudied.

May a state unilaterally withdraw from a treaty to which it is a party when the treaty doesn’t otherwise so provide? Are states obligated not to arbitrarily detain people or subject them to degrading treatment? May a successor state repudiate the odious debts of the preceding state? Because customary international law is created by the regular practice among states, not by the states’ lawmakers, its legal validity is not self-evident. Three questions therefore can be asked in connection with its legal status: (1) What are the norms of customary international law governing the conduct of states or their citizens?, (2) Are states legally bound by it?, and (3) Does customary international law apply domestically without incorporation by domestic law?

I will argue that there are other sorts of questions that do not need to be asked about customary international law: namely, jurisprudential questions. It is often thought that
judicial recognition of customary international law depends on jurisprudential assumptions about the nature of law, legal norms and legal validity. This is a mistake. The limits of judicial reliance on customary international law are constitutional or evidentiary, not jurisprudential. Jurisprudential views about law, which are analytic in character, have nothing to say about the questions just flagged. My argument is in three steps. The first step is a claim about *Erie Railroad v. Tompkins*. Although *Erie* fairly can be read to require domestic authorization for customary international law to have domestic legal effect, the case and its reasoning do not rely on commitments to a theory of law, including legal positivism. Second, reliance on positivism has an unwelcome consequence for the binding character of customary international law. The third step is that conceptions of law or legal validity can ground different views about the relation between international and domestic law. Positions on the priority of customary international law therefore are determined by views about that relation, not by views on the source of its authority. Taken together, these considerations suggest that jurisprudence is not needed to answer the questions courts and other legal authorities ask about customary international law’s content, the legal obligations it creates, and its domestic legal effect.

The paper is in three parts. Part I argues that legal positivism is irrelevant to *Erie Railroad Co. v. Tompkins*’ holding that federal jurisdiction does not give federal courts general lawmaking power. Positivism is neither sufficient nor necessary for *Erie*’s result and rationale. Instead, the holding rests on one or more uncertain constitutional bases. Part II describes a dilemma for those relying on legal positivism as a basis for *Erie*’s result: Dualists about international law must either conclude that customary international law does not bind governments or select a conception of positivism that preserves customary international law but is ad hoc. The domestic effect of customary international law concerns the relation of priority between domestic and international law in a legal system. Part III argues that the same conception of law can ground different views about that priority. It con-
cludes that positions on the customary international law are determined by substantive legal views about the proper relation between international and domestic law, not the source of authority of customary international law. A conclusion follows.

BIBLIOGRAPHY

BOOKS


BOOK CHAPTERS


“The Law and Psychology of Precedent” (with William S. Laufer), in

ARTICLES


“Why Banks are Not in Bankruptcy” (with Richard Hynes), 67 Wash. & Lee L. Rev. 985 (2010).


“Erie and the Irrelevance of Legal Positivism” (with Jack Goldsmith), 84


BOOK REVIEWS